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

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

MAR 25 2013

DATE: Office: VERMONT SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
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:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

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. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to employ 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 York limited liability company established in 2009, states it is engaged in the export and sale of used automobiles. It claims to be a subsidiary of located in Afghanistan. The petitioner seeks to employ the beneficiary in the position of President and Director for a period of three years.

The director denied the petition, concluding that the petitioner failed to establish: (1) that it would employ the beneficiary in a primarily managerial or executive capacity; (2) that it was continuously doing business as defined in the regulations; and (3) that its foreign parent company is or will be doing business as a qualifying organization abroad.

On appeal, counsel asserts that the director's decision was factually incorrect based on the evidence of record and that the beneficiary will be acting primarily in an executive or managerial capacity. Counsel emphasizes that the beneficiary was denied re-entry into the United States during the term of his previous "new office" L-1A petition approved in September 2009 due to the closing of the U.S. Embassy in Afghanistan during this period. As a result, counsel claims that the beneficiary's ability to develop the petitioner as originally planned was severely limited since he had to manage the company remotely from Afghanistan. Therefore, counsel asserts that the petitioner should be treated as a "new office."

Further, counsel asserts that the record supports that the petitioner and the foreign employer are active and operating, and references evidence submitted on the record and appeal, such as payroll records, bank statements, and tax documentation. Counsel contends that the beneficiary's duties comply with the statutory definition of "executive capacity," and that the director placed undue emphasis on the petitioner's staffing levels.

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.

(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 AAO acknowledges counsel's request on appeal that the instant petition be adjudicated pursuant to the regulations applicable to "new offices" at 8 C.F.R. § 214.2(l)(3)(v). The beneficiary was previously granted one year in L-1A classification in order to open a new office in the United States, from October 1, 2009 until October 1, 2010. The petitioner explains that the beneficiary was admitted to the United States in January 2010 after issuance of a single-entry L-1 visa, but was unable to obtain a new visa to be readmitted after departing in March 2010, due to U.S. Embassy closings and delays overseas. The petitioner filed the instant petition on August 11, 2011, more than 10 months after the expiration of the beneficiary's initial L-1 approval. The AAO notes that the petitioner indicated "no" on the Form I-129 Petition for a Nonimmigrant Worker where asked whether the beneficiary is coming to the United States to work in a new office.

Despite counsel assertions, the petitioner may not be granted a second "new office" L-1A visa approval. The regulations allow for a one-year period for a U.S. petitioner to commence doing business and develop to the point that it will support a managerial or executive position. The one-year "new office" provision is an accommodation for newly established enterprises, provided for by USCIS regulation, that allows for a more lenient treatment of managers or executives that are entering the United States to open a new office. By allowing multiple petitions under the more lenient standard, USCIS would in effect allow foreign entities to create under-funded, under-staffed or even inactive companies in the United States, with the expectation that they could receive multiple approvals for L-1 petitions without primarily engaging in managerial or executive duties. The only provision that allows for the extension of a "new office" visa petition requires the petitioner to demonstrate that it is staffed and has been "doing business" in a regular, systematic, and continuous manner for the previous year. 8 C.F.R. § 214.2(l)(14)(ii).

Further, the petitioner claims that it has been doing business since 2009, and thus cannot claim eligibility as a new office as defined at 8 C.F.R. § 214.2(l)(1)(ii)(F). The petitioner failed to file for an extension of the petition prior to the expiration of the beneficiary's previously granted period in L-1A classification and failed to explain the lengthy delay in requesting a petition extension. Therefore, this petition must be considered a new individual petition.

II. The Issues on Appeal:

A. Employment in a Managerial or Executive Capacity

The first issue to be addressed is whether the petitioner established that it will employ the beneficiary in a primarily managerial or executive capacity. On appeal, counsel asserts that the beneficiary will be employed in an executive capacity.

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.

Upon review of the petition and the evidence, and for the reasons discussed herein, the petitioner has not established that the beneficiary will perform primarily executive duties with the U.S. employer as required by the Act.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner stated that the beneficiary "will continue to be in charge of the supplier corporation in the United States which finds, purchases and ships pre-owned automobiles for sale in international markets with a focus on profit and regulatory compliance."

In a letter submitted in support of the petition, the director further described the beneficiary's duties as follows:

> His duties are to oversee and expand [the petitioner's] business dealing, negotiate new contracts (taking advantage of changes in the market), and establish the auto sales portion of the business plan . . . . To accomplish his goals, [the beneficiary] must hire and train additional employees, including a full-time professional manager of the auto sales division. These duties qualify the position as an executive and/or managerial position.

The petitioner provided a copy of its 2010 IRS Form 1120, U.S. Corporation Income Tax Return, for the fiscal year ended on March 31, 2011. The petitioner reported over $2.4 million in gross receipts or sales, and indicated that it paid $16,890 in compensation of officers and $15,058 in salaries and wages. The most recent state quarterly wage report indicated that the petitioner reported paying total wages of $4,620 during the first quarter of 2011. The petitioner listed two employees on its Form NYS-45, Quarterly Combined Withholding, Wage Reporting, and Unemployment Insurance Return – the beneficiary and [redacted], who received $1,920 during the three-month period.

Aware of the importance of a detailed description of the job duties, the director issued a request for evidence (RFE) that the petitioner "submit a breakdown of the number of hours devoted to each of the beneficiary's proposed job duties on a weekly basis." However, in response, the petitioner provided only a prospective listing of duties for the beneficiary identical to that provided with the "new office" petition approved in 2009. As such, the petitioner has not provided a current, detailed job description for the beneficiary. The 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). 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 definition of executive has two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does 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 AAO cannot determine based on the minimal information provided whether the beneficiary would primarily perform executive duties upon his transfer to the United States.

