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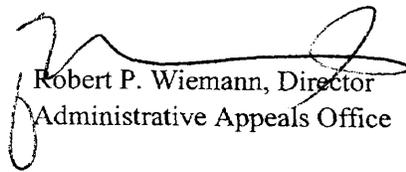
IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

IN BEHALF OF PETITIONER:
[Redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner was incorporated under the laws of the State of New Jersey and is engaged in the development of wireless network infrastructure products. The petitioner claims that it is the parent company of [REDACTED] located in France. The beneficiary is currently employed by the petitioner in H-1B status in the position of director, connectivity group. The petitioner seeks to change the beneficiary's status and continue to employ him in this position for a two-year period.

The director denied the petition concluding that the petitioner did not establish that the beneficiary had at least one continuous year of full-time employment with a qualifying entity within the three-year period preceding the filing of the petition.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the petitioner and its foreign subsidiary had employed the petitioner concurrently in two distinct positions for more than two years preceding the filing of the petition. Counsel contends that during this time, the beneficiary spent an aggregate of over 365 days working for the foreign entity, and claims that this employment should be considered to be one year of continuous employment, as it was only interrupted by the beneficiary's valid H-1B employment with the petitioner, the foreign company's parent company. Counsel submits a detailed brief and additional evidence in support of the appeal.

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(1)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (1)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The issue in this matter is whether the beneficiary was employed had at least one continuous year of full-time employment with a qualifying organization within the three years preceding the filing of the petition.

The regulation at 8 C.F.R. § 214.2(l)(1)(ii)(A) defines "intracompany transferee" as:

An alien who, within three years preceding the time of his or her application for admission into the United States, has been employed abroad continuously for one year by a firm or corporation or other legal entity or parent, branch, affiliate or subsidiary thereof, and who seeks to enter the United States temporarily in order to render his or her services to a branch of the same employer or a parent, affiliate, or subsidiary thereof in a capacity that is managerial, executive or involves specialized knowledge. *Periods spent in the United States in lawful status for a branch of the same employer or a parent, affiliate, or subsidiary thereof and brief trips to the United States for business or pleasure shall not be interruptive of the one year of continuous employment abroad but such periods shall not be counted toward fulfillment of that requirement.*

(Emphasis added).

The I-129 Petition was submitted on September 2, 2003. The petitioner indicated in its August 19, 2003 letter that the beneficiary commenced working for the petitioner's organization in H-1B status in October 2000. The petitioner also detailed the beneficiary's prior employment experience. Prior to joining the petitioner in H-1B status, the beneficiary had never worked for a foreign branch, affiliate, subsidiary or parent company of the petitioner. The petitioner indicated that upon approval of the L-1A petition, the beneficiary would continue to serve as "Director, Connectivity Group," the position in which he currently serves in H-1B status. The petitioner stated that the beneficiary has also served as chairman of the petitioner's French subsidiary since June 2001.

In an August 28, 2003 letter accompanying the petitioner's submission, counsel for the petitioner stated:

Since June 2001, [the beneficiary] has served concurrently in the executive capacity of Chairman of [the foreign entity], [the petitioner's] wholly owned subsidiary in France, and as Director, Connectivity Group with [the petitioner] in the United States. He has spent over one

year serving in France in the capacity of Chairman. The only interruptions to this one year period have been his trips to work with [the petitioner] in the United States in H-1B status.

In support of the petition, the petitioner submitted, in part: (1) evidence that the foreign entity was established in France in June 2001, including corporate documents, most of which were untranslated, identifying the beneficiary as president of the entity; and (2) a detailed account of the number of days the beneficiary spent in France since June 2001, supported by copies of plane tickets and copies of the beneficiary's current and expired passports.

On September 10, 2003, the director requested additional evidence to establish that the beneficiary has been employed by the foreign organization for one continuous year. The director instructed the petitioner to provide: (1) the beneficiary's last annual tax return, and, if applicable, tax withholding certificate reflecting the employer; (2) copies of payroll documents of the business entity reflecting the beneficiary's period of employment and salary; and (3) other unequivocal evidence establishing the foreign employment by the beneficiary.

