



U.S. Citizenship  
and Immigration  
Services

D7

[REDACTED]

DATE: DEC 28 2012 OFFICE: VERMONT SERVICE CENTER FILE: [REDACTED]

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)

ON BEHALF OF PETITIONER:

SELF REPRESENTED

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,

Ron Rosenberg  
Acting Chief, 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 The director's decision is withdrawn and the matter remanded for entry of a new decision.

The petitioner filed this nonimmigrant petition seeking to classify 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 limited liability company established in August 2010, was established for the purpose of providing the services of commercial and industrial construction development, and to assist the parent company in the commercialization of heavy equipment to Mexico. It claims to be a subsidiary of [REDACTED], located in [REDACTED] Tampico, Mexico. The petitioner seeks to employ the beneficiary as the general manager of its new office in the United States for a period of one year.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity in the United States.

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, the petitioner submits a brief and additional evidence to supplement the record.

#### **I. The Law**

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 or 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.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as an assignment within an organization in which the employee primarily:

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly

supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as an assignment within an organization in which the employee primarily:

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher-level executives, the board of directors, or stockholders of the organization.

Finally, the pertinent regulations at 8 C.F.R. § 214.2(l)(1)(ii) define the term "qualifying organization" and related terms as follows:

- (G) *Qualifying organization* means a United States or foreign firm, corporation, or other legal entity which:
  - (1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section;
  - (2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee[.]

\* \* \*

- (I) *Parent* means a firm, corporation, or other legal entity which has subsidiaries.

\* \* \*

- (K) *Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity;

or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

(L) *Affiliate* means

- (1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or
- (2) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

## II. The Issues on Appeal

### A. *Employment in a Managerial or Executive Capacity*

The sole issue addressed by the director is whether the petitioner established that the beneficiary would be employed in the United States in a primarily managerial or executive capacity within one year.

To establish eligibility under section 101(a)(15)(L) of the Act, the petitioner must meet certain criteria. Specifically, within three years preceding the beneficiary's application for admission into the United States, a firm, corporation, or other legal entity, or an affiliate or subsidiary thereof, must have employed the beneficiary for one continuous year. Furthermore, 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.

Upon review of the record, the AAO finds that the petitioner established that the beneficiary would be employed in the United States in a primarily managerial or executive capacity within one year.

The record reflects that the petitioner was established for the purpose of providing the services of commercial and industrial construction development, among other stated purposes. The petitioner submitted its business plan which explained its plan to purchase commercial property, hire a construction company to build a multi-unit shopping center, and subsequently collect rent on each unit upon completion. The petitioner submitted ample evidence establishing that it has already started its first investment project in the United States, consisting of the purchase and development of a commercial property named [REDACTED]. In particular, the petitioner submitted copies of: (1) Commercial Contract – Unimproved Property for [REDACTED] reflecting that it purchased the property for \$175,000 on November 2, 2010; (2) Proposal for [REDACTED] dated January 28, 2011, listing service fees to [REDACTED]; (3) [REDACTED] for \$4937.50 dated April 1, 2011; (4)

Proposal from [REDACTED] for the amount of \$590,037 for services including building the concrete foundation and structure, plumbing, electrical, and air conditioning and heating.

In addition, the petitioner provided evidence that it hired two employees, an executive assistant and a purchasing manager, to support the beneficiary. The petitioner provided detailed job descriptions for each employee, as well as for the beneficiary. The petitioner provided a description of the beneficiary's job duties in the United States, which include: analyzing operations to evaluate the performance of a company and its staff in meeting objectives, and to determine areas of potential cost reduction, program improvement and policy change; negotiating and approving contracts and agreements with real estate title companies, commercial suppliers, federal and state agencies, and other organizational entities; preparing budgets; and reviewing reports by staff members.

On appeal, the petitioner provides new evidence to confirm that its project of developing [REDACTED] is underway, including evidence that the petitioner has entered into contracts with various independent contractors including [REDACTED] (for electrical work). The petitioner provides evidence that its plans for [REDACTED] were received by [REDACTED]. Finally, the petitioner explains that the director may have misunderstood the previously submitted documentation, and clarifies that the beneficiary's job duties include: ensuring the scheduled completion of projects; coordinating the work of all project managers, architects, civil engineers; plan and direct the work of consultant teams; and coordinating with the city's construction inspector, project engineer and contractor throughout the construction process.

In view of the above, the petitioner has provided sufficient evidence to establish that the beneficiary will primarily be employed in a managerial or executive capacity within the first year of operations. The petitioner has established by a preponderance of the evidence that it will employ the services of independent contractors to perform the day to day operations related to the construction and development of [REDACTED] and that the beneficiary's primary duty is to coordinate and direct the work of the contractors. The petitioner has also established that it has hired two employees, sufficient relieve the beneficiary from primarily performing non-qualifying duties. Accordingly, the AAO finds that the petitioner has overcome the director's basis for denial of the petition.

### ***B. Qualifying Relationship***

Beyond the director's decision, the AAO finds insufficient evidence in the record to establish that the petitioner has a qualifying relationship with the beneficiary's foreign employer.

To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." See generally section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(i).

The petitioner claims to be a subsidiary of the beneficiary's foreign employer, [REDACTED] ("the foreign entity"), based upon common ownership and control by the beneficiary and [REDACTED]. The petitioner submitted evidence confirming that the beneficiary and [REDACTED] each own 500 shares of stock (50/50 ownership). The petitioner

submitted evidence reflecting the ownership structure of the foreign entity as follows: [REDACTED] owns 600 shares (approximately 4%); the beneficiary owns 2,400 shares (approximately 14%); and [REDACTED] owns 13,741 shares (approximately 82%).

Based upon the ownership structures described above, the record does not establish that the petitioner qualifies as a "subsidiary" of the foreign entity. In order to qualify as a subsidiary of the foreign entity under the regulations, the foreign entity must have ownership and/or control of the petitioner. *See* 8 C.F.R. § 214.2(l)(1)(iii)(K). Here, the petitioner claims common ownership and control by individual shareholders, not by the foreign entity itself. Therefore, it does not qualify as the subsidiary of the foreign entity.

The record contains insufficient evidence establishing that the petitioner and the foreign entity qualify as "affiliates." The regulations define the term "affiliates" as "one of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity." 8 C.F.R. § 214.2(l)(1)(ii)(L)(2). Here, the petitioner is held equally by two shareholders, while the foreign entity is held by three shareholders. Furthermore, while the beneficiary and [REDACTED] are both common shareholders in the U.S. and foreign entities, they do not own approximately the same share or proportion of each entity, as [REDACTED] owns approximately 82% of the shares, and the beneficiary owns approximately 14% of the shares. The record fails to establish that the U.S. and foreign companies are "owned by the same individual or group of individuals, with each individual owning and controlling approximately the same share or proportion of each entity," as required by 8 C.F.R. § 214.2(l)(1)(ii)(L)(2).

The AAO will remand this matter to the director for a new decision. The director should request any additional evidence deemed warranted and allow the petitioner to submit such evidence within a reasonable period of time. As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

**ORDER:** The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing discussion and entry of a new decision which, if adverse to the petitioner, shall be certified to the Administrative Appeals Office for review.