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**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF M-M-, LLC

DATE: OCT. 27, 2015

APPEAL OF VERMONT SERVICE CENTER DECISION

PETITION: FORM I-129, PETITION FOR A NONIMMIGRANT WORKER

The Petitioner, a web and network consulting company, seeks to extend the Beneficiary's temporary employment as its contract manager and chief executive officer under the L-1A nonimmigrant intracompany transferee classification. *See* Immigration and Nationality Act (the Act) § 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L). The Director, Vermont Service Center, denied the petition. The matter is now before us on appeal. The appeal will be dismissed.

The Director concluded that the Petitioner did not establish that it has a qualifying relationship with the Beneficiary's foreign employer, [REDACTED], located in Pakistan. Further, the Director concluded that the Petitioner did not establish that the U.S. and foreign entities are currently doing business as defined by the regulations.

On appeal, the Petitioner asserts that both entities are wholly owned by the Beneficiary, and therefore, it has a qualifying relationship with the Beneficiary's foreign employer. Further, the Petitioner contends that both entities are qualifying organizations that continue to do business in the United States and abroad.

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, Petition for a Nonimmigrant Worker (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.

II. THE ISSUES ON APPEAL

A. Qualifying Relationship

The first issue to be addressed is whether the Petitioner has established that it has a qualifying relationship with the Beneficiary's foreign employer.

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

1. Facts

On the Form I-129, the Petitioner stated that it is wholly owned by the Beneficiary's foreign employer located in Pakistan. The Petitioner initially submitted no supporting evidence to document its ownership or the ownership of the foreign entity.

The Director later issued a request for evidence (RFE) in February 2014 stating that the Petitioner had not provided sufficient evidence of either entity's ownership or control. As such, the Director requested that the Petitioner provide a list of owners for each company, along with documentation to corroborate the claimed ownership of both entities including income tax returns, articles of organization and/or bylaws reflecting the percentage of ownership in each entity.

In response, the Petitioner submitted evidence indicating that it owned and controlled a domain name in the United States, [REDACTED]. The Petitioner provided evidence reflecting that it has a [REDACTED] listing. The Petitioner also provided a statement from [REDACTED] an employee of the foreign employer, who stated that the Beneficiary is the sole owner and chief executive of the foreign entity. The Petitioner submitted a Pakistani tax return document reflecting that the foreign employer had issued 1,000 shares at a value of ten rupees per share and that all outstanding shares were owned by the Beneficiary. Further, the Petitioner provided a memorandum of association for the foreign employer dated in July 2005 indicating that the Beneficiary held all 1,000 outstanding shares in that company.

As noted, the Director denied the petition, concluding that the Petitioner did not establish that it has a qualifying relationship with the foreign employer. The Director stated that evidence reflecting ownership in a domain name and a [REDACTED] listing was not sufficient to demonstrate that there was common ownership and control between the Petitioner and the foreign employer.

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On appeal, the Petitioner asserts that the Director erred in concluding that it does not have a qualifying relationship with the foreign entity. The Petitioner provided additional evidence to support this assertion.

Specifically, the Petitioner submitted an ownership certificate issued on July 30, 2014 indicating that the Beneficiary owns all 1,000 membership units in the U.S. company. The Petitioner further provided a certificate of organization showing it was established on [REDACTED] in the State of Georgia. Again, the Petitioner provided foreign employer Pakistani tax return documentation indicating that the Beneficiary is the owner of all 1,000 outstanding shares in the foreign employer.

After conducting an initial review of the record, we issued an additional RFE in on July 31, 2015. We pointed to the fact that the Petitioner stated it was established in [REDACTED] whereas other documentation submitted reflected that the entity was organized in the State of Georgia in [REDACTED]. We asked the Petitioner to explain this discrepancy.

In response, the Petitioner provided a document from the State of Maryland Department of Assessments and Taxation, dated August 25, 2015, indicating that it was registered as a limited liability in Maryland on [REDACTED]. The Petitioner submits documentation from the Internal Revenue Service reflecting the issuance of an employee identification number to the company at an address in Maryland in [REDACTED]. The Petitioner states that the company was initially established in Maryland, but that it later registered in the State of Georgia in [REDACTED], indicating that “there is no point since [REDACTED] that the company was not authorized to conduct Business legally.”