The petitioner, through counsel, submitted a response dated December 3, 2003. Counsel stated:

We pointed out at the outset that [the beneficiary] has worked for over one year for [the foreign entity], and that his periods of stay in the United States in H-1B status since joining the company were spent working for [the foreign entity's] parent company, and the petitioner herein....Pursuant to 8 C.F.R. 214.2(l)(ii)(A) and long established CIS, and legacy INS policy, these periods of stay in the US do not interrupt the continuity of his one year employment at the foreign subsidiary. As stated in section 214.2(l)(ii)(A) of the regulations, "Periods spent in the United States in lawful status for a branch of the same employer or a parent, affiliate or subsidiary thereof . . . shall not be interruptive of the one year of continuous employment abroad ...". In a February 14, 1994 letter from Jacquelyn A. Bednarz, Chief, Nonimmigrant Branch Adjudications (reprinted in 71 Interpreter Releases, 373, March 14, 1994), Ms. [REDACTED] confirmed that this policy applies to periods spent in H-1B status for a branch, parent, affiliate or subsidiary. . . .

The petitioner submitted the beneficiary's 2002 IRS Form 1040, Individual Income Tax Return, and Form W-2, Wage and Tax Statement, which shows wages of \$145,692.40 from the petitioner. Counsel stated that, "as a matter of administrative and accounting convenience, [the beneficiary] has been paid solely through the US parent for his employment at both companies." Counsel objected to the director's request for "unequivocal evidence" of the beneficiary's foreign employment, and asserted: "[N]either the statute nor the regulations appear to impose this high of an evidentiary burden on the petitioner." Counsel asserted that the following evidence, submitted in response to the director's request, could verify the beneficiary's foreign employment: (1) documentary evidence showing 138 days physical presence in France, and employment with the foreign entity for 2001; (2) documentary evidence showing 208 days physical presence in France and employment with the foreign entity for 2002; (3) documentary evidence showing 34 days physical presence in France and employment with the foreign entity for 2003; (4) four sworn statements from the beneficiary's business associates confirming his employment as president of the foreign entity and presence in France for

over 365 days between 2001 and 2003; and (5) copies of corporate credit cards for the foreign entity issued in the beneficiary's name.

The documents submitted to evidence the beneficiary's employment with the foreign entity included copies of electronic mail correspondence between the beneficiary and other employees of the petitioner's group during his time in France, letters from business associates, and evidence that he used the foreign entity's credit cards.

The director denied the petition on December 16, 2003, concluding that the beneficiary did not have one continuous year of full-time employment with the foreign entity within the three years prior to filing the petition. The director observed that the beneficiary had been in the United States for four years in L-1B, J-1, and H-1B status for unrelated companies prior to joining the petitioning organization in H-1B status in October 2000. The director noted that because the foreign company was not established until eight months after the beneficiary began working for the petitioner, the beneficiary could not be considered to have been employed in a qualifying capacity within the overseas office. The director observed that the United States office merely "required the beneficiary to go to the foreign office on several occasions to help set-up and operate the foreign company," and therefore the beneficiary is not being transferred from the overseas entity. The director noted that the overseas entity has never paid the beneficiary, which further establishes that he has only been employed by the United States company. The director concluded: "The beneficiary cannot demonstrate any employment with the overseas office before being employed with the United States office."

In her decision, the director also distinguished the facts of this case to those in the advisory opinion letter cited by counsel in response to the request for evidence. The director briefly discussed two precedent decisions, *Matter of Kloeti*, 18 I&N Dec. 295 (Reg. Comm. 1981), and *Matter of Continental Grain*, 14 I&N Dec. 140 (D.D. 1972). The director determined the facts of the instant matter are not unlike those in *Matter of Kloeti*, in which it was determined that a beneficiary never worked for the foreign entity abroad and was therefore ineligible for L-1 classification.