Counsel acknowledged in the response to the RFE that "many of the duties of the Beneficiary are similar to those of an executive establishing a 'new office.'" However, as explained above, the instant matter cannot be treated as a new office petition. When a new business is established and commences operations, the regulations governing new offices recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of activities not normally performed by employees at the executive or managerial level and that often the full range of executive responsibility cannot be performed. 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. *See* 8 C.F.R. § 214.2(l)(3)(v)(C). This evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties.

Since the petitioner has already been operating for more than one year, the petitioner must demonstrate that it can currently support a position that falls within a managerial or executive capacity. A petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978).

The petitioner stated that it employs two workers other than the beneficiary, including , who serves as a purchasing agent and who works as a part-time administrative assistant as well as a purchasing agent. The petitioner indicated that the purchasing agents work 35 to 40 hours per week; however, this claim is not supported by the record. As noted above, the most recent salary information provided for indicates that he earns an average of $640 per month. The petitioner paid approximately $7,700 in 2010, but there was no evidence of wages paid to this individual in 2011. 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)).

Counsel suggests on appeal that the director unfairly considered the petitioner's lack of employees and argues that staffing levels should not be determinative of whether the beneficiary is acting primarily as an executive. Counsel asserts, as required by section 101(a)(44)(C) of the Act, that the director should have taken into account the reasonable needs of the organization, component, or function in light of the overall purpose and stage of development of the organization, component, or function. However, counsel's argument is not convincing as it is based on the premise that the petitioner should still be considered as a "new office" in a preliminary stage of development.

As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, USCIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. However, it is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Family Inc. v. USCIS*, 469 F.3d 1313 (9th Cir. 2006); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

The AAO has long interpreted the statute to prohibit discrimination against small or medium-size businesses. However, the AAO has also consistently required the petitioner to establish that the

beneficiary's position consists of "primarily" managerial and executive duties and that the petitioner has sufficient personnel to relieve the beneficiary from performing operational and administrative tasks.

Reading section 101(a)(44) of the Act in its entirety, the "reasonable needs" of the petitioner may justify a beneficiary who allocates 51 percent of his duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of his or her time on non-qualifying duties. The reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. *See Brazil Quality Stones v. Chertoff*, 531 F.3d 1063, 1070 n.10 (9th Cir, 2008).

Here, the petitioner appears to be operating with a single part-time employee. The petitioner has not provided a current, detailed position description for the beneficiary, nor has it explained how this single employee would relieve the beneficiary from engaging in primarily non-qualifying operational and administrative tasks. Even though the enterprise is in a preliminary stage of organizational development, the petitioner is not relieved from meeting the statutory requirements, and must still establish that it was able to support a managerial or executive position as of the date of filing.

The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.*

As discussed, the petitioner has not established an organization that includes subordinate managerial employees to allow the beneficiary to primarily focus on directing management or establishing the goals of the company. In fact, the evidence of record indicates that the company employs, at most, one part-time purchasing agent and reflects that the beneficiary will be primarily concerned with the day-to-day operations of the petitioner.

Based on the petitioner's failure to provide requested evidence regarding the beneficiary's actual duties and failure to establish that the company has a staff or contracted workers to relieve the beneficiary from performing non-qualifying duties, the petitioner has not established that it will employ him in a qualifying executive capacity. Accordingly, the appeal will be dismissed.

B. Foreign employer "doing business" abroad

The director also denied the petition based on the petitioner's failure to establish that the foreign employer was doing business abroad. In order to meet the definition of a "qualifying organization," the foreign entity must be shown to be "doing business" by providing goods and/or services in a regular, systematic, and continuous fashion. *See* 8 C.F.R. § 214.2(l)(14)(ii).

In the present matter, the petitioner has not provided sufficient evidence to establish that the foreign employer is "doing business." The director noted this lack of evidence on the record and requested additional evidence of the foreign employer's business activities in the year previous to the filing of the petition, such as copies of purchase contracts, purchase orders, invoices, bills of lading, and copies of U.S. customs documentation.

In response, the petitioner has only provided a listing, purported to be from the Afghani Minster of Finance, showing various shipments of cars the foreign employer has received in 2011. Also, the petitioner has offered bank account statements of the foreign employer. However, the provided documentation does little to establish the foreign employer as conducting business in a regular, systematic, and continuous fashion. Although the provided bills of lading and the listing from the [redacted] suggest the shipment of cars, nothing is provided to show the actual sale of goods and income on the part of the foreign employer in 2010 or 2011. In fact, the petitioner does not offer any income generated by the foreign employer from 2009 through 2011, but only submits a business plan from the originally approved new office petition which claims $4,500,000 in revenue for the foreign employer in 2008, without any supporting documentary evidence. Further, the bank account statements provide little material information on the operations of the foreign employer, only showing largely indiscernible transfers and receipts of funds left unexplained. Additionally, the petitioner has not submitted the purchase contracts and orders; invoices; or U.S. customs documentation as was requested by the director. 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). 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, the AAO cannot determine based on the minimal information provided whether the foreign employer is doing business consistent with the regulations, and therefore, a qualifying organization as required by the Act. For this additional reason, the petition cannot be approved.

Although the appeal will be dismissed and the petition will be denied, the evidence of record is sufficient to show that the petitioner is doing business. Accordingly, the director's decision will be withdrawn with respect to that single issue.

III. 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, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.