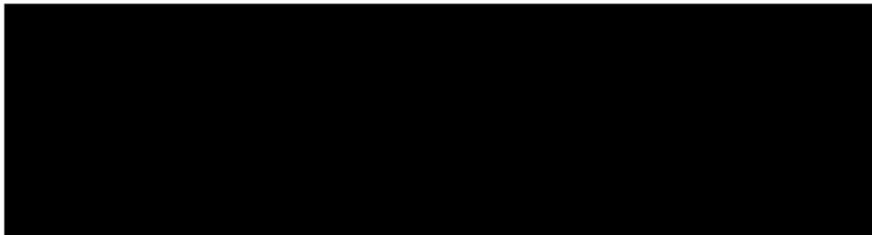




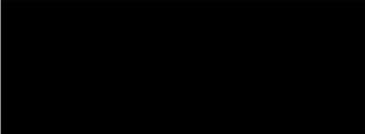
U.S. Citizenship  
and Immigration  
Services



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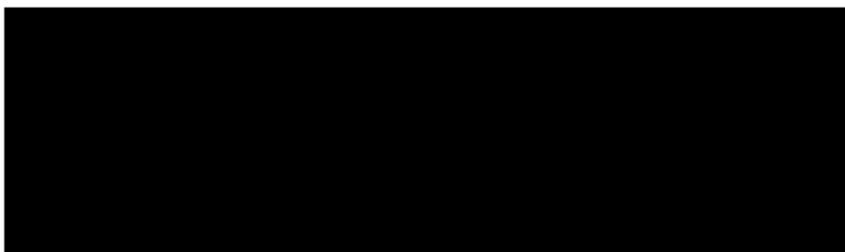
DATE: **DEC 20 2012**

Office: CALIFORNIA 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:

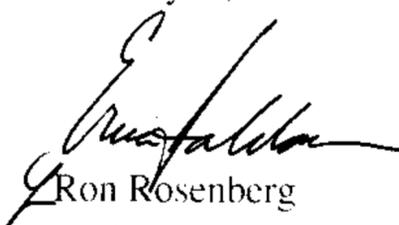


INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office 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, California 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 California corporation established in June 2011, states that it will operate an information technology business. The petitioner claims to be a branch of De Mus d.o.o., located in Serbia. The petitioner seeks to employ the beneficiary as the branch manager of its new office in the United States.

The director denied the petition, concluding that the petitioner failed to establish that the foreign entity employed the beneficiary in a primarily managerial or executive capacity. In denying the petition, the director emphasized that the petitioner failed to provide requested evidence, including the percentage of time the beneficiary allocated to each of the job duties included in her position description with the foreign entity. The director emphasized that, as the description included a number of non-managerial duties, the record did not establish that her duties for the foreign employer are primarily managerial or executive. The director further observed that the petitioner failed to provide requested evidence pertaining to the beneficiary's subordinate employees, including information regarding their job duties and educational levels. As such, the director found the record insufficient to establish that the beneficiary was primarily engaged in the supervision of managerial, supervisory or professional employees, or that she was otherwise employed in a qualifying managerial or executive capacity.

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.

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.

Upon review, the AAO agrees with the director's decision and will affirm the denial of the petition. For the first time on appeal, the petitioner submits previously requested evidence for review. The submitted evidence will not be considered in this proceeding.

On December 2, 2011, the director put the petitioner on notice of the required evidence and gave a reasonable opportunity to provide it for the record before the visa petition was adjudicated. *See* 8 C.F.R. § 103.2(b)(8). Specifically, the director requested, *inter alia*, (1) a detailed specific description of the beneficiary's duties abroad; and (2) the percentage of time required to perform each of the duties of the foreign position. In response, the petitioner failed to provide the requested evidence. Instead the petitioner submitted a letter listing 12 vague and very broad duties performed by the beneficiary at the foreign entity. The director denied the petition after noting that the petitioner failed to submit the requested evidence and as such, could not determine that the foreign entity employs the beneficiary in an executive or managerial capacity. The director emphasized that the position description provided in response to the RFE included a number of duties which

did not fall within the statutory definitions of managerial or executive capacity. Specifically, the director cited the beneficiary's stated responsibilities for "monitoring and analyzing competitors," "advertising duties such as creating and systemization of advertising budget, and "advertisement campaign creation, placement and contracting and branding." The director noted that the petitioner "did not identify the percentage of time required to perform the duties" of the position, and thus prevented USCIS from determining what types of duties the beneficiary primarily performs in the course of her day-to-day duties.

The director correctly found that such information was critical to the petitioner's claim that the beneficiary has been employed in a qualifying managerial or executive capacity abroad. Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. See sections 101(a)(44)(A) and (B) of the Act. Here, the petitioner failed to document what proportion of the beneficiary's duties has been allocated to managerial functions and what proportion has been non-managerial. The petitioner listed the beneficiary's duties as including both managerial and administrative or operational tasks, but failed to quantify the time the beneficiary spends on them. This failure of documentation is important because several of the beneficiary's daily tasks, such as those noted in the director's decision as well as such duties as "daily correspondence with major clients," and "creating public announce[ment]s, press releases," do not fall directly under traditional managerial or executive duties as defined in the statute. For this reason, the AAO cannot determine whether the beneficiary is primarily performing the duties of manager or executive. See *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Further, the director emphasized that the petitioner failed to provide requested information regarding the job duties of the beneficiary's claimed subordinates, thus preventing any further inquiry as to whether the employees relieve her from performing non-qualifying duties, or whether the employees are actually managers, supervisors or professionals. The AAO notes that this information was also critical because the beneficiary's position description included a number of vague duties such as "managing new clients' acquisition process," and "managing other business processes," and did not clarify how or whether non-qualifying work associated with these "processes" would be delegated to subordinates.

The regulation at 8 C.F.R. § 214.2(l)(3)(viii) states that the director may request additional evidence in appropriate cases. Although specifically requested by the director, the petitioner did not provide the requested evidence. The petitioner's failure to submit this information cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. See 8 C.F.R. § 103.2(b)(14). The director appropriately denied the petition, in part, for failure to submit requested evidence.

On appeal, counsel acknowledges that the petitioner's response to the RFE did not include the requested percentage breakdown of the beneficiary's duties, and concedes that the beneficiary spends a portion of her time on non-qualify operational duties. The petitioner submits a new, expanded position description that includes clarification regarding the nature of the duties and the previously requested percentages of time allocated to each duty. Counsel contends that, based on this evidence, the petitioner has met its burden to establish that the beneficiary performs primarily executive duties.

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); see also *Matter of Obaigbena*, 19 I&N Dec.

533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal. Consequently, the appeal will be dismissed.

Beyond the decision of the director, the petitioner failed to establish that it has acquired sufficient physical premises to house the new office prior to filing the instant petition. *See* 8 C.F.R. § 214.2(l)(3)(v)(A).

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on November 23, 2011. The petitioner indicated on the Form I-129 that it operates an information technology business and failed to indicate its current number of employees. The petitioner indicated that the beneficiary's worksite will be located at [REDACTED]

The petitioner failed to submit evidence that it had leased or purchased physical premises to house its new office and on December 2, 2011, the director issued an RFE requesting such evidence. In response to the RFE, the petitioner submitted an "Annex / Lease Agreement" with [REDACTED] dated December 14, 2011, 12 days after the request for evidence.

The "Annex / Lease Agreement" states, in part:

The client [REDACTED] agrees to lease an office space located in [REDACTED] during the validity of the Annex and originating contract to the provider free of charge in reciprocation to the services provided by [the petitioner].

The office space in question is consisted of 2 separate office rooms, a shared front desk area, a warehouse area (not to be used by [the petitioner]), a kitchenette and 2 lavatories summing up to an area of 3049 sq feet.

Both of the parties agree that all utilities except for telephone and/or fax fees will be covered by [REDACTED]

This Annex will be considered active starting with 1/2/2012.

Validity of this Annex is twelve months and will be automatically extended if not terminated by the client and/or provider.

The document referencing the petitioner's lease agreement was signed on December 14, 2011, 22 days after the filing of the petition, and the agreed upon lease commenced on January 2, 2012. The 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).

Additionally, the petitioner did not submit any information concerning [REDACTED] authority to sublet the premises to the petitioner. 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)).

Based on the foregoing, the petitioner has not established that it has secured sufficient physical premises to house the new office prior to filing the petition. For this additional reason, the petition cannot be approved.

The AAO maintains 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 (9<sup>th</sup> Cir. 2003).

### 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. Due to the failure to provide the requested evidence, the petitioner has not met its burden.

The petitioner is not precluded from filing a new visa petition on the beneficiary's behalf that is supported by competent evidence that the beneficiary is now entitled to the status sought under the immigration laws.

**ORDER:** The appeal is dismissed.