On appeal, counsel contends that beneficiary has served for a sufficient time with the petitioner's French subsidiary to qualify for L-1 status, and that the beneficiary's previous periods of stay in the United States in L-1, J-1, and H-1 status for unrelated employers, are not relevant. Counsel emphasizes that the beneficiary's trips to the United States to work for the petitioner in H-1B status should not be considered interruptive of the beneficiary's continuous one year period of employment with the foreign entity, based on the definition of "intracompany transferee" at 8 C.F.R. § 214.2(l)(ii)(A). Counsel contends that the director overlooked this provision of the L-1 regulations.

Counsel again refers to a February 14, 1994 letter from [REDACTED], Chief, Nonimmigrant Branch, INS Office of Adjudications, to support his argument that the beneficiary's time spent in the United States working for the petitioner in H-1B status is not interruptive of his qualifying employment abroad. See Letter from [REDACTED], Chief, Nonimmigrant Branch, INS Office of Adjudications, to Mr. [REDACTED] attorney (Feb. 14, 1994)(reproduced in 71 No. 10 *Interpreter Releases* 351, 373 (March 14, 1994.))([REDACTED] letter). Counsel argues that the director misunderstood the petitioner's reason for citing the letter and overlooked the policy described in the letter, "as the denial suggests that only time spent in the US for visits, training or conferences are non-interruptive of qualifying experience." Counsel further suggests that the

director improperly relied on *Matter of Kloeti*, stating that the beneficiary in the cited case had no prior experience working abroad for the foreign employer. Counsel states that the instant matter can be distinguished based on the petitioner's evidence that the beneficiary was physically present in France and working for the foreign entity "for a one year period prior to filing the L-1 petition." Counsel also addresses the director's reference to *Matter of Continental Grain*, and refers to subsequent changes to the regulations that "expand the kinds of activities carried out in the United States which are not considered interruptive of the one year experience abroad requirement." Counsel again cites the definition of "intracompany transferee" at 8 C.F.R. § 214.2(l)(1)(ii)(A) and claims that "the fact that [the beneficiary] had previously worked for [the petitioner] in the US in lawful H-1B status in addition to his overseas employment with [the foreign entity], should have no bearing on his eligibility for L-1A status in light of this provision of the regulations."

Finally, counsel accounts in detail the number of days the beneficiary was physically present in France working for the petitioner's subsidiary between June 2001 and September 2003, concluding that the beneficiary has "over 365 total days working experience" with the foreign entity.

Upon review, counsel's assertions are not persuasive. A determination as to whether the beneficiary was employed by the foreign entity on a full-time continuous basis for at least one year in the three years preceding the filing of this petition rests on two separate issues. First, the AAO must determine whether the statutory and regulatory definitions of "intracompany transferee" permit a beneficiary to acquire his one year of continuous employment abroad on an intermittent basis while concurrently employed by a related entity in the United States in a lawful status. Second, the AAO must determine that the beneficiary was employed by a qualifying organization abroad.

Counsel's expansive interpretation of 8 C.F.R. § 214.2(l)(1)(ii)(A) is not supported by the statute, precedent decisions, or Citizenship and Immigration Services (CIS) policy. Counsel relies primarily on the regulatory definition of "intracompany transferee" and the 1994 ██████ letter to sustain his assertion that the beneficiary's approximately sixteen trips to work for a new foreign subsidiary, ranging from six to 34 days in length, over a two-year period constitute continuous employment with a foreign entity for L-1 purposes.

The Bednarz letter remains useful as guidance as there have been few opportunities for CIS to interpret the "shall not be interruptive" language in the definition of "intracompany transferee" at 8 C.F.R. § 214.2(l)(1)(ii)(A). However, the facts of this matter can be distinguished from those discussed in the Bednarz letter. The letter raised the question of *when* the beneficiary of an L-1 petition must have obtained the required one year of continuous experience working abroad for a foreign company, specifically, whether such experience could have been gained more than three years prior to the beneficiary's admission to the United States.

