U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave. N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

b7

DATE: OCT 2 3 2012 Office: VERMONT SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

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)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

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

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, a Texas corporation established in February 2011, states it will be engaged in the hospitality business. It claims to be a subsidiary of [redacted] located in Bardoli, India. The petitioner seeks to employ the beneficiary as the Vice President of a "new office" in the United States for a period of one year. The petitioner further requests that the beneficiary be granted a change of status from F-1 to L-1A.

The director denied the petition concluding that the petitioner failed to establish that the beneficiary had been employed abroad with a qualifying organization for at least one continuous year of full-time employment within a three year period preceding the filing of the petition. The director pointed to the record which indicates that the beneficiary had been employed with the foreign employer from 2006 through 2008, making it impossible for the beneficiary to have been employed abroad for one continuous year in the preceding three years.

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 confirms that the beneficiary had only been employed with the foreign employer as General Manager from January 2006 through August 2008 and submits payroll records to confirm said employment. Counsel contends that the director made a "gross error by not reviewing the supporting documentation which clearly supports the beneficiary's employment in his family based business as a General Manager since 2006." Further, the petitioner offers: a letter from the foreign employer stating that the beneficiary's period of foreign employment occurred between 2006 through 2008; an updated proposed job description; and a certificate of stock ownership in the name of the beneficiary demonstrating that he owns 100 shares in the petitioning company.

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(l)(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 (l)(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 regulation at 8 C.F.R. § 214.2(l)(3)(v) further provides that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office in the United States, the petitioner shall submit evidence that:

(A) Sufficient physical premises to house the new office have been secured;

(B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive of managerial authority over the new operation; and

(C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (l)(1)(ii)(B) or (C) of this section, supported by information regarding:

(1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;

(2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and

(3) The organizational structure of the foreign entity.

As stated, the basis of the director's denial of the petition was the petitioner's failure to establish that the beneficiary had been employed aboard with a qualifying organization for at least one continuous year of full-time employment within a three-year period preceding the filing of the petition.

As referenced above, the regulation at 8 C.F.R. § 214.2(l)(3)(iii) states that an individual petition filed on Form I-129 shall be accompanied by 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. Further, the regulation at 8 C.F.R. § 214.2(l)(3)(v)(B) requires the petitioner to submit evidence that the beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity.

Counsel's contention that the director made a "gross error" in interpreting the record is unconvincing. The petitioner offers a letter from the foreign employer, in the original record and again on appeal, dated

October 2, 2008 that states, "This is to certify that [the beneficiary] worked for us from January 2006 till August 2008." Although the letters and accompanying payroll evidence confirm that the beneficiary did previously work for the foreign employer for one continuous year, this evidence also clearly establishes that the beneficiary was not employed with the foreign employer for one continuous year *within three years preceding* the filing of the petition on June 2, 2011. As noted by the director, the petitioner has admitted on the record that the beneficiary had only been employed with the foreign employer for approximately two months within the previous three years.

In response to a request for evidence (RFE) issued on June 10, 2011, the petitioner asserted:

> As indicated on Form I-129, Beneficiary was employed with overseas entity from January 2, 2006 till August 29, 2008 i.e. for two (2) years and eight (8) months which is within three (3) years from the beneficiary's date of entry as a non-immigrant. He resumed his employment at overseas entity from September 30, 2010 till November 24, 2010 during his visit to his home country.

The petitioner maintained that the beneficiary's was initially admitted to the United States on January 20, 2009 in F-1 nonimmigrant status, and stated that "based on the INA and the INS/USCIS memo and polices [*sic*], the period spent in United States in nonimmigrant status shall stop the 3 year clock." The director failed to address these assertions in the notice of decision.