2. Analysis

Upon review of the submitted evidence, the Petitioner has not established that it has a qualifying relationship with the foreign 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.

As general evidence of a Petitioner's claimed qualifying relationship, a certificate of formation or organization of a limited liability company (LLC) alone is not sufficient to establish ownership or control of an LLC. LLCs are generally obligated by the jurisdiction of formation to maintain records identifying members by name, address, and percentage of ownership and written statements of the contributions made by each member, the times at which additional contributions are to be made,

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events requiring the dissolution of the limited liability company, and the dates on which each member became a member. These membership records, along with the LLC's operating agreement, certificates of membership interest, and minutes of membership and management meetings, must be examined to determine the total number of members, the percentage of each member's ownership interest, the appointment of managers, and the degree of control ceded to the managers by the members. Additionally, a petitioning company must disclose all agreements relating to the voting of interests, the distribution of profit, the management and direction of the entity, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986). Without full disclosure of all relevant documents, we are unable to determine the elements of ownership and control.

The regulations specifically allow the director to request additional evidence he or she deems necessary. *See* 8 C.F.R. § 214.2(l)(3)(viii). As ownership is a critical element of this visa classification, the director may reasonably inquire beyond the identification of a member of an LLC into the means by which this membership interest was acquired. Evidence of this nature should include documentation of monies, property, or other consideration furnished to the entity in exchange for the membership interest. Additional supporting evidence would include an operating agreement, minutes of relevant membership or management meetings, or other legal documents governing the acquisition of the ownership interest.

The Petitioner has not submitted sufficient evidence to establish its ownership. The Petitioner has not provided membership certificates, articles of organization, or other corporate documentation reflecting its asserted ownership, as requested by the Director. In addition, the Petitioner has not submitted evidence of capital contributions made in the company to substantiate its ownership.

In the current matter, the Petitioner states that it was originally formed in Maryland in [REDACTED], but later registered in the State of Georgia, this location being the most advantageous for its business. However, although the Petitioner has provided documentation from the State of Maryland confirming its formation in [REDACTED] it has not submitted any corporate documentation relevant to the original formation of the company as necessary to confirm its ownership at the time of filing. The Georgia limited liability company with the same name was established well after this petition was filed. The Petitioner has not provided any other documentation to substantiate its ownership as of 2013, including certificates of membership from its original formation, an operating agreement reflecting its formation in [REDACTED], or evidence of capital contributions made pursuant to its formation in [REDACTED] and thereafter. This lack of evidence relevant to ownership in the Petitioner leaves question as to its actual ownership. 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

As such, without appropriate supporting evidence with respect to ownership in the Petitioner, we cannot conclude that it has a qualifying relationship with the foreign entity. For this reason, the appeal will be dismissed.

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B. Doing Business (U.S. Entity)

The next issue to be addressed is whether the Petitioner has demonstrated that it is doing business as defined by the regulations.

The regulations define a qualifying organization as one doing business as an employer in the United States. *See* 8 C.F.R. § 214.2(l)(1)(ii)(2). “Doing business,” is defined as the regular, systematic, and continuous provision of goods or services. *See* 8 C.F.R. § 214.2(l)(1)(ii)(H).

1. Facts

The Petitioner stated on the Form I-129 that it had two employees as of the date of the filing. The Petitioner explained that the Beneficiary, after being approved for a two year petition extension, traveled to Pakistan in April 2012, where he was delayed from returning to the United States for sixteen months. The stated that “the business dropped substantially and as a result [the Beneficiary] had to terminate [its marketing manager]” and “several clients abandoned the projects because of uncertainty.” The Petitioner provided emails supporting the disruption of its business during 2012 and 2013 due to the Beneficiary’s absence. The Beneficiary stated that “as soon [as] I have landed in the USA, I have started the recruitment process to build my team and gain the lost business.” The Petitioner provided a job advertisement for a marketing executive position in the [REDACTED] area dated in September 2013.

