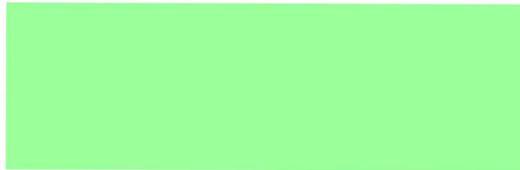
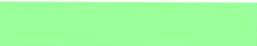


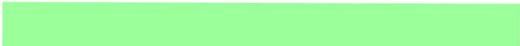


U.S. Citizenship  
and Immigration  
Services

(b)(6)



DATE: **DEC 02 2014** Office: CALIFORNIA SERVICE CENTER FILE: 

IN RE: Petitioner:   
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:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case. This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.

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.

Thank you,

Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, California Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will withdraw the director's decision and remand the matter to the service center for further review and issuance of a new decision.

The petitioner filed this nonimmigrant petition seeking to extend the beneficiary's status 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 Virginia corporation established in July [REDACTED] states that it engages in the publishing, distributing, and selling of digital content. The petitioner claims to be an affiliate of [REDACTED] located in Russia. The petitioner seeks to extend the beneficiary's employment as president and CEO for a period of one year.

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

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO. On appeal, the petitioner asserts that the beneficiary is employed in an executive position at the petitioning U.S. company. The petitioner submits a brief and additional evidence in support of the appeal.

#### 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

<sup>1</sup> The petitioner re-incorporated in Delaware on August [REDACTED]

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.

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.

## II. THE ISSUE ON APPEAL

The sole issue addressed by the director is whether the petitioner established that it will employ the beneficiary primarily in a qualifying managerial or executive capacity.

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on October 21, 2013. The petitioner indicated on the Form I-129 that it engages in the publishing, distributing, and selling of digital content with three current employees and failed to indicate its gross annual income. In support of the petition, the petitioner submitted a letter that included a lengthy description of the beneficiary's duties and a sample week of his daily routine, indicating that he would primarily focus on oversight and management of the company's operations through his subordinates, which include a vice president, a chief technology officer, a staff assistant, six consulting advisors, and six telecommuting technical specialists in Russia. The petitioner also provided a description of the beneficiary's subordinates' job duties and responsibilities, explaining how the subordinates would carry out the actual tasks of performing the IT services contracted to complete.

The petitioner provided an organizational chart for the U.S. company depicting the beneficiary as the CEO and president at the top of the corporate hierarchy, directly supervising a vice president of the administration department, an advisory board of five professionals, a staff assistant, a marketing department, led by one of the professional advisors, and a chief technology officer, supervising a lead computer software engineer, four developers, and a quality engineer. The petitioner provided its 2012 IRS Forms W-2, Wage and Tax Statement, 2012 IRS Forms 1099-MISC, Miscellaneous Income, and payroll records demonstrating that the vice president, staff assistant, and beneficiary were employed by the petitioner in 2012. The petitioner also provided copies of contracts and consultant agreements, dated in 2013, demonstrating that the petitioner employed members of the advisory board and employees of the foreign entity in Russia as contractual employees of the U.S. company.

The director issued a request for additional evidence ("RFE") on August 24, 2012, instructing the petitioner to submit, *inter alia*, the following: (1) a more detailed description of the beneficiary's proposed duties; and (2) a more detailed organizational chart.

In response to the RFE, the petitioner provided the same position description for the beneficiary, along with a list of projects he has been supervising at the U.S. company and an updated organizational chart, which included two new positions hired in 2014. The petitioner also submitted its 2013 IRS Forms W-2 and 2013 IRS Forms 1099-MISC demonstrating that the vice president, chief technology officer, staff assistant, and beneficiary were employed by the petitioner in 2013.

The director denied the petition on February 3, 2014, concluding that the petitioner failed to establish that the beneficiary will be employed primarily in a qualifying managerial or executive capacity. In denying the petition, the director found that, based on the organizational structure provided, the beneficiary's position is primarily assisting with the day to day non-supervisory duties of the business, which precludes the beneficiary from being considered a manager or executive.

On appeal, the petitioner asserts that the beneficiary will be employed in an executive capacity. The petitioner contends that the director failed to properly review the submitted information and ignored the specifics of the listed duties for the beneficiary. The petitioner asserts that the petitioner's evidence clearly shows what the beneficiary does on a daily basis and that those duties are primarily executive in nature.

