**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

(b)(6)

DATE: AUG 0 8 2014 OFFICE: VERMONT SERVICE CENTER FILE:

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
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 remand the matter for further review and a new decision.

The petitioner filed the nonimmigrant petition seeking to extend the beneficiary's employment under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L), as an intracompany transferee employed in a managerial or executive capacity. The petitioner, a Delaware limited liability company, states that it operates a spa and health center. It claims to be an affiliate of ocated in Ukraine. The beneficiary was previously granted L-1A status for a period of one year to open a new office. The petitioner now seeks to extend his status for a period of three years so that he may continue to serve in the position of vice president of the engineering department.

The director denied the petition concluding that the petitioner failed to establish that it is doing business or is sufficiently staffed and operational after one year.

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. On appeal, counsel for the petitioner asserts that the U.S. entity has acquired physical premises where the company is doing business and that the beneficiary is serving in a managerial or executive capacity.

## 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.

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," the regulations at 8 C.F.R. § 214.2(l)(3)(v) require the petitioner to 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.

The initial "new office" petition may be approved for a period not to exceed one year, after which the petitioner is required to demonstrate that it is "doing business" if it seeks to extend the validity of the petition. 8 C.F.R. § 214.2(l)(7)(i)(*3*). Specifically, the regulation at 8 C.F.R. § 214.2(l)(14)(ii) provides that a "new office" visa petition may be extended by filing a new Form I-129, accompanied by the following:

(A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;

(B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;

(C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;

(D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and

(E) Evidence of the financial status of the United States operation.

The term "doing business" is defined at 8 C.F.R. § 214.2(l)(1)(ii)(H) as "the regular, systematic and continuous provision of goods and/or services by a qualifying organization and does not include them mere presence of an agent or office of the qualifying organization in the United States and abroad."

## II. THE ISSUE ON APPEAL

The sole issue addressed by the director is whether the petitioner established that the U.S. company is doing business or is sufficiently staffed and operational after the initial one year period as a "new office."

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on February 20, 2014. The petitioner is a limited liability company, established in April 2012 and authorized to do business in New York. In support of the petition, counsel for the petitioner submitted a memorandum explaining that the

In support of the petition, the petitioner submitted its IRS Form 1065, U.S. Return of Partnership Income, for 2012. Although the Form 1065 states that the U.S. company did not receive any income in 2012, it shows that the U.S. company paid $22,141,749 in gross rents, $14,859 in advertising, $395,341 in commissions, $1,953,060 in repairs, and $3,762,569 in utilities. The petitioner also submitted IRS Forms 941, Employer's Quarterly Federal Tax Return, for the first, second, third, and fourth quarters of 2013, indicating that it had three employees the first quarter, five employees the second quarter, and six employees the third and fourth quarters. The petitioner submitted a payroll summary, dated January 10, 2014, showing that it employed a staff of six, including the beneficiary. According to the organizational chart, dated February 19, 2014, all of the staff are employed by the property/real estate division of the petitioner, with the beneficiary as the lone exception. The chart shows the beneficiary to be the sole employee in the spa division.

The director issued a request for additional evidence ("RFE") on March 3, 2014, instructing the petitioner to submit evidence of its new operation staffing. In response to the RFE, the petitioner submitted a letter from the Controller for the petitioner, stating that the petitioner currently has 31 employees, 30 of which "work directly on the property side," and one employee, the beneficiary, who works on the spa side. The letter goes on to state that the property side employees consist of a property manager, vice-president of tenants relations, controller, building engineer/chief engineering, office assistant, and assistant controller. Additionally, there are four building engineers and 20 janitorial staff. The petitioner also submitted a letter from a real estate attorney, dated March 25, 2014, explaining that the petitioner is in the process of obtaining a Physical Culture Establishment permit from the New York City Board of Standards and Appeals, which is necessary for the establishment and operation of the petitioner's day spa.

The director denied the petition on April 7, 2014, concluding that the petitioner failed to establish that it is doing business or is sufficiently staffed and operational after one year. In denying the petition, the director found that the property side of the petitioner's organization is fully functioning and doing business, but the spa side, which is the division that employs the beneficiary, is still under construction and has not yet opened for business. The director found that since the spa is still under construction, it is not possible for the spa to have been doing business in a regular, systematic, and continuous manner for the previous year.

On appeal, counsel for the petitioner asserts that petitioner's real estate and spa business are the same entity as they are part of the same Limited Liability Corporation and possess the same IRS Employer Identification Number. As such, the petitioner asserts that the company is currently doing business and providing goods and services with 31 full time employees and a gross annual income in excess of $25M.

In support of the appeal, the petitioner submits its IRS Form 1065 for 2013, stating that its principal product or service is "rental real estate." Although the Form 1065 states that the U.S. company did not receive any income in 2012, it shows that the U.S. company paid $31,662,025 in gross rents, $225 in advertising, $650,279 in commissions, $2,262,018 in repairs, and $4,430,049 in utilities. The petitioner also submits 2013 IRS Forms W-2 for 38 employees.

