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THE DIFFERING IMPACT OF FOREIGN ENTITY CHANGES ON AN L-1 EXTENSION AND EB-1(C) PETITION

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U.S. Citizenship and Immigration Services (USCIS) has issued a final policy memorandum designating Matter of F-M- Co. as an Adopted Administrative Appeals Office Decision. The decision clarifies that for employment-based first preference category multinational executives or managers, a petitioner must have a qualifying relationship with the beneficiary's foreign employer at the time the petition is filed, and maintain that relationship until the petition is adjudicated. It also clarifies that if a corporate restructuring affecting the foreign entity occurs before the immigrant visa petition is filed, a petitioner may establish that the beneficiary's qualifying foreign employer continues to exist and do business through a valid successor entity.

This differs markedly for an L-1 extension. In our prior blog, Questions Arising From Foreign Entity Changes after an L-1 Petition is Approved, we explained that an extension request can be made for an L-1 even if the foreign entity (i.e., parent, affiliate, subsidiary) that employed the foreign national on the L-1 visa has dissolved and there is no successor in interest or successor entity, so long as there is a foreign qualifying entity, even if that foreign entity is not the one that employed the beneficiary. 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, 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. Still, an old decision of the Board of Immigration Appeals, Matter

of Chartier, 16 I&N Dec. 284 (BIA 1977), provides clarity. In *Matter of Chartier*, 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).

Matter of F-M-Co confirms that 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) under the employment-based first preference (EB-1C), and the foreign entity where the beneficiary worked no longer exists as a result of a reorganization. There is no parallel regulatory provision to 8 CFR § 214.2(*l*)(1)(ii)(G)(2); the analogous provision at 8 C.F.R. § 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*." (Emphasis added.) If the foreign entity that employed the beneficiary no longer exists, it must at least exist as a successor to the prior entity under the Neufeld Memorandum of 2009, which adopted a commonsensical definition of successor over a strict reading that had previously been followed – where a valid successor relationship could only be established through the assumption of all of a predecessor entity's rights, duties and obligations. The Neufeld Memorandum turned to Black's Law Dictionary for definitions of "successor" and "successor-in-interest". The 2009 edition of Black's Law Dictionary defined a "successor" as "a corporation that, through amalgamation, consolidation or other assumption of interests is vested with the rights and duties of an earlier corporation," and a "successor-in-interest" as "one who follows another in the ownership or control of property"

and “retains the same rights as the original owner, with no change in substance.” By ruling that the qualifying entity abroad is not required to exist in the exact same legal form, and that a successor entity may be considered to be the same entity that employed the beneficiary abroad, the AAO acknowledged the reality that large organizations may undergo reorganization, and as a result, associate entities may be merged, consolidated, or dissolved.

Nevertheless, the AAO’s adopted decision in *Matter of F-M- Co* will unfortunately lead to differing and absurd results for a nonimmigrant L-1 extension and for a petition for permanent residency. When a beneficiary applies for extension of L-1 status after the foreign entity that employed him/her ceases to exist, the extension may be approved based on the existence of another qualifying foreign entity abroad. However, when the beneficiary is then sponsored for permanent residency, there must be a valid current relationship between the U.S. Petitioner and the foreign entity or foreign successor entity, as broadly defined in the Neufeld Memorandum, in order for the immigrant visa to be approved. If, though a merger or transfer, the foreign entity no longer meets the definition of parent, affiliate, or subsidiary, and further does not meet the definition of a successor, the petition for permanent residency will not be approved.