The Petitioner submitted an email dated in February 2013 reflecting the company's organizational structure. The email stated that there were four tiers of company “rankings,” including general staff, officers/team leads, managers, and the director. An employee list attached to this email indicated that the Petitioner employed a director of operations, a marketing executive, and project manager in its [REDACTED] office. The employee listing reflected that the business development manager position was currently vacant and also suggested that the company employed a project manager in its Pakistan office and an administrative accounts officer, but did not identify individuals assigned to these positions. The Petitioner provided a photograph of the employees in its [REDACTED] office which included the Beneficiary and three other employees. The Petitioner submitted a business plan indicating that it planned on growing to six employees in the first quarter of 2014 and the Beneficiary stated in the business plan that “if I would have been given ample time to manage my business after the renewal of my petition, my company could have grown substantially resulting in the employment of several American citizens.”

The Director later issued a request for evidence (RFE) in February 2014 stating that the provided evidence was insufficient to demonstrate that the Petitioner and the foreign employer were doing business at the time the petition was filed. Therefore, the Director asked that the Petitioner provide evidence of both companies’ business activities, reflecting their financials, purchase orders, invoices, tax returns, and other such documentation.

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In response, the Petitioner submitted evidence indicating that it owned and controlled a domain name in the United States, "medialinkers.com." The Petitioner provided evidence reflecting that it has a [REDACTED] listing. In a response letter, the Petitioner stated that the Beneficiary "was able to maintain some business for his company but had to rebuild the relationship due to his absence" and that it "continues to gain business despite [the Beneficiary's] latest setback."

The Petitioner submitted a salary sheet dated in March 2014 reflecting that the foreign employer employed twenty-two individuals, including the Beneficiary as CEO. The Petitioner submitted the foreign entity's tax return from 2012 reflecting that it had earned over 15 million rupees during that fiscal year.

Furthermore, the Petitioner provided an email chain from May 2014 reflecting its engagement of a marketing manager. The Petitioner submitted three contracts it had entered into in 2013 with companies in Georgia to provide website design services. The Petitioner did not provide any evidence of its finances during the preceding years or evidence reflecting any payments received from clients.

In denying the petition, the Director pointed to a lack of transactional documentation, such as invoices, proof of payments received, and financial documentation, as well as a lack of supporting evidence to corroborate that the Petitioner had employees other than the Beneficiary.

On appeal, the Petitioner again emphasizes that the Beneficiary was delayed in Pakistan for over fifteen months and that this caused significant disruption in the company's business, noting that the company "suffered tremendously." The Petitioner asserts that the Director erred in concluding that it is not doing business. The Petitioner provided nine contracts for website design work executed with customers in the spring and summer of 2014 and evidence of payments received from these contracts. The Petitioner submitted only one such contract dated in 2013 and no evidence that it was generating income as of the date the petition was filed. The Petitioner provided no documentation establishing the company's revenue or financial position in 2013.

As noted, following the appeal, we issued an additional RFE on July 31, 2015. We asked the Petitioner to submit evidence to demonstrate that it had been authorized to conduct business in the United States from 2011 to the present. Further, we advised the Petitioner that the agreements it submitted were insufficient to establish that the company was doing business, noting that these documents did not reflect the company's financial status. As such, we requested that the Petitioner submit its U.S. corporate income tax returns from 2011 through 2014. In addition, we advised the Petitioner that the evidence provided with respect to its employees was insufficient to demonstrate the company's employment levels at the time of filing in September 2013. Therefore, we requested that the Petitioner provide IRS Forms 941, Employer's Quarterly Federal Tax Returns, for each quarter of 2012, 2013 and 2014, along with IRS Forms W-2 and W-3 for this same period.

The Petitioner explained that the company was initially established in Maryland, but that it later registered in the State of Georgia in 2014. The Petitioner emphasized that that "there is no point

since 2009 that the company was not authorized to conduct Business legally.” The Petitioner submitted its Forms 941 from 2012 through to the present. The Petitioner's Form 941 from the third quarter of 2013, coinciding with the filing of the petition in September 2013, indicates that the company had three employees and paid \$8,648.75 in wages during this quarter. The Petitioner reported two employees on its Form 941 for the fourth quarter of 2013 and the first quarter of 2014. The Petitioner provided its IRS Forms W-2 for 2012 reflecting that it had six employees during that year and paid over \$111,000 in wages. However, the Petitioner did not provide copies of its Form W-2s for 2013 or 2014. The Petitioner did provide its IRS Forms W-3 for 2013 and 2014, which show that it paid wages of \$47,773.60 and \$88,000, respectively, during these years.