The facts outlined by an attorney in a January 19, 1994 letter addressed to Ms. ██████ described a case in which an alien had been employed for a continuous two-year period by the foreign parent company of a U.S. entity in a specialized knowledge capacity and had subsequently been working for the U.S. subsidiary in H-1B status for a three-year period. The petitioner intended to request that the beneficiary be granted a change of status from H-1B to L-1B. The beneficiary would be performing duties that require specialized knowledge, and the foreign and United States entities remained qualifying organizations.

In her February 14, 1994 response, Ms. ██████ noted that L-1 classification may be granted to a beneficiary who has been employed in a qualifying capacity for a qualifying organization for one continuous year within the three years preceding the beneficiary's admission to the United States. Ms. ██████ referenced the regulation at 8 C.F.R. § 214.2(l)(1)(ii)(A) and confirmed that the Immigration and Naturalization Service's (now CIS's) interpretation would accommodate the situation described by the attorney. Ms. ██████ stated:

If the alien has been employed in a lawful status in the United States for a firm related in a qualifying capacity to his or her prior foreign entity for three years or more, the INS will go beyond the three-year period of time prior to the alien's admission to the United States in order to determine if the alien was, in fact, eligible for L-1 nonimmigrant status.

Bednarz letter, *supra*.

The implication of this opinion is that a beneficiary's one year of continuous employment abroad, *once established*, remains continuous, despite the beneficiary's subsequent stay in the United States for a branch, affiliate, subsidiary, or parent of the foreign entity in an authorized nonimmigrant status. While the instant petition also involves a request to change the beneficiary's status from H-1B to L-1, the facts are otherwise dissimilar. Rather than claiming that the beneficiary's H-1B status in the United States was not interruptive of a one-year continuous period of full-time employment abroad, counsel seeks to count approximately sixteen trips to France over a two-year period as the required period of continuous overseas employment.

Counsel has not advanced any support for the proposition that regulatory definition of intracompany transferee was intended to create an exception to the statutory requirement that the beneficiary be employed continuously for one year with a qualifying entity abroad within the three years preceding his application for admission. *See* section 101(a)(15)(L) of the Act, 8 U.S.C. § 1101(a)(15)(L). The AAO cannot find that the regulation at 8 C.F.R. § 214.2(l)(1)(ii)(A) contemplates a situation whereby a beneficiary could acquire one year of continuous qualifying employment abroad by aggregating short periods of employment with a foreign entity while concurrently employed by a United States entity. Rather, the regulatory definition of "intracompany transferee" only allows CIS to expand the "one year of continuous employment abroad" requirement established by statute beyond the three years immediately preceding the filing of the petition. The provision accommodates situations in which a beneficiary who had at least one continuous year of qualifying experience with a related foreign entity, but worked or received training with a qualifying U.S. entity in another status for two or more years before seeking to obtain L-1 status. Beneficiaries in this situation would otherwise be disqualified from obtaining L-1 status even if they had been continuously employed abroad with a qualifying entity for years immediately prior to their entry to the United States. The beneficiary in this case cannot be considered to have been continuously employed by the foreign subsidiary.

This limited interpretation of 8 C.F.R. § 214.2(l)(1)(ii)(A) is supported the CIS precedent decision, *Matter of Continental Grain Co.*, 14 I&N Dec. 140 (DD 1972). Although this decision pre-dates the current definition of intracompany transferee, the decision supports the proposition that the beneficiary of an L-1 petitioner must gain his continuous year of employment abroad, but that any *subsequent* periods of stay with a related United States company will not be interruptive. In *Matter of Continental Grain*, the beneficiary had worked for a foreign entity continuously for a one-year period, spent 28 months in the United States receiving training

in the United States, and had then returned to the foreign entity for an additional seven months immediately prior to submission of the L-1 petition.

The decision emphasizes that the beneficiary was employed abroad by the petitioner's subsidiary in a qualifying capacity for more than the required "one year." The issue was whether the period of time the beneficiary spent in the United States prohibited a finding that he was employed by the foreign entity within the one-year period immediately preceding the filing of the petition, as was required under section 101(a)(15)(L) of the Act (1970). The director concluded: "The beneficiary's period of training within the United States . . . should not be regarded as interruptive of the concept that he 'has been employed continuously for one year by ... the same employer or a subsidiary thereof' within the meaning of section 101(a)(15)(L)."