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 petitioner has asserted that, based on this definition, USCIS must take into consideration the beneficiary's employment history for the three years immediately preceding his admission to the United States as an F-1 nonimmigrant in January 2009. The record shows that the beneficiary was employed by a qualifying organization abroad for approximately 19 months in the three years prior to his initial admission in F-1 status, a status he still held at the time the petition was filed on June 2, 2011. For the reasons discussed below, the petitioner's interpretation of the regulation at 8 C.F.R. § 214.2(l)(1)(ii)(A) is not persuasive.

To review the required one year of continuous employment abroad, USCIS must count back three years from the date that the L-1A petition is filed. The regulation at 8 C.F.R. § 214.2(l)(3)(iii) clearly requires that an individual petition filed on Form I-129 be accompanied by evidence that the beneficiary "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." The definition of "intracompany transferee" also indicates that, if the beneficiary has been employed abroad continuously for one year by a qualifying organization within three years preceding the time of the beneficiary's "application for admission into the United States," the beneficiary may be eligible for L-1 classification. 8 C.F.R. § 214.2(l)(1)(ii)(A).

However, when the definition of "intracompany transferee" is construed together with the regulation at 8 C.F.R. § 214.2(l)(3) and section 101(a)(15)(L) of the Act, the phrase "preceding the time of his or her application for admission into the United States" refers to a beneficiary whose admission or admissions pertained to the rendering of services "for a branch of the same employer or a parent, affiliate, or subsidiary thereof" or for "brief trips to the United States for business or pleasure." Statutes and regulations must be read as a whole, and interpretations should be consistent with the plain purpose of the Act to avoid absurd results. *See generally Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000).

Therefore, according to the plain purpose of the Act and regulations, USCIS may not reach over *any* admission and subsequent stay, including an admission and stay in F-1 status, unless that admission was "for a branch of the same employer or a parent, affiliate, or subsidiary thereof [or] brief trips to the United States for business or pleasure." 8 C.F.R. § 214.2(l)(1)(ii)(A). Unless the authorized period of stay in the United States is either brief or "on behalf" of the employer, the period of stay will be interruptive of the required one year. *See* 52 Fed. Reg. 5738, 5742 (Feb. 26, 1987) ("Time Spent in the United States Cannot Count Towards Eligibility for L Classification"); *see also Matter of Continental Grain Company*, 14 I&N Dec. 140 (D.D. 1972) (finding that an intervening period of stay is not interruptive when the beneficiary was in the United States as an H-3 trainee on behalf of the employer).

The petitioner does not claim, nor present evidence in response to the request for evidence or on appeal, that beneficiary's admission in F-1 status could be considered a "[period] spent in the United States in lawful status for a branch of the same employer or a parent, affiliate, or subsidiary thereof" and, thus, this period of stay must be considered interruptive of the beneficiary's claimed one year of continuous employment abroad. The beneficiary was admitted to the United States as an F-1 student in January 2009, nearly five months after terminating his employment with the foreign entity, and he remained in F-1 status as of June 2011 when the petition was filed. As such, the extended period the beneficiary spent in the United States cannot be deemed to have been on behalf of a qualifying organization. In addition, it cannot be deemed to be the type of brief trip for business or pleasure described at 8 C.F.R § 214.2(l)(1)(ii)(A).

In the present matter, the beneficiary's stay in the United States was not for the purpose of being employed by the same employer or a subsidiary or an affiliate thereof. Rather, as explained earlier, the beneficiary remained in the United States for over two years after terminating his employment with the foreign entity. Therefore, the provisions specified in 8 C.F.R. § 214.2(l)(3)(iii) and 8 C.F.R. § 214.2(l)(3)(v)(B) must be applied. In other words, the petitioner must establish that the beneficiary was employed abroad by a qualifying organization for at least one out of the three years prior to the date the petition was filed. As the

beneficiary was residing in the United States for over two years during the three year period prior to the date the instant petition was filed, it would be factually impossible for the beneficiary to have been employed abroad for one year during the requisite three-year time period. Therefore, the petition was properly denied, and the appeal will be dismissed.

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. Here, that burden has not been met.

ORDER: The appeal is dismissed.