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

DATE: APR 18 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 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 Florida corporation established on March 24, 2010, is an import/export company. It claims to be an affiliate of located in Maracaibo, Venezuela. The petitioner seeks to employ the beneficiary as its president for a period of one year. The beneficiary was previously granted L-1A status to open a new office. The petitioner is again seeking status as a new office.

The director denied the petition, concluding that the petitioner failed to establish the following: (1) that the petitioner qualifies for a new office extension or a new office petition; and (2) that the beneficiary would be employed in a primarily managerial or executive capacity in the United States.

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 director erred in treating the application as an extension rather than a new office petition. Counsel provides no other explanation, brief, or supporting evidence to support 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 evidentiary requirements for this classification are set forth at 8 C.F.R. § 214.2(l)(3).

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)(l)(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.

8 C.F.R. § 214.2(l)(l)(ii)(F) defines a "new office" as an organization which has been doing business in the United States through a parent, branch, affiliate, or subsidiary *for less than one year* (emphasis added).

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. Facts and Procedural History

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The petitioner filed Form I-129, Petition for a Nonimmigrant Worker, on May 31, 2012. On Form I-129, the petitioner indicated that it was established in 2010, and has a "projected" number of 8 employees and a "projected" gross income of $600,000. The petitioner indicated that it is requesting to extend the beneficiary's L-1A status in the United States, as well as requesting new office status.

In a letter dated May 22, 2012 submitted with the initial petition, counsel for the petitioner stated that he is "hereby submitting and requesting a nunc pro tunc consideration as of February 17, 2012, a new Petition requesting a one year approval" for the following reasons:

1. The beneficiary, who is also the foreign owner, has invested tens of thousands of dollars, was not adequately advised by his former lawyer of the personnel and organizational requirements to extend an L-1 Visa. Had he been properly advised, additional moneys and expansion would have been made to meet the L-1 Extension requirements. In fact a review of the L-1 Extension process reveals absurd statements made by the previous lawyer regarding employment of the Attorney and the company Accountant to meet staffing requirements!

2. The continuing recession has made it difficult to properly expand the business.

3. The American Subsidiary did not actually commence operations until the end of the first quarter of 2011.

   It is therefore respectfully requested that the attached petition be accepted as a "New Office Petition" to allow sufficient opportunity to expand and preserve the significant of [*sic*] money already invested, as well as comply with the L-1 regulations which the beneficiary and petitioner now understand.

In a letter accompanying the initial petition, the petitioner asserted that the beneficiary will work for the U.S. company "in order to direct and accomplish the goals and to develop and acquire contract [*sic*] with clients." The petitioner asserted that the beneficiary will be responsible for hiring, employing, and instructing workforce as well as to "set up and manage the overall functions of the company." The petitioner asserted that, at the end of the next 12 months, it will hire 3 subordinate managers. The petitioner submitted an organizational chart, indicating that it employs or will employ the beneficiary, an administrative manager, a purchase and sales manager, an operational and logistics manager, a sales assistant, a purchase assistant, an operational assistant, a logistics assistant, and

The director issued a request for evidence ("RFE") requesting, *inter alia,* the following: (1) documentation establishing that the beneficiary has maintained lawful non-immigrant status from February 17, 2012 to May 28, 2012; (2) documentation establishing why the petitioner is eligible for a second "new office" petition; (3) additional documentation regarding the duties performed by the beneficiary in the past year and the duties he will perform if the petition is extended, including a breakdown of the number of hours devoted to each proposed job duty; (4) a detailed description of the U.S. office including the number of employees employed or to be hired, a copy of work schedules for all employees including the beneficiary, and a detailed description of the duties and the percentage of time dedicated to each duty for all employees; (5) evidence of the number of contractors utilized and the duties performed by each contractor, if the company has used contractors; and (6) English translations for all documents in any language other than English.

In response to the RFE, counsel for the petitioner clarified that it is not asking for an extension of a new office petition, that the petitioner was incorrectly advised by its prior attorney regarding the requirement of having sufficient staffing at the end of 12 months, and that the petitioner was affected by the severe economic downturn. Counsel concluded: "As indicated on the petition, we are asking for your discretion in allowing a new start up year. I believe you have the discretion to approve the same and would appreciate after receiving the additional documentation." In response to the RFE, the petitioner submitted invoices, wire transfers, bills of lading and shipping receipts showing business activity.

The director denied the petition, concluding that the petitioner failed to establish the following: (1) that the petitioner qualifies for a new office extension or a new office petition; and (2) that the beneficiary would be employed in a primarily managerial or executive capacity in the United States. In denying the petition, the director explained that the petitioner is not entitled to either an extension of a new office petition or a second new office petition. The director also discussed the many discrepancies in the record regarding the petitioner's claimed staffing and organizational structure.

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. The only reason the petitioner provides for the appeal is: "The Service Center erred in treating the application as an extension rather than a new office petition." The petitioner provides no other explanation, brief, or supporting evidence to support the appeal.

III. Analysis

The first issue to be addressed is whether the petitioner qualifies as a "new office."

Upon review and for the reasons discussed herein, counsel's assertion that the petitioner qualifies as a "new office" is not persuasive. Despite counsel assertions, the petitioner may not be granted a second "new office" L-1A visa approval. The L-1A nonimmigrant visa is not an entrepreneurial visa classification that would allow an alien a prolonged stay in the United States in a non-managerial or non-executive capacity to start up a new business. 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. 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 extensions of their L-1 status 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). The record reflects that the petitioner's extension petition was denied on February 17, 2012, and counsel conceded in his letter dated May 22, 2012 that this decision "cannot be challenged on appeal or via a Motion to Reconsider as there can be no argument with the decision."

In support of the instant petition, counsel asserted that the "American Subsidiary did not actually commence operations until the end of the first quarter of 2011." However, other than counsel's bare assertion, counsel submitted no evidence to prove the petitioner's lack of business operations until 2011.. 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 AAO emphasizes that the petitioner was incorporated in March 2010 and was previously granted a new office petition in which the petitioner was afforded one year to develop its business operations. The petitioner failed to meet its burden of proof in establishing that it qualifies as a new office. *See* 8 C.F.R. § 214.2(l)(l)(ii)(F) (defining a "new office" as an organization which has been doing business in the United States through a parent, branch, affiliate, or subsidiary *for less than one year* (emphasis added)). The petitioner's claim of poor economic conditions does not excuse the petitioner from meeting the strict statutory and regulatory requirements.

The petitioner's request that the instant petition be treated as a "new office" petition because it received incorrect advice from its former attorney is unpersuasive as well. Any appeal or motion based upon a claim of ineffective assistance of counsel requires: (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard, (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988). The petitioner provided none of the above required evidence to support a claim of ineffective assistance of counsel.

The second issue to be addressed is whether the petitioner has established, at the time of filing, that the beneficiary will be employed in a primarily managerial or executive capacity as defined in section 101(a)(44) of the Act.

Upon review of the record, the petitioner failed to establish that, at the time of filing, it will employ or has the capacity to employ the beneficiary in a primarily managerial or executive capacity. The record is unclear as to the petitioner's actual staffing and organizational structure at the time of filing. The instant Form I-129 only listed "projected" employees. In its letter accompanying the initial petition, the petitioner asserted that the beneficiary "will hire" additional employees. Although specifically requested by the director to submit a detailed description of the U.S. staff, including the number of employees and a detailed description of the duties, the petitioner failed to submit any such evidence. 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).

As discussed in the director's decision, the record contains numerous inconsistencies regarding the number of employees supervised by the beneficiary and the nature of their job duties, but on appeal, counsel fails to address any of the director's findings in this respect. Overall, the record fails to establish that the petitioner has sufficient staffing and organizational structure to employ the beneficiary in a qualifying managerial or executive capacity. In fact, in requesting that the petitioner be treated as a "new office," the petitioner is essential conceding that it does not currently employ the beneficiary in a qualifying managerial or executive capacity. Counsel also conceded that "[t]he continuing recession has made it difficult to properly expand the business." Accordingly, the AAO affirms the director's finding that the beneficiary is not employed in a managerial or executive capacity in the United States.

Beyond the decision of the director, the petitioner submitted insufficient evidence to establish that the petitioner has a qualifying relationship with the beneficiary's foreign employer. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." *See generally* section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l).

According to Form I-129, the petitioner claimed it is an affiliate of the beneficiary's foreign employer based upon the beneficiary's 100% ownership of both entities. The petitioner submitted evidence establishing that the beneficiary owns 100% of the U.S. entity. However, the petitioner submitted failed to submit any properly translated documentation establishing the ownership structure of the foreign employer. The petitioner was specifically advised in the RFE to submit English translations for all documents in any language other than English, but failed to provide any translations in its RFE response. Again, 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).

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, 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.