Counsel claims that the current definition of "intracompany transferee" "was amended to expand the kinds of activities carried out in the United States which are not considered interruptive of the one year experience abroad requirement." Contrary to counsel's claim, it is reasonable to conclude that 8 C.F.R. § 214.2(l)(1)(ii)(A) merely incorporates the director's finding in *Matter of Continental Grain*, rather than creating a new exception to the requirement that the beneficiary complete one year of continuous employment abroad.

Furthermore, the regulation at 8 C.F.R. § 214.2(l)(3)(iii) requires the petitioner to submit evidence that the beneficiary has one continuous year of *full-time* employment abroad. While counsel has made an attempt to establish that the beneficiary's employment with the foreign entity should be considered "continuous," the record does not establish that the beneficiary's claimed employment with the French subsidiary is or was full-time. As noted above, the beneficiary's claimed qualifying employment abroad was accrued intermittently during sixteen trips of varying lengths over a two-year period. In order to be classified as an intracompany transferee, the beneficiary's employment abroad must be on a full-time, as opposed to a part-time or intermittent basis. The beneficiary's full-time services may be divided among affiliate companies, but the full-time employment must occur abroad. *See* 8 C.F.R. § 214.2(l)(3)(iii); *see also*, 9 FAM § 41.54 n.11.1a (noting that several years of part-time employment equaling one year in aggregate cannot be viewed as meeting the one year of full-time employment abroad requirement). The requirement that the full-time employment be gained abroad precludes the beneficiary from gaining his qualifying experience while employed concurrently by the U.S. entity and the foreign entity.

Based on the foregoing discussion, the beneficiary's claimed period of employment with the foreign entity was neither continuous nor full time and thus he does not meet the criteria for classification as an intracompany transferee pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(A).

Furthermore, even if the statute permitted an L-1 beneficiary to acquire his qualifying foreign employment while concurrently employed with a related U.S. company, the director found that the beneficiary was not employed by the foreign entity.

The record indicates that the beneficiary has been paid only by the United States entity since commencing H-1B employment in October 2000, although the petitioner claims that he assumed an active role as president of

the petitioner's foreign subsidiary in June 2001. While the AAO acknowledges counsel's assertion that the U.S. company compensated the beneficiary for employment at both entities as "a matter of administrative and accounting convenience," the record does not establish what portion of the beneficiary's salary is attributed to his employment with the foreign entity and what portion is attributed to the U.S. entity. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The AAO notes that the beneficiary's 2002 Form 1040, U.S. Individual Income Tax Return, does not attribute any portion of the beneficiary's income to foreign employment, and there is no evidence that the beneficiary paid income taxes in France related to his foreign employment.

Employment does not necessarily depend upon the amount or the existence of a salary for purposes of this visa classification. *Johnson v. Laird, Inc. v. INS*, 537 F. Supp. 52 (D. Or. 1981); *see also Matter of Pozzoli*, 14 I&N Dec. 569 (Reg. Comm. 1974) (observing that "power of control" over an employee's activity rather than salary is the essential element). The secondary evidence submitted to establish the beneficiary's employment in France, consisting of internal electronic mail messages written by and to the beneficiary, evidence that the beneficiary utilized a credit card bearing the foreign company's name, and the presence of the beneficiary's name on the foreign company's corporate registration documents, is not sufficient to establish that the beneficiary should be considered an employee engaged in the provision of services specifically on behalf of the foreign company.

However, the AAO cannot wholly concur with the director's determination that the beneficiary's time spent abroad was solely in connection with his position within the United States office. As the petitioner has not established that the beneficiary's claimed employment in France was full time or continuous, this issue need not be discussed further. Likewise, the AAO finds no need to determine the exact number of days the beneficiary spent in France purportedly working for the foreign entity prior to the filing of this petition, as the petitioner cannot establish that these periods of time constitute full-time continuous employment abroad for purposes of this visa classification.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met this burden.

ORDER: The appeal is dismissed.