Upon review, the AAO finds sufficient evidence to establish that the petitioner is doing business as defined in the regulations. *See* 8 C.F.R. § 214.2(l)(1)(ii)(H). While the petitioner's tax returns do not reflect any income, the company has reported substantial expenditures for rents, commissions, repairs, and utilities, which support the petitioner's claims that it is currently doing business. Furthermore, the fact that the U.S. company is divided into two separate and distinct divisions, with one fully operational division and one that is still in the development phase, does not negate the fact that the U.S. entity is doing business. Therefore, we

will withdraw the director's finding that the petitioner is not doing business after one year, as required by the regulations. *See* 8 C.F.R. § 214.2(l)(14)(ii)(B).

If the beneficiary was hired to occupy a position in the division that is not yet operational, the issue is not whether the U.S. entity is doing business, but rather, whether the beneficiary will be performing qualifying duties in a managerial or executive capacity under the extended petition. For the reasons discussed below, we will remand for further review and to allow the director to enter a new decision.

## III. EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY

Beyond the decision of the director, the record is unpersuasive in demonstrating that the beneficiary will be employed in the United States in a primarily managerial or executive capacity under the extended petition. *See* 8 C.F.R. § 214.2(l)(14)(ii)(C).

The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. The regulations provide strict evidentiary requirements for the extension of a "new office" petition and require United States Citizenship and Immigration (USCIS) officers to examine the claimed managerial duties in light of the organizational structure and staffing levels of the petitioner after one year. *See* 8 C.F.R. § 214.2(l)(14)(ii)(D).

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." *See* section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. *Id.* at (ii). The term "function manager," on the other hand, applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *Id.* If a petitioner claims that the beneficiary is managing an essential function, the petitioner must identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. In addition, the petitioner must provide a comprehensive and detailed description of the beneficiary's daily duties demonstrating that the beneficiary manages the function rather than performs the duties relating to the function. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

The petitioner stated on the Form I-129 that the beneficiary will be employed by the U.S. entity as vice president of the engineering department. The petitioner indicated that it operates a spa and health center with a "projected" gross annual income of $1,500,000.00. Counsel for the petitioner submitted a memorandum and stated that the beneficiary will be employed "in a managerial and executive capacity to manage and direct the total new engineering department of this new spa and health operation . . . to complete the engineering related spa equipment purchase, installation, and on going maintenance of this spa equipment for the successful operation of a spa and health center operation located on petitioner's premises." Additionally, the petitioner submitted an organizational chart with staffing projections for additional employees that would be supervised by the beneficiary.

A petitioner must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. The petitioner must demonstrate that the

beneficiary's responsibilities will meet the requirements of one or the other capacity. Furthermore, a visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). As the director did not address this issue in her decision, we will remand the matter for further review.

## IV. EMPLOYMENT ABROAD IN A MANAGERIAL OR EXECUTIVE CAPACITY

Furthermore, the record does not persuasively demonstrate that the beneficiary was employed by the foreign entity in a qualifying managerial or executive capacity, or in a position involving specialized knowledge, as required by 8 C.F.R. § 214.2(l)(3)(v)(B).

On appeal, the AAO issued an RFE, advising the petitioner that the evidence of record does not demonstrate that the beneficiary was employed in a managerial or executive capacity position, or in a position involving specialized knowledge, at the foreign entity for one continuous year in the three year period preceding the filing of the initial new office petition. We noted that the information presented on each of the beneficiary's Forms DS-160 and the statements made during his interviews with the U.S. Department of State are inconsistent and do not appear to qualify the beneficiary for the benefit sought in this application. The petitioner responded to the RFE on July 11, 2014.

Upon review, the petitioner has not established that the beneficiary was employed by the foreign entity in a qualifying managerial or executive capacity, or in a position involving specialized knowledge. Again, as the director did not address this issue in her decision, we will remand the matter for further review.

## V. CONCLUSION

We review *de novo* all questions arising on appeal. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). In nonimmigrant visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. *See Matter of Skirball Cultural Center*, 25 I&N Dec. 799 (AAO 2012).

In the current matter, we find the record inadequate for review. Although the director's decision implied that the beneficiary would not be engaged in primarily managerial or executive duties under the extended petition, the director did not make a specific finding on this issue. Nor did the director make a decision on the beneficiary's overseas duties. An officer must fully explain the reasons for denying a visa petition in order to allow the petitioner a fair opportunity to contest the decision and the AAO an opportunity for meaningful appellate review. *Cf. Matter of M-P-*, 20 I&N Dec. 786 (BIA 1994) (finding that a decision must fully explain the reasons for denial to allow the respondent a meaningful opportunity to challenge the determination on appeal).

We find that a remand is warranted in this case in order to allow the director to render a new decision. The director may allow the petitioner an additional opportunity to submit evidence in support of the petition and may also consider the evidence that the petitioner submitted on appeal.

**ORDER:** The record is remanded to the director for further consideration of the visa petition consistent with the foregoing opinion and for the entry of a new decision which, if adverse to the affected party, shall be certified to the AAO for review.