The Petitioner submitted additional information regarding its contracts, including a listing of nine contracts executed in 2012. The same listing reflected that the Petitioner executed only three contracts in 2013. The Petitioner provided checks indicating payments from customers, but two of these checks were dated in 2014, while another was dated in 2012. The petitioner provided no other supporting documentation reflecting its financial position or revenue.

2. Analysis

Upon review, the Petitioner has not provided sufficient evidence to establish that it is doing business as defined by the regulations. As noted, the regulations define a qualifying organization as one doing business as an employer in the United States. *See* 8 C.F.R. § 214.2(l)(1)(ii)(2). “Doing business,” is defined as the regular, systematic, and continuous provision of goods or services. *See* 8 § 214.2(l)(1)(ii)(H). In the RFE issued by this office, the Petitioner was asked to submit U.S. corporate income tax returns from 2011 through 2014 to verify that the Petitioner was regularly, systematically and continuously providing goods and services when the petition was filed. However, the Petitioner has not provided this evidence.

Although the Petitioner has submitted contracts, mostly executed well before or after the filing of the petition, the Petitioner has not submitted transactional documentation to substantiate that it was receiving income or regularly providing services at the time it filed this petition. In fact, the Petitioner has stated repeatedly that its business was substantially disrupted due to the Beneficiary’s absence from the United States for more than 15 months in 2012 and 2013. The Petitioner has not provided the aforementioned income tax returns or transactional documentation indicating that the company was regularly and systematically providing goods and services when the petition was filed. Again, 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. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

Although the Petitioner provides evidence that its business has made some recovery since the filing of the petition and that it was doing business prior to the Beneficiary's travel to Pakistan, this evidence is not relevant to the issue of whether the Petitioner was doing business regularly and systematically when this petition was filed in September 2013. The Petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved

at a future date after the Petitioner or Beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978).

Therefore, the Petitioner has not provided sufficient evidence to demonstrate that was doing business as defined by the regulations. For this additional reason, the appeal will be dismissed.

C. Doing Business (Foreign Entity)

The last issue to be addressed by the Director is whether the Petitioner established that the foreign employer is doing business as defined by the regulations. In denying the petition, the Director observed that the evidence provided to document the foreign entity's business activities was dated in 2011 and 2012.

After reviewing the totality of the evidence submitted, including the additional evidence provided on appeal, we find that the Petitioner has provided sufficient evidence to demonstrate that the foreign employer is doing business. For instance, on appeal, the Petitioner submitted foreign entity tax documentation from Pakistan indicating that it earned over 15 million rupees in revenue during 2013. As such, the Director's conclusion that the Petitioner did not establish that the foreign entity was doing business is hereby withdrawn.

III. ADDITIONAL ISSUE

Beyond the decision of the Director, the Petitioner has not established that the Beneficiary was acting in a qualifying managerial or executive capacity as of the filing of the petition in September 2013.

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, 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. Section 101(a)(44)(C) of the Act.

In the RFE issued on July 31, 2015, we requested that the Petitioner submit IRS Forms 941 relevant to each quarter from 2011 through to 2014. As stated previously, these tax forms reflect that the Petitioner's business likely employed only two individuals at the time this petition was filed. In addition, on the Form I-129, the Petitioner stated that it had only two employees, confirming its low level of staffing at the time of the requested extension.

Furthermore, as previously mentioned, the Petitioner has stated that its business greatly disrupted by the Beneficiary's absence from the United States for approximately 15 months during this same period. The Petitioner's low level of staffing as of the date of the filing of the petition leaves question as to whether it employed sufficient employees and had sufficient operations to support the Beneficiary in a qualifying managerial or executive position during this time. The fact that the Petitioner would no longer be able to function in the Beneficiary's absence suggests that the Beneficiary was likely primarily engaged in the performance of non-qualifying operational duties and not managerial or executive level tasks. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm'r 1988). For this additional reason, the petition cannot be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F.Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(noting that the AAO reviews appeals on a *de novo* basis).

III. CONCLUSION

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, it is the Petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of M-M-, LLC*, ID# 11011 (AAO Oct. 27, 2015)