



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

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

MATTER OF S-, LLC

DATE: JULY 18, 2016

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a “real estate investment and restaurant operations” business, seeks to extend the Beneficiary’s temporary employment as its president/CEO under the L-1A nonimmigrant classification for intracompany transferees. *See* Immigration and Nationality Act (the Act) section 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L). The L-1A classification allows a corporation or other legal entity (including its affiliate or subsidiary) to transfer a qualifying foreign employee to the United States to work temporarily in a managerial or executive capacity.

The Director, Vermont Service Center, denied the petition. The Director concluded that the Petitioner had not submitted sufficient evidence that it was doing business as defined in the regulations. The Director further found that the Petitioner could not be considered to be doing business by virtue of its corporate relationship with another entity that is doing business.

The matter is now before us on appeal. In its appeal, the Petitioner submits additional evidence and asserts that it is doing business through its claimed subsidiary, which operates a restaurant.

Upon *de novo* review, we will withdraw the Director’s decision and remand the matter to the Director, Vermont Service Center, for further review and the entry of a new decision.

**I. LEGAL FRAMEWORK**

To establish eligibility for the L-1 nonimmigrant visa classification, a qualifying organization must have employed the Beneficiary in a 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. Section 101(a)(15)(L) of the Act. 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. *Id.*

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

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- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (I)(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. DOING BUSINESS

The sole issue on appeal is whether the Petitioner has established that it is doing business in the United States.

The regulation at 8 C.F.R. § 214.2(I)(1)(ii)(H) states:

*Doing business* means the regular, systematic and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States.

### A. Evidence of Record

The Petitioner filed the Form I-129 on January 5, 2015, to request a third extension of the Beneficiary's L-1A status, which was originally granted in January 2010. On the Form I-129, the Petitioner described its type of business as "Real Estate Investment, Restaurant Operations, Remodeling, Trading." The Petitioner stated that it has 38 current employees in the United States with \$1.5 million in gross annual income and \$800,000 in net annual income.

In a letter dated January 2, 2015, the Petitioner stated that it is a wholly owned subsidiary of [REDACTED] a professional interior designing company in [REDACTED] Nepal. The Petitioner explained that it was established in 2009 in order to expand [REDACTED] into the United States and stated that it "intends to acquire distressed, foreclosed, abandoned and repossessed residential properties located in Northern Virginia, Maryland and [REDACTED] metro region."

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The Petitioner further explained:

In addition to acquiring distressed properties, [the Petitioner] has also actively sought and acquired other businesses in order to diversify its portfolio of services and hedge against pitfalls of ‘singular investments.’ [REDACTED], a Virginia-based limited liability company is a wholly-owned subsidiary of [the Petitioner]. The company recently acquired [REDACTED] restaurant located in the heart of [REDACTED] in the Commonwealth of Virginia. Prior to its acquisition, the [REDACTED] was successfully and profitably operated by its previous owners for over thirteen years.

The Petitioner submitted copies of its IRS Forms 1120, U.S. Corporation Income Tax Return, for the years 2009, 2011, and 2012, and provided evidence that it had filed for an extension to file its 2013 tax return. In 2012, the Petitioner reported that it had no assets, income, or rent expenses. It stated that it paid \$75,000 in salaries and wages and \$5,270 in taxes and licenses. In 2011, the Petitioner reported no assets or income, but did report rent expenses, salaries, and wages of \$156,513, and some other business-related expenses.

The Petitioner also submitted evidence related to its claimed wholly-owned subsidiary, [REDACTED] showing that this company was established in November 2012 and purchased the existing [REDACTED] restaurant from its previous owner in December 2012 for \$226,000. As evidence of its claimed ownership of [REDACTED] the Petitioner submitted [REDACTED] operating agreement which indicates that its members are: (1) the petitioning company, which contributed \$226,000 in exchange for 100% of the membership interest, and (2) the Beneficiary, who is listed as the managing member and who contributed \$0 in exchange for 0% membership interest.

The Director issued a request for evidence (RFE) asking the Petitioner to provide additional documentation to show that it was doing business. The Director indicated that the exact nature of the Petitioner’s business operations was unclear. The Director acknowledged the Petitioner’s claimed relationship with [REDACTED] and [REDACTED] operation of the restaurant, but advised the Petitioner that it could not show that it was “doing business” through a subsidiary company. The Director requested additional information and evidence that explains how the Petitioner engages in the regular, systematic, provision of goods or services. The Director suggested that the Petitioner submit current federal income tax returns, business bank statements, vendor and customer contracts, third party agreements, and sales invoices to corroborate its current business activities.

In its RFE response, the Petitioner asserted that it meets the doing business requirement through the business activity of its wholly-owned subsidiary [REDACTED] and provided a copy of [REDACTED] membership certificate number 1 identifying the petitioning company as the owner of 100% of the company’s membership units. The Petitioner claimed that [REDACTED] is part of its qualifying organization and this subsidiary is actively engaged in running an Italian restaurant named [REDACTED]. The Petitioner asserted that because its subsidiary is engaged in the regular,

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systematic, and continuous provision of goods and services through the operation of a restaurant, it has established its eligibility for the benefit sought.

The Petitioner submitted a copy of [REDACTED] 2013 IRS Form 1120, which showed \$894,658 in gross income and payment of \$316,642 in salaries and wages. [REDACTED] tax return indicates at Schedule K that that it is not owned by a foreign or domestic corporation. The Petitioner also provided a copy of its own 2013 tax return. The Petitioner's tax return showed no assets, gross receipts, or sales. The Petitioner reported that it paid no salaries, wages, or rents, but did report \$66,527 in taxes and licenses, nominal accounting costs and bank charges, \$12,819 in office expenses, and \$166,175 for "software" expenses. At Schedule K, the Petitioner reported that it does not have a domestic subsidiary.

The Director had noted that the tax returns submitted at the time of filing did not include any information about the Petitioner's ownership by the Beneficiary's claimed foreign employer in Nepal. In response, the Petitioner submitted a letter from its accountant who explained that "[REDACTED] is C Corporation and doesn't have any Schedule K1. 100% share of [REDACTED] hold [sic] by [the Petitioner]. This company also C Corp so no questions of Schedule K1."

Furthermore, the Petitioner submitted copies of its corporate bank statements dating back to 2013. These account records show credits to the Petitioner's account in the form of wire transfers from [REDACTED]. Many of these transfers are not fully annotated, but those that are state that the purpose of the funds transfer was for "Import of Solar Goods." The debits out of the account are primarily salary payments, car payments, rent payments for the Beneficiary's apartment, cash withdrawals, and transfers to [REDACTED] corporate checking account.

The Petitioner's response to the RFE included copies of IRS Form W-2 Wage and Tax Statements issued to 12 employees of Argia's in 2014, along with payroll summaries for 14 employees for June 2015. The Petitioner also provided copies of 15 IRS Form W-2s that it issued to employees of [REDACTED] in 2013. As noted, the Petitioner did not report payment of any salaries or wages on its IRS Form 1120 for 2013. The Petitioner submitted [REDACTED] IRS Form W-2s for 2013 and 2014 showing that the remaining restaurant employees were on [REDACTED] payroll.

The Director denied the petition finding that the Petitioner is not doing business and cannot be considered to be doing business solely by virtue of its relationship with a related entity which is doing business.

On appeal, the Petitioner asserts that the business of [REDACTED] restaurant, which is wholly owned and operated by its claimed subsidiary, [REDACTED] "should be included as an integral part of the US business operations of this multinational 'qualifying organization' with the business that it is doing credited towards the 'doing business' requirement as referenced in and defined by 8 C.F.R. We do strongly argue that this is clearly all one business, all operating together as a qualifying organization, and 'doing business' in the United States."

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B. Analysis

Upon review, we will withdraw the Director's decision and remand the petition to the Director for further review and entry of a new decision.

We agree, in part, with the Petitioner's claim that a holding company can be deemed to be doing business through a subsidiary operating company, provided that both companies are part of the same qualifying organization and sufficiently document that relationship. If the Petitioner had acquired an existing restaurant directly, there would be no question of whether it was doing business by operating the restaurant. Here, however, the Petitioner states that it established a subsidiary limited liability company to purchase the restaurant, and therefore, the Petitioner must establish its qualifying relationship with that claimed subsidiary in order satisfy the definition of "doing business."

The record as presently constituted contains insufficient evidence to support the Petitioner's claim that it wholly owns [REDACTED]. The Petitioner submitted [REDACTED] membership certificate and operating agreement which indicate that the petitioning company is [REDACTED] sole owner. However, neither the Petitioner's nor [REDACTED] tax returns acknowledges the claimed relationship between the companies. The statement submitted by the Petitioner's accountant regarding the unavailability of Schedule K-1 does not resolve this discrepancy and the Petitioner has not otherwise resolved these inconsistencies with independent, objective evidence pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Further, the Petitioner did not submit evidence that it actually paid [REDACTED] \$226,000 in exchange for its ownership interest in the company. Finally, there are documents in the record which refer to the Beneficiary and his spouse as owners of [REDACTED] restaurant. As such, the record as presently constituted does not contain sufficient evidence of the Petitioner's ownership of [REDACTED]. Absent such evidence, we cannot find that the Petitioner is doing business through its claimed wholly-owned subsidiary.

In addition, we found other discrepancies in the Petitioner's tax returns which require further explanation. As noted, the record shows that the Petitioner issued IRS Forms W-2 in 2013, but did not report the payment of any salaries or wages on its IRS Form 1120. Also, the Petitioner's bank statements appear to show that it has received regular payments from a [REDACTED] company in exchange for goods, but the Petitioner does not claim that it is engaged in trade and did not report any income on its 2013 tax return.

In order to determine the Petitioner's eligibility, the Director should request additional evidence of the Petitioner's ownership of [REDACTED] as well as evidence to address the unexplained discrepancies addressed herein. This evidence should include complete copies of the Petitioner's tax returns filed with the IRS for the 2013, 2014, and 2015 tax years.

### III. U.S. EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY

Although not addressed by the Director, we further find insufficient evidence in the record to establish that the Beneficiary will be employed in a managerial or executive capacity as defined at section 101(a)(44) of the Act.

At the time of filing, the Petitioner provided a description of the Beneficiary's duties that described his role in general terms, noting that he formulates the corporate vision and mission, identifies corporate goals, oversees the acquisition of residential properties, directs financial activities, and exercises discretionary authority in decision-making. The duties, which are described in abstract terms, make repeated references to the Petitioner's real estate investment activities which have not been documented in the record, and do not address the Beneficiary's role with respect to the restaurant.

In response to the RFE, the Beneficiary submitted a statement explaining that he works seven days per week for approximately 80 hours, and devotes 74 hours per week on duties associated with the restaurant, noting that he discusses daily issues and sets the agenda with the chefs, managers, front of house staff and kitchen staff and monitors the restaurant's operations. The record as presently constituted lacks a detailed description of the Beneficiary's actual duties within the scope of the day-to-day operations of the restaurant. Absent a detailed description of his duties and the percentage of time he allocates to specific tasks, we cannot determine whether he would perform primarily managerial or executive duties under the extended petition.

Also, while the Petitioner has provided various employee lists for the restaurant, it has not provided position descriptions for these individuals. As the matter will be remanded to the Director, the Director is instructed to request additional evidence, including a more detailed description of the Beneficiary's duties, a description of how he allocates his time to each delineated duty, a detailed organizational chart depicting the staffing of the company at the time of filing, and information regarding the subordinate staff employed by the Petitioner and its claimed subsidiary, including their names, job titles, job duties, educational qualifications, and full- or part-time status. The Petitioner should also provide evidence of its current staffing levels and structure.

The Petitioner must establish eligibility at the time of filing the nonimmigrant visa petition and must continue to be eligible for the benefit through adjudication. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the Petitioner or Beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg'l Comm'r 1978).

### IV. CONCLUSION

The Director's decision is withdrawn and the case remanded for the above stated reasons. 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; *Matter of Otiende*, 26 I&N 127, 128 (BIA 2013).

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**ORDER:** The decision of the Director, Vermont Service Center, is withdrawn. The matter is remanded to the Director, Vermont Service Center, for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

Cite as *Matter of S-, LLC*, ID# 17044 (AAO July 18, 2016)