

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

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

**PUBLIC COPY**



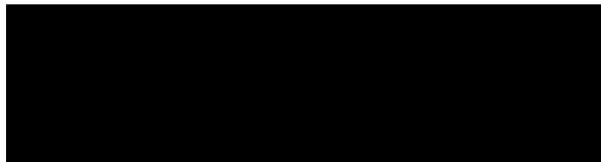
D7

DATE: **MAY 30 2012** 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 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 with the field office or service center that originally decided your case by filing a 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,

Perry Rhew  
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 petition seeking to classify the beneficiary as a 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 corporation established in November 2009, states that it intends to engage in the wholesale trade of refurbished desktop and notebook computers and electronics. It claims to be an affiliate of [REDACTED]. The petitioner seeks to employ the beneficiary as the president and operations manager of its new office in the United States for a period of one year.

The director denied the petition concluding that the petitioner failed to establish that the U.S. company had secured sufficient physical premises to house the new office.

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 asserts that the leased premises are "surely adequate for office space and storage," and states that the petitioner will secure separate warehouse space for its import and distribution business as needed. Counsel contends that the director's adverse determination is not supported by the regulations pertaining to new office petitions.

### 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 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.

## II. Discussion

The sole issue addressed by the director is whether the petitioner secured sufficient physical premises to house the new office in the United States. *See* 8 C.F.R. § 214.2(l)(3)(v)(A).

### A. Facts and Procedural History

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on February 11, 2010. Evidence of the physical premises secured for the new office is required initial evidence for a petition filed pursuant to 8 C.F.R. § 214.2(l)(3)(v). Therefore, the critical facts to be examined are those that were in existence at the time of filing the petition. It is a long-established rule in visa petition proceedings that a petitioner must establish eligibility as of the time of filing. 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'r. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r1971); *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r. 1998).

On the Form I-129, the petitioner indicated its address as [REDACTED]. The petitioner's initial evidence included a lease agreement between the petitioning company and [REDACTED], who is identified as the owner of the property. The lease agreement does not specify the size or portion of the premises leased to the petitioner.

The lease agreement indicates that the parties agreed to a one-year term [REDACTED]. The lease contains the following provision:

4. USE OF PREMISES. The Premises shall be used and occupied by Tenant as a private dwelling, and no part of the Premises shall be used at any time during the term of this Agreement by Tenant for the purpose of carrying on any business, profession, or trade of any kind, or for the purpose other than as a private dwelling. Tenant may allow no more than \_\_\_\_ additional individuals, other than transient relatives and friends who are guests of Tenant, to use or occupy the Premises without first obtaining Landlord's written content to such use. Tenants shall comply with any and all laws, ordinances, rules and orders of any and all governmental or quasi-governmental authorities affecting the cleanliness, use, occupancy and preservation of the Premises.

The petitioner indicated in its accompanying letter dated February 1, 2010 that it will "carry out the negotiation, distribution, storage, marketing and sale of refurbished computers and imported digital and electronic products" from its newly-secured New York office.

The director issued a request for additional evidence (RFE) on March 17, 2010. The director observed that the petitioner's lease agreement is for premises that are to be used only as a private dwelling. The director requested that the petitioner provide evidence to establish that it has secured physical premises to house the new office. The director further noted that the petitioner did not establish that it had secured a warehouse or shipping and receiving facilities, and requested additional evidence that the petitioner has secured physical premises suitable for the conduct of international trade.

In response, the petitioner submitted an affidavit from [REDACTED] the beneficiary's brother, who indicates that he owns the premises at [REDACTED] which he describes as a three-bedroom single-family home with a basement. [REDACTED] stated that his family lives on the two main floors of the house, while "the finished basement occupies approximately an additional 700 square feet sufficient to operate [the petitioner's] proposed operations." He states that he agreed to lease the basement of his house to his brother's company "as office space in the beginning until they can secure their own premises." The petitioner also re-submitted a copy of the lease agreement.

In a letter dated April 13, 2010, counsel for the petitioner emphasized that "because the L-1A petition has not yet been approved, a warehouse or shipping and receiving facilities have not yet been leased." Counsel stated that the petitioner "does not desire to spend a lot of money on any empty warehouse or

shipping and receiving facilities before it knows whether the L-1A Petition will be approved." Counsel asserted that "[r]equiring [the petitioner] to secure said premises would only present a 'chicken' and the 'egg' problem and be expensive."

The director denied the petition on April 30, 2010, concluding that the petitioner failed to establish that it had secured sufficient physical premises to house the new office. In denying the petition, the director acknowledged that leasing conventional office and warehouse space in advance of the petition's approval involves an element of financial risk. However, the director emphasized that the requirement to obtain sufficient physical premises is plainly established in the regulations governing new office petitions.

On appeal, counsel for the petitioner asserts that "the beneficiary has arranged and secured physical premises at his brother's presently empty garage and basement at his house in [REDACTED]. Counsel provides measurements for the basement and garage space and asserts that the premises are "almost 1,000 square feet in area and are surely adequate for office space and storage." Counsel states that the petitioner will obtain separate warehouse space once the company begins engaging in bulk sales and distribution activities. Finally, counsel contends that there is no regulation that requires that the petitioner obtain its "premises/office space and warehouse" in advance of filing the petition for a new office.

#### B. Discussion

Upon review, counsel's assertions are not persuasive. The petitioner has not submitted evidence that it has secured adequate physical premises to house the new office.

The AAO acknowledges that the regulations do not specify the type of premises that must be secured by a petitioner seeking to establish a new office, and observes that there may be cases in which a residential premises or home office would satisfy the regulatory requirements. However, the petitioner bears the burden of establishing that its physical premises should be considered "sufficient" as required by the regulations at 8 C.F.R. § 214.2(l)(3)(v)(A). To do so, it must clearly identify the nature of its business, the specific amount and type of space required to operate the business, its proposed staffing levels, and evidence that the space can accommodate the petitioner's growth during the first year of operations. USCIS may also consider evidence that the company has obtained a license to operate the business from a residential dwelling, if required, evidence that the landlord has authorized the use of residential space for commercial purposes, evidence that the company has established separate phone lines or made other accommodations for the use of the premises by the U.S. company, or any other evidence that would establish that a residential dwelling or portion of a residential dwelling will meet the company's needs. Finally, photographs and floor plans of the leased premises may assist in determining that the premises secured are sufficient to accommodate the petitioner's business operations.

Although the petitioning company is named as tenant on the submitted lease agreement, the AAO cannot overlook the fact that the terms of the lease specifically provide that "the premises shall be used and occupied by Tenant as a private dwelling and no part of the Premises shall be used at any time during the term of this Agreement by Tenant for the purpose of carrying on any business, profession, trade of any kind, or for any purpose other than as a private dwelling." The parties to the agreement made no

amendments to this language and it remains part of the executed lease agreement. The director specifically noted this deficiency in the RFE, and the petitioner made no attempt to explain why this language appears in a lease agreement for premises that are intended to be used for the import, sales and distribution of computers and related products. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

While the beneficiary's brother claims that he owns the premises and leased it to his brother's company as office space, the record contains no evidence of [REDACTED] ownership of the property or evidence establishing the size of the premises. Furthermore, the statement made by [REDACTED] in his affidavit suggested that the leased premises, despite the one-year lease term, are only intended to be used by the petitioning company "until they can secure their own premises." It is unclear whether the petitioner intends to operate its business from [REDACTED] basement, or if the lease was executed for the purpose of satisfying the evidentiary requirement at 8 C.F.R. § 214.2(l)(3)(v)(A).

The petitioner has not offered any additional evidence on appeal to demonstrate that the specific premises secured are sufficient to accommodate the petitioner's intended business. Counsel provides measurements for the leased premises and states for the first time that the petitioning company would also have use of a garage. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The petitioner has not submitted evidence on appeal to overcome the director's determination on this issue. Accordingly, the appeal will be dismissed.

### III. New Office Requirements

Beyond the decision of the director, the record does not contain evidence that the intended United States operation, within one year of the approval of the petition, will support an executive or managerial position, as required by 8 C.F.R. § 214.2(l)(3)(v)(C). 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.

Here, the petitioner has not adequately described the scope of the new entity, its proposed organizational structure or its financial goals. *See* 8 C.F.R. 214.2(l)(3)(v)(C)(1). The petitioner indicated on the Form I-129 that its number of employees is "to be determined." In its letter dated February 1, 2010, the petitioner indicated that it anticipates hiring "a sales manager, shipping manager, administrative assistant, among

others" and indicated that at least one employee "will perform administrative and managerial duties under [the beneficiary's supervision." The petitioner did not provide a business plan, hiring plan or any other information regarding the company's intended personnel structure or financial objectives for the first year of operations to support its assertions regarding the number and types of employees to be hired. 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)).

Furthermore, the petitioner's description of the beneficiary's proposed duties does not support its claim that he will be performing "executive functions." The petitioner indicates that the beneficiary will be responsible for: forecasting/tracking market conditions/costs; meeting with potential retail and wholesale customers and developing this trade; managing suppliers costs, selection, etc.; developing strategies and assisting buyers; managing the supply base; and bringing new technology, ideas, and opportunities. These duties suggest that the beneficiary will be directly involved in sales, market research, marketing, product sourcing and other operational tasks, rather than managing such tasks through subordinate personnel. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 604 (Comm'r 1988).

The petitioner has also failed to submit initial evidence establishing the size of the United States investment, the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States, as required by 8 C.F.R. § 214.2(l)(3)(v)(C)(2). The petitioner has not provided evidence that it has opened a bank account or received any funds as capitalization for the new office. The record is also silent with respect to the size of the investment in the U.S. entity and the actual start-up costs of the U.S. entity. Again, 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. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r. 1972)).

Given the lack of evidence with respect to the beneficiary's proposed duties, the size of the investment, the company's anticipated start-up costs, and the proposed staffing and organizational structure of the new office, the evidence as a whole does not establish that the intended U.S. operation will support a managerial or executive position within one year of approval of the petition. For these additional reasons, the petition cannot be approved.

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, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(noting that the AAO conducts appellate review on a *de novo* basis).

#### 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. When the AAO denies a petition on multiple

alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003).

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.