



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **DEC 05 2013** OFFICE: VERMONT SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Petition for a Nonimmigrant Worker under Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER: SELF-REPRESENTED

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. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner filed this nonimmigrant petition seeking to classify the beneficiary 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 New Jersey corporation established in 2011, claims to be a wholesaler dealer and a subsidiary of M/s. [REDACTED] located in India. The petitioner seeks to employ the beneficiary as the vice-president of its new office for a period of three years.¹

The director denied the petition, concluding that the petitioner failed to establish that: (1) the beneficiary has been employed abroad in a position that was managerial, executive, or involved specialized knowledge for at least one continuous year within the three years preceding the filing of the petition;² or (2) the intended U.S. operation, within one year of the approval of the petition, will support an executive or managerial position.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. Counsel for the petitioner submits a brief 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.

¹ Pursuant to 8 C.F.R. § 214.2(l)(7)(i)(A)(3), if the beneficiary is coming to the United States to open or be employed in a new office, the petition may be approved for a period not to exceed one year.

² The L Classification Supplement to the Form I-129 indicates that the instant petition seeks to qualify the beneficiary as an L-1A intracompany transferee as a managerial or executive employee of a "new office." Accordingly, the applicable regulation requires the petitioner to establish that "the beneficiary has been employed abroad for one continuous year in the three year preceding the filing of the petition in a managerial or executive capacity." 8 C.F.R. § 214.2(l)(3)(v)(B). Therefore, the AAO will not address whether the beneficiary was employed abroad in a 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 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.

The regulation at 8 C.F.R. § 214.2(l)(3)(v) further provides that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office in the United States, the petitioner shall submit evidence that:

- (A) Sufficient physical premises to house the new office have been secured;
- (B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation; and
- (C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (l)(1)(ii)(B) or (C) of this section, supported by information regarding:
 - (1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;

- (2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and
- (3) The organizational structure of the foreign entity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means 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), provides:

The term "executive capacity" means 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 ISSUES ON APPEAL

A. Managerial or Executive Capacity in the United States

The first issue to be addressed is whether the petitioner established that the beneficiary would be employed in a qualifying managerial or executive capacity within one year of approval of the new office petition.

In its March 12, 2012 letter of support, the petitioner claimed that the beneficiary will take charge of the entire U.S. operation upon his arrival, and indicated that his duties would focus on corporate planning, administration, finance, purchases, sales, business development and personnel. The petitioner provided the following overview of the beneficiary's proposed duties:

Corporate Planning:

[The beneficiary] reports to the Board and co-ordinates the function of corporate planning with the President Mr. [REDACTED]. He will analyze company's performance. He will prepare comparative analysis of the operating programs. With this exercise he will evaluate the strengths & weaknesses of the company and forecast the plan for business activity of the company, laying down the path of progress for the company's forthcoming year/s. His responsibilities include making recommendations to the management with regard to economic objectives and policies for the company.

General Administration:

[The beneficiary] directs the overall business operations of the organization. He will analyze the operating procedures and devise most efficient methods to accomplish the task/work. He is responsible to manage the affairs of the company in a manner to conduct the same in an orderly manner ensuring due compliance with statutory requirements and to achieve smooth and efficient operations overall. [The beneficiary], as vice-president, has been authorized to deal with and decide day to day operations of the company. He will be supported by General Manager and his staff.

Finance:

[The beneficiary] will oversee, matters related to Finance. The responsibilities cover Budget control, Finance, Cash flow, Accounting system, Audit, Taxation and other related matters. He will conduct a Bench-mark study for the working funds requirements and provide required cash flow for smooth operations. [The beneficiary] will also judiciously employ spare funds of the company. He will be assisted by an accountant and his team for due performance of his job functions in this area of operation. He will also avail the services of Public Accountants on contract terms. [The beneficiary] will also prepare MIS reports for the management of the company.

Sales & Business Development:

[The beneficiary] is responsible for business development, including, promotion of business. He will look for new business opportunities, promote new products, and expand the customer base. The aim and purpose of this exercise is to secure progressive development of business and thereby the increase in the revenues of the company. In order to achieve this goal, he may resort to publicity and promotional activities so as to promote the sales of the company even in the face of competition. This activity is undertaken as may be required and justified by business prudence. The Sales Manager, with his team will support this [operation] and report to [the beneficiary].

Personnel:

[The beneficiary], with the control of General administration, will also have the charge of Personnel department. Will have the authority to hire and fire staff. He will review the performance of the staff for ongoing and periodical rating of the employees. With this exercise he will decide about their remuneration and rewards. He will establish and follow procedures and policy to continually boost the morale of the staff.

The petitioner also submitted a business plan in which it explained that it would operate as a wholesaler and dealer of general merchandise. It stated the beneficiary would be tasked with finding potential buyers for its products, and that it would import materials/items from overseas but also buy locally and market those goods in the United States. The petitioner indicated that it would eventually export goods procured in the United States for sale to overseas buyers.

The petitioner stated that it expected its initial marketing to respond with "encouraging results," and anticipated an annual gross income of \$500,000. It stated that it would ultimately expand its location to include a large warehouse to better accommodate customers and merchandise and expand its staffing. An organizational chart submitted with the petition indicates that the

beneficiary would oversee the five areas previously identified (corporate matters, general administration, finance, sales and business development, and personnel), and within these areas there would be a general manager, a secretary, an unspecified number of administrative staff, and accountant and accounting assistant, a marketing manager and salesmen, and an unspecified number of personnel staff. Finally, according to a projected financial statement appended to the business plan, the petitioner expected a net profit of \$43,300 after its first year of operations, and anticipated approximately \$98,000 in payroll expenditures to its staff in the first year.

The petitioner submitted a copy of a lease agreement with [REDACTED] for the period from January 1, 2012 through December 31, 2012 for the premises located at [REDACTED] in [REDACTED] New Jersey, with a monthly rental fee of \$800. The petitioner also included two photographs which show a desk with a computer, phone/fax, and printer. The square footage of the rented space was not identified in the lease.

The director issued a request for evidence (RFE) on August 9, 2012. The director requested additional information regarding the type of business to be conducted and requested that the petitioner identify its prospective customers as well as the products and services to be provided. The director further requested: (1) evidence that establishes the size of the U.S. investment and the foreign entity's financial status; (2) evidence of the amount of money invested into the U.S. entity; (3) evidence that the company will grow to be of sufficient size to support a managerial or executive position, including information regarding the number of employees to be hired, including their job titles, job duties and projected salaries.

In response, the petitioner explained that it will do business as a wholesaler and dealer, serving retail customer such as convenience stores and liquor stores, initially as a dealer of cigarette rolling papers. It stated that the size of the investment in the U.S. will be \$100,000, and noted that the company has established a bank account "with a respectable amount," of over \$18,000.

Additionally, the petitioner submitted a new lease agreement with [REDACTED] in response to the RFE, which covered a ten-year period from August 1, 2012 through July 31, 2022. This lease was for a 600 square foot premises located at [REDACTED] New Jersey, with a monthly rental fee of \$800. The lease was also accompanied by two additional photographs of a desk, file cabinet, table, microwave and refrigerator.

Finally, the petitioner submitted copies of the first page of its bank statements for the periods ending February 29, 2012, March 30, 2012, April 30, 2012 and May 31, 2012. It is noted that none of the statements showed the transaction history for the relevant periods. Furthermore, the ending balance on the May 31, 2012 statement was \$1,176. Although a balance of \$18,200 was reported in the March 30, 2012 statement, there is no evidence in the record demonstrating to what this money was applied.

The director denied the petition concluding, in part, that the petitioner failed to establish that the beneficiary would be employed in a qualifying managerial or executive position within one year of approval of the "new office" petition. In denying the petition, the director found that the submitted evidence is insufficient to demonstrate that the beneficiary will function in a managerial or executive capacity and there is no indication that the beneficiary's duties will be primarily managerial or executive in nature. The director found that the incomplete bank statements provided no evidence of business dealings undertaken by the petitioner, and observed that the lease agreement submitted in response to the RFE was for a different premises than the one identified as the work location of the beneficiary on the Form I-129 petition. The director concluded that the evidence is not persuasive in establishing that the beneficiary will be managing a subordinate staff of professional, managerial, or supervisory personnel who relieve him from performing non-qualifying duties.

On appeal, the petitioner contends that the beneficiary qualifies as an executive of the U.S. company and restates the contentions previously offered in response to the RFE. No new documentary evidence is submitted on appeal. The petitioner explains that it signed a second lease agreement because its landlord offered additional premises at a more convenient location.

Upon review, and for the reasons stated herein, the petitioner has not established that it would employ the beneficiary in a qualifying managerial or executive capacity within one year of commencing operations in the United States.

The one-year "new office" provision is an accommodation for newly established enterprises, provided for by U.S. Citizenship and Immigration Services (USCIS) regulation that allows for a more lenient treatment of managers or executives that are entering the United States to open a new office. When a new business is first established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of low-level activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed in that first year. In an accommodation that is more lenient than the strict language of the statute, the "new office" regulations allow a newly established petitioner one year to develop to a point that it can support the employment of an alien in a primarily managerial or executive position.

Accordingly, if a petitioner indicates that a beneficiary is coming to the United States to open a "new office," it must show that it is prepared to commence doing business immediately upon approval so that it will support a manager or executive within the one-year timeframe. *See generally*, 8 C.F.R. § 214.2(l)(3)(v). At the time of filing the petition to open a "new office," a petitioner must affirmatively demonstrate that it has acquired sufficient physical premises to house the new office and that it will support the beneficiary in a managerial or executive position within one year of approval. Specifically, the petitioner must describe the nature of its business, its

proposed organizational structure and financial goals, and submit evidence to show that it has the financial ability to remunerate the beneficiary and commence doing business in the United States. *Id.*

On review, the petitioner's general description of the beneficiary's duties fails to establish that the beneficiary will be engaged in either a primarily managerial or primarily executive position. The description provided in the letter of support is more indicative of a marketing position and not of an executive at the U.S. company. The petitioner did not provide any further description of the beneficiary's duties. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Overall, the position description alone is insufficient to establish that the beneficiary's duties will be primarily in a managerial or an executive capacity, particularly in the case of a new office petition where much is dependent on factors such as the petitioner's business and hiring plans and evidence that the business will grow sufficiently to support the beneficiary in the intended managerial or executive capacity. The petitioner has the burden to establish that the U.S. company will realistically develop to the point where it will require the beneficiary to perform duties that are primarily managerial or executive in nature within one year. Accordingly, the totality of the record must be considered in analyzing whether the proposed duties are plausible considering the petitioner's anticipated staffing levels and stage of development within a one-year period.

In order to qualify for L-1 nonimmigrant classification during the first year of operations, the regulations require the petitioner to disclose the business plans and the size of the United States investment, and thereby establish that the proposed enterprise will support an executive or managerial position within one year of the approval of the petition. The petitioner is required to describe the nature of the office, the anticipated scope of the entity, its proposed organizational structure and its financial goals. *See* 8 C.F.R. § 214.2(l)(3)(v)(C).

Even though the enterprise is in a preliminary stage of organizational development, the petitioner is not relieved from meeting the statutory requirements. In its business plan, the petitioner provided a generalized overview of the nature of the company (a wholesaler and dealer of general merchandise). However, it is unclear how the petitioner can confidently predict the sales figures and profit margins it provides in its business plan. The record contains no product-specific market research or forecasting to support the petitioner's projected financial statement and project profit.

Moreover, the financial statement projects collective salary expenditures of \$98,000 during the first year of operations and \$115,000 during the second year of operations, but contains no specific hiring plan or projections. According to the Form I-129 petition, the beneficiary will earn \$800 per week, or \$41,600 annually. The AAO recognizes that the petitioner will be commencing business and acquiring staff on a piecemeal basis during the first year of operations. The regulations, however, require the petitioner to demonstrate that, by the end of that first year, the beneficiary will have sufficient subordinate employees to relieve him from performing non-qualifying duties. However, subtracting the beneficiary's salary from the salary projections of the first and second year of operations reveals that only \$56,400 and \$73,400, respectively, will remain to pay the salaries of the numerous employees identified on the organizational chart.

As previously noted, the organizational chart anticipates the hiring of a general manager, a marketing manager, an accountant, a secretary, an accounting assistant, and an unspecified number of salesmen as well as administrative and personnel staff, but provides no timeline for hiring the staff. Absent a more specific business plan outlining the timeframe of its hiring process and the manner in which the petitioner will pay the required salaries, the AAO is unable to determine how and when the U.S. entity will ultimately meet the hiring goals set forth on the organizational chart.

Due to the lack of evidence submitted the petitioner has not met its burden to establish that the beneficiary would be relieved from performing non-qualifying duties within one year of commencing operations. The regulations require the petitioner to present a credible picture of where the company will stand in one year, and to provide sufficient supporting evidence in support of its claim that the company will grow to a point where it can support a managerial or executive position. The petitioner expects gross sales in the amount of \$500,000 during its first year of operations, yet does not identify the products it will sell beyond a specific brand of cigarette papers for which it does not yet have a dealer contract.

Additionally, the petitioner's most recent bank statement reveals a balance of only \$1,176, and the record contains no invoices or purchase orders demonstrating that it has begun to acquire goods for its wholesale business. Aside from its own contentions, the petitioner fails to submit evidence that the business will be able to support a managerial or executive position for the beneficiary by the end of the first year of operations. 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)).

The definitions of executive and managerial capacity each have two parts. First, the petitioner must show that the beneficiary will perform the high-level responsibilities that are specified in the definitions. Second, the petitioner must show that the beneficiary will *primarily* perform these specified responsibilities and will not spend a majority of his or her time on day-to-day functions.

Champion World, Inc. v. INS, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). Absent evidence that the company will hire employees to perform the day-to-day functions of the business during the first year of operations, the petitioner has not met this burden.

Based on the evidentiary deficiencies addressed above, the AAO will uphold the director's determination that the petitioner failed to establish that the beneficiary would be employed in a qualifying managerial or executive capacity within one year of the approval of the new office petition. Accordingly, the appeal will be dismissed.

B. Employment Abroad

The next issue to be addressed is whether the beneficiary 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, as required by 8 C.F.R. § 214.2(1)(3)(iii).

In a letter of support dated March 12, 2012, the petitioner claims to be the subsidiary of [REDACTED] located in Gondia, India. It further states that the beneficiary "has been associated with the overseas principals since several years as Managing Partner," and that the petitioner is the subsidiary of this foreign partnership by virtue of its 100% ownership of the petitioner.

In support of the claimed qualifying relationship, the petitioner submitted a copy of the foreign entity's deed of partnership dated September 1, 2011. The deed indicates that the beneficiary and [REDACTED] each own a 50% interest in the partnership. The deed further indicates in paragraph (2) that "[t]he partnership shall be deemed to have commenced w.e.f. From 01-04-2011." Regarding the U.S. entity, the record contains a letter from the Treasurer of the State of New Jersey confirming that the petitioner was registered as a domestic profit corporation on April 6, 2011. The record also contains a copy of the petitioner's stock certificate number 1 and accompanying stock ledger, demonstrating that 1,000 common shares were issued to [REDACTED] on June 6, 2011.

The director denied the petition, finding that the beneficiary did not have the requisite one year of continuous full-time employment abroad with a qualifying organization, since the petition in this matter was filed in May 2012, only eight months after the date the deed of partnership for the foreign entity was executed.

On appeal, the petitioner contends that the foreign partnership was in effect since April 1, 2011, contrary to the director's findings. The petitioner claims that the Indian Partnership Act permits the formation of partnerships by oral agreement, and claims that the formation of such partnership may be recorded at a later date "if so desired." Emphasizing that its deed of partnership specifically

states that the partnership was formed on April 1, 2011, the petitioner asserts that the foreign entity had been doing business for more than one year prior to the filing of the petition, and consequently the beneficiary's employment with the foreign partnership during this period satisfied the regulatory requirement under 8 C.F.R. § 214.2(1)(3)(iii).

Upon review of the Indian Partnership Act of 1932 (hereinafter IPA),³ the AAO concurs with the petitioner's contentions. According to the IPA, the registration of a partnership is not compulsory; however, significant legal rights under the IPA are denied to a partnership that elects to forego registration. Further, there is no provision under the IPA prohibiting registration of a partnership subsequent to its formation. Instead, a partnership deed must include certain information, such as the duration of the firm and the date each partner joined the firm.

In this matter, the deed of partnership states that the foreign partnership was formed on April 1, 2011. Although the deed of partnership was not registered until September 1, 2011, the foreign entity commenced operations on April 1, 2011, and therefore was doing business for one full year prior to the filing of the instant petition. Therefore, the director's finding regarding the date of the foreign entity's establishment was incorrect and is hereby withdrawn.

III. CONCLUSION

The petition will be denied and the appeal dismissed for the above stated reasons. 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, the petitioner has not met that burden.

ORDER: The appeal is dismissed.

³ See http://www.mca.gov.in/Ministry/actsbills/pdf/Partnership_Act_1932.pdf (last accessed on November 26, 2013).