Upon review, the AAO finds sufficient evidence to establish that the beneficiary will be employed in a primarily executive capacity in the United States.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(I)(3)(ii). Contrary to the director's observations, the petitioner has provided a description of the beneficiary's duties, along with evidence of what he does on a daily basis and projects that he oversees, sufficient to establish that his duties are primarily related to the management and direction of the company and not to producing a product, providing a service, or performing other non-qualifying functions. The evidence submitted also establishes that the beneficiary establishes the goals and policies of the organization and exercises a wide latitude in discretionary decision-making. *See* sections 101(a)(44)(B)(ii) and (iii) of the Act.

In the instant matter, we disagree with the director's conclusion that the beneficiary's job duties – specifically those listed in the director's decision – are more indicative of an employee who will be performing the necessary tasks to provide a service or to produce a product. The director's decision focuses on four sub-tasks listed within grander responsibilities that are actually indicative of an executive position. The petitioner addresses this issue on appeal and provides additional evidence establishing the responsibilities of the beneficiary and each of his subordinates in the U.S. and abroad. The petitioner's descriptions are sufficient to establish that the beneficiary does not directly perform the services carried out by the petitioner's business.

As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, USCIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. The reasonable needs of the petitioner may justify a beneficiary who allocates 51 percent of his duties to

managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of his or her time on non-qualifying duties. Here, the petitioner has established that, at a minimum, the beneficiary primarily manages and directs the corporation in addition to managerial and professional employees. Given the overall purpose of the organization and its current stage of development, the petitioner established a reasonable need for an executive to oversee the business.

While the beneficiary will undoubtedly be required to apply his expertise to perform some higher-level negotiations and operational tasks, we are persuaded that the beneficiary's subordinates in the United States and abroad will carry out the majority of the day-to-day non-qualifying tasks required to operate the business, thus allowing the beneficiary to perform primarily qualifying duties. As the petitioner has established that the beneficiary will be employed in an executive capacity, the director's decision will be withdrawn with respect to this issue.

### III. QUALIFYING RELATIONSHIP

Although the director's decision will be withdrawn, the petitioner failed to submit sufficient evidence as to the actual control of the foreign entity, which raises the issue of whether there is a qualifying relationship between the U.S. and foreign entities pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(G). When considering the totality of the evidence presented, the petitioner has not sufficiently demonstrated that it is an affiliate of the foreign entity.

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(l).

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.

- (J) *Branch* means an operating division or office of the same organization housed in a different location.
- (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.

The petitioner stated on the Form I-129 that it has an affiliate relationship with the foreign entity, and stated:

[The petitioner] (ownership: [Beneficiary] 50.81%, [redacted] 41.07%, [redacted] 1.97%, [redacted] 4.95%, [redacted] 1.2%)

[The foreign entity] (ownership: [Beneficiary] 47%, [redacted] 38%, [redacted] 15%)

The foreign entity's State Register and Articles of Association both reflect the same ownership structure listed on the Form I-129.

Upon review, the petitioner has not provided clear evidence as to the actual control of the foreign entity. Although the foreign entity's ownership has been established, as listed above, its Articles of Association indicate that each of the members have one vote per share. As such, although the beneficiary owns a higher percentage of the shares of the foreign entity, he does not own a majority, which is typically required to establish control over an entity. Otherwise, the two remaining voting members may unite to establish a majority and control the entity.

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (Comm'r 1988); see also *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (Comm'r 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm'r 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct

or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

If one individual owns a majority interest in a petitioner and a foreign entity, and controls those companies, then the companies will be deemed to be affiliates under the definition even if there are multiple owners. In the instant matter, it appears that the beneficiary owns the highest percentage of the foreign entity's shares, but not a sufficient majority to retain control of said entity. Thus, it cannot be determined that the U.S. and foreign entities are both owned and controlled by the same individual.

Based on the evidence in the record, the petitioner has not met its burden to establish that it is an affiliate of the foreign entity. For this reason, the petition cannot be approved.

In light of the foregoing, the AAO finds the evidence of record insufficient to warrant approval of the petition. Further evidence is required in order to establish that the U.S. and foreign entities are both owned and controlled by the same individual.

#### IV. CONCLUSION

The director's decision will be withdrawn and the matter remanded for further consideration and entry of a new decision. The director is instructed to issue a request for evidence addressing the issues discussed above, and any other evidence she deems necessary.

**ORDER:** The director's decision dated November 26, 2012 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.