(b)(6)

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

DATE: JUL 26 2013 OFFICE: VERMONT SERVICE CENTER FILE

IN RE: Petitioner:
Beneficiary:

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

ON BEHALF OF PETITIONER:

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
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal.[1] The AAO will dismiss the appeal.

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 Florida corporation established in March 2012, states that it engages in freight forwarding. The petitioner claims to be a subsidiary of located in Venezuela. The petitioner seeks to employ the beneficiary as general manager/CEO of its new office in the United States.

The director denied the petition concluding that the petitioner failed to establish that the beneficiary would be employed in a qualifying managerial or executive capacity within one year of approval of the new office petition.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO. On appeal, counsel for the petitioner asserts that the director failed to consider all relevant evidence in concluding that the petitioner would not employ the beneficiary in a qualifying managerial or executive capacity, and instead placed undue emphasis on the size of the office leased for the company's start-up operations. Counsel 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.

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.

[1] The AAO initially rejected the appeal as untimely filed on April 13, 2013. The petitioner has since submitted evidence that the appeal was in fact timely and properly filed. The appeal was erroneously rejected by the designated USCIS filing location for lack of a filing fee, which was in fact included with the timely-filed appeal. Accordingly, the AAO will adjudicate the appeal on its merits.

(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 of 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), 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.

II. THE ISSUE ON APPEAL

The sole issue addressed by the director 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.

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on July 27, 2012. Where asked to describe the beneficiary's proposed duties in the United States, the petitioner stated:

1. Set up of American subsidiary,
2. Hire personnel.
3. Seek investors.
4. Coordinate management.
5. Long term planning.

The petitioner did not submit any additional information about the beneficiary's proposed position in the United States. The petitioner submitted a three-page business plan, dated April 5, 2012, which indicated its intention to provide "freight forwarding, logistics and consulting services to both importers and exporters doing business from the United States," as well as provide "trade-related services such as customs clearance, documentation issue, insurance, inventory management and supply-chain management." However, the business plan does not include any information about the management of the U.S. company, the beneficiary's

role as general manager/CEO, the hiring plan for the U.S. company, or other information about the U.S. company's proposed operations.

The director issued a request for additional evidence ("RFE") on August 8, 2012, instructing the petitioner to submit, *inter alia*, evidence to demonstrate that the beneficiary, within one year, will be relieved from performing the non-managerial, day-to-day activities involved in producing a product or providing a service. Specifically, the director requested information regarding the number of employees to be hired and the wage or salary to be paid to each; the job titles and job duties for all proposed positions; and a description of the management and personnel structure of the U.S. office.

In response to the RFE, neither counsel nor the petitioner submitted any additional information related to the beneficiary's proposed position in the United States. The petitioner submitted an updated business plan that included a proposed timeline and status for the pre-existing sections of the plan related to: communications; business organization; licenses, permits and business names; insurance; and financing.

In response to the director's specific queries regarding the proposed staffing and organizational structure of the company, counsel for the petitioner stated, "The U.S. company is a start-up and will hire employees when the L-visa is adjudicated."

The director denied the petition on November 8, 2012, concluding 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, although requested by the director in the RFE, the petitioner failed to submit a detailed description of the proposed staff of the U.S. business with the number of employees, wages that will be paid, job titles and duties with the percentage of time dedicated to each duty and a description of the management and personnel structure for the beneficiary and employees he will be managing. Therefore, the director found that the petitioner failed to establish that the beneficiary will be employed at the managerial or executive level. The director further found that the petitioner has not shown that the beneficiary will function at a senior level within the organizational hierarchy other than in position title within one year.

The director also observed that, based on the information and photographs provided regarding the petitioner's leased premises, it appears to be operating from a small office with two desks, and would not have sufficient staff to support the beneficiary's proposed managerial or executive position.

On appeal, counsel for the petitioner submits a brief and indicates that, "[i]n no way did the officer considered [*sic*] the totality of the circumstances before denying this case and simply used an irrelevant finding, the size of the initial or temporary office in making the decision." Counsel states the following about the beneficiary's proposed position in the United States:

> The initial L visa filing, form I-129 at number 7, provided a description of the beneficiary's proposed duties in the United States as follows:
>
> 1) Set up an American subsidiary,
> 2) Hire personnel
> 3) Seek investors

4) Coordinate management
5) Long term planning

Further evidence was provided in the form of a business which stated the business profile targeting marketing customers, pricing power and proposed business organization, pricing power and proposed business organization [*sic*]. Documentation was also provided from the operations of the foreign company including bank and tax statements as well as contracts with major customers which in its totality demonstrated the ability of the foreign company to provide financial support for the start-up of the petitioner company subsidiary.

The Immigration Service in its denial on page 3 expected a description of the staff of the U.S. business with the number of employees, wages that will be paid, job titles and the duties with the percentage of time dedicated to each duty and a description of the management and personnel structure. This is hardly possible for a start-up company. The American subsidiary cannot be expected to be fully staffed with managers and other employees before the L Visa application is adjudicated in the first instance. The American company also cannot be expected to have a large office to accommodate an imaginary staff which is not yet hired, before adjudication. Instead, it provided for the petitioning company to have a temporary office which is the case here until such time that it can move forward with its business plan. Availability of a small office to begin business is not a reason in and itself [*sic*] to state that evidence fails to demonstrate that the beneficiary will be employed at the managerial level. In fact the totality of the evidence including the structure of the foreign company as well as the proposed business plan demonstrated the opposite.

[The beneficiary] himself has been the Chief Operations Officer of the foreign company since 1982 and the company has been as success [*sic*] in the freight forwarding business for over 30 years. This is certainly proving for him while his L visa application is pending to plan and begin operations in the United States but to start cautiously until such time that he is legal to work in the United States and can further hire staff and increase the size of operations.

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 description of the beneficiary's duties fails to establish that the beneficiary will be engaged in either a primarily managerial or primarily executive position. While the petitioner indicates that the beneficiary will exercise discretionary authority over the U.S. company as its president and owner, the petitioner has not provided sufficient information detailing the beneficiary's proposed duties to demonstrate that these duties qualify him as a manager or an executive. The petitioner did not submit any details about the beneficiary's proposed position in the United States. Accordingly, the director requested that the petitioner submit a more specific description of the beneficiary's duties, identifying the percentage of time required to perform the duties of the managerial or executive position. The director also requested that the petitioner submit a staffing plan for the new office, including the number of employees, wages that will be paid, job titles and proposed position descriptions for all proposed employees, including the beneficiary.

Although advised that the initial position description was insufficient and afforded a second opportunity to supplement the record, the petitioner failed to provide a detailed description of the beneficiary's job duties and a breakdown detailing the amount of time the beneficiary will allocate to specific duties. In response, the petitioner re-submitted the same business plan and added a "proposed timeline" and "status" lines to each section, but failed to respond to the director's request for a more specific description of the beneficiary's duties and a staffing plan for the new office. Any failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

While several of the vague duties described by the petitioner would generally fall under the definitions of executive capacity, the lack of specificity raises questions as to the beneficiary's actual proposed responsibilities. 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).

At the time of filing, the petitioner submitted a three-page business plan that did not describe the foreign entity's vision or actual plans for the U.S. company. The business plan does not contain any information regarding anticipated revenues and capital required for carrying out its plans to operate as a freight forwarding business in the United States, nor does it discuss the petitioner's hiring plans for the first year of operations or proposed organizational structure. As such, it is impossible to determine, based on the minimal evidence submitted, 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 exactly 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. 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)).

Therefore, while counsel correctly asserts on appeal that the petitioner is not required to establish that the new office is already staffed as of the date of filing, the director's requests for information regarding the *proposed* employees and organizational structure of the company were appropriate considering the regulatory requirements at 8 C.F.R. § 214.2(l)(3)(v)(C)(*1*). Any failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Contrary to counsel's assertions on appeal, the director denied the petition, in part, based on the petitioner's failure to submit this information regarding the proposed staffing of the company. The AAO agrees, however, that the director's findings regarding the proposed staffing of the company based on the size of the petitioner's leased premises were entirely speculative. Our finding is based on the petitioner's failure to provide the required information regarding the beneficiary's actual duties and the proposed organizational structure of the new office, rather than on the size of its leased premises.

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). The fact that the beneficiary owns and manages a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of sections 101(a)(15)(L) of the Act. *See* 52 Fed. Reg. 5738, 5739-40 (Feb. 26, 1987) (noting that section 101(a)(15)(L) of the Act does not include any and every type of "manager" or "executive").

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.

III. MANAGERIAL OR EXECUTIVE CAPACITY ABROAD

Another issue not addressed by the director is whether the petitioner has established that the beneficiary was employed by the foreign entity in a qualifying managerial or executive capacity, as required by 8 C.F.R. § 214.2(l)(3)(v)(B).

On the Form I-129, the petitioner stated that the beneficiary commenced employment with the foreign entity in 1982. Where asked to describe the beneficiary's duties abroad for the 3 years preceding the filing of the petition, the petitioner stated:

1. Oversee all company managers.
2. Evaluate all managerial decisions.
3. Approve new projects and evaluate customer accounts.
4. Responsible for long-term planning for the company.
5. Seek investors for job relations.

In support of the petition, the petitioner submitted a letter from the foreign entity indicating that the beneficiary "has been president of [the foreign entity] since 1982 and has worked for the company in that time period." The letter went on to list the same five duties listed above as the beneficiary's job duties at the foreign entity. The petitioner also submitted a document from the foreign entity listing its employees and a brief description of each of their duties.

The petitioner did not submit any additional details about the beneficiary's duties abroad. The petitioner submitted an organizational chart for the foreign entity depicting the beneficiary as president. According to the chart, the beneficiary supervises one vice-president, one administrative manager, and one operations manager. The administrative manager supervises an "appraiser" and a "secretary," and the operations manager supervises one "examiner," one "dispatcher," and one "chauffer."

In response to the RFE, the petitioner submitted a new letter from the foreign entity describing the beneficiary's duties abroad as follows:

> [The beneficiary], besides being the Owner and President of [the foreign entity], oversees the individual evaluations of his subordinate supervisors. He also evaluates and approves of rejects proposals issued by his subordinate supervisors for any new possible project or new customers. Considering that we do not have a Sales Department per say, [the beneficiary] does perform the main function of a Sales Department, which is to attract and retain customers, and follow up with the potential ones.
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> * * *
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> [The beneficiary] has total degree of discretionary authority in the day by day operations in [the petitioner].

> [The beneficiary] distributes his time in a flexible way to all his executive managerial and non-managerial duties, always meeting the goals proposed within his position.

Upon review, and for the reasons stated herein, the petitioner has not established that the beneficiary was employed by the foreign entity in a qualifying managerial or executive capacity.

The fact that the beneficiary manages or directs a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 101(a)(15)(L) of the Act. By statute, eligibility for this classification requires that the duties of a position be "primarily" of an executive or managerial nature. Sections 101(A)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). While the information provided by the petitioner indicates that the beneficiary exercises discretion over the foreign entity's day-to-day operations as its owner and president, the petitioner has failed to show that the beneficiary's actual duties are primarily managerial or executive in nature. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Here, the petitioner has provided a vague list of job duties and indicated that the beneficiary is the sole employee responsible for sales at the foreign entity. Absent a detailed description of the beneficiary's actual duties and a consistent account of how the beneficiary allocates his time to specific duties, the AAO cannot conclude that the beneficiary has been employed by the foreign entity in a qualifying managerial or executive capacity. For this additional reason, the petition cannot be approved.

The AAO maintains discretionary authority to review each appeal on a *de novo* basis. The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). 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 v. United States*, 229 F. Supp. 2d 1025,1043 (E.D. Cal. 2001), *aff'd* 345 F. 3d 683 (9th Cir. 2003).

IV. CONCLUSION

The petition will be denied and the appeal 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 petitioner has not met that burden.

ORDER: The appeal is dismissed.