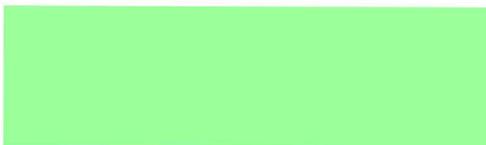




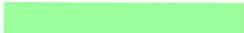
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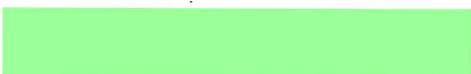


DATE: **JAN 24 2013**

Office: VERMONT SERVICE CENTER

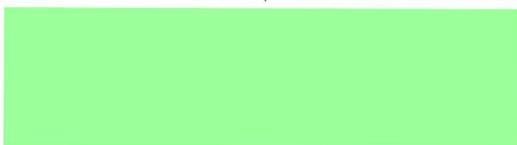
FILE: 

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:

