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QUESTIONS ARISING FROM FOREIGN ENTITY CHANGES AFTER AN L-1 PETITION IS APPROVED

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An L-1 visa may be issued to a foreign national employee who has worked abroad for at least one continuous year within the last three years for a qualifying, related business entity (e.g., parent, subsidiary, or affiliate) in an executive, managerial, or specialized knowledge capacity, and who is being transferred to the U.S. to work for the same employer or a parent, subsidiary, or affiliate of the employer. *See* INA § 101(a)(15)(L).

An interesting question arises when, during the course of the employee's valid L-1 employment in the United States, the foreign entity goes through a corporate reorganization, and thereby ceases operations, merges with another company, or undergoes some other change in its corporate structure or ownership.

Is a foreign national employee who earned his/her one year of qualifying work experience at a foreign entity that undergoes corporate reorganization eligible to maintain L-1 status?

According to 8 CFR §214.2(*l*)(1)(ii)(G)(2), the employer must be doing business in the U.S. and at least one other country for the duration of the employee's stay in the U.S. as an L-1 nonimmigrant. A foreign qualifying entity (i.e., affiliate, subsidiary, etc.), also, must be doing business the entire time the beneficiary is in L-1 status. However, it is less clear whether the foreign qualifying entity needs to be the same one that employed the L-1 while s/he was abroad.

Is an amended L-1 petition required when the foreign entity undergoes corporate reorganization?

There is scant guidance regarding the need to file an amendment when there is

a change in the foreign entity, such as when the foreign entity goes out of existence but the U.S. employer has subsidiaries in other countries, or when the U.S. employer acquires another entity in the foreign country while it sells the former foreign entity where the beneficiary had previously worked. In the absence of clear authority, and in an abundance of caution, some employers may choose to file an amendment.

However, we may draw clues from at least two sources that strongly suggest that an amendment is not necessary.

In *Matter of Chartier*, 16 I&N Dec. 284 (BIA 1977), the L-1 employee was employed by a company in Canada, then transferred to work for the same employer in the U.S. The Service granted, then later revoked, the foreign national employee's L-1 status because it found that the employer did not have a subsidiary or affiliate in Canada. The Service contended that without an established foreign branch, there was no place for the alien to return to, and his L-1 employment could not be deemed temporary. The Board rejected this argument, concluding in its Interim Decision that the L-1 employee could be sent back to Canada, *or to the company's affiliate in Belgium*. The Board's decision indicates that the L-1 remained valid so long as the company had *a* qualifying entity abroad, even if it was not *the* foreign entity where the L-1 employee gained his qualifying experience.

This conclusion may also be drawn from USCIS L-1 training materials, which were uncovered in response to a FOIA request, and can be found on AILA InfoNet at AILA Doc. No. 13042663 (posted April 26, 2013). The materials contain the following example: "An L-1A was a manager for Company A in Italy. L-1A transfers to the U.S. to work for affiliated Company B. After L-1A transfers, Company A ceases to do business and becomes a dormant company. Company B still has foreign affiliate, Company C, that is doing business in Japan. Therefore, the petition remains valid." Although training materials are not as authoritative as case law, they still reflect the government's view that an L-1 petition remains valid even when the foreign entity where the foreign national employee gained his qualifying employment becomes dormant, as long as the employer has another qualifying entity abroad.

In some instances, the change to the foreign entity's organizational structure may affect the terms and conditions of the L-1 beneficiary's employment in the United States – for example, if some of the job duties were dependent on the

continued existence of the entity abroad. However, in the absence of such a material change to the L-1 employee's position in the United States, a change in the foreign entity's organization should not warrant the filing of an amendment so long as the petitioner continues to do business in at least one other country through a qualifying branch, parent, affiliate or subsidiary. However, the petitioning entity in the US may still want to file an amendment out of an abundance of caution.

The analysis changes if the L-1 beneficiary is sponsored by the U.S. entity for lawful permanent residency under the employment-based first preference for multinational executives or managers pursuant to INA § 203(b)(C), and the foreign entity where the beneficiary worked no longer exists as a result of a reorganization. There is no parallel regulatory provision as 8 CFR § 214.2(*l*)(1)(ii)(G)(2), and the analogous provision at 8 CFR § 204.5(j)(3)(i)(C) provides the "prospective employer in the United States is the same employer or a subsidiary or affiliate of the firm or corporation or other legal entity by which the alien was employed overseas". While an argument can still potentially be made that USCIS adopt the same reasoning as it does with L-1s, the Administrative Appeals Office (AAO) in a non-precedential decision has interpreted the section to mean that the foreign entity where the beneficiary worked at abroad has to continue to exist at the time of filing, because the language of regulation uses the word "is", signifying present existence of the foreign entity. *See* *Matter of ___*, LIN 0800457652 (AAO Apr. 8, 2010). On the other hand, the door does not shut totally. If the employee worked in the foreign country for a branch of the petitioner as opposed to a distinct entity, which subsequently closes, the AAO in another non-precedential decision has reasoned that the beneficiary is working for the "same" employer and can thus be classified as a multinational executive or manager. *See* *Matter of ___*, LIN 0618952335 (AAO Nov. 7, 2008). One can also potentially argue that if the distinct entity that hired the beneficiary closes, another foreign entity, either in the same or a different foreign country, could serve as a successor in interest if it assumes substantially all assets and liabilities. In the immigration context, a transfer of a particular business line and its employees to the new entity may suffice for purposes of establishing a successor in interest entity.

(*The blog is for informational purposes only, and should not be considered as a substitute for legal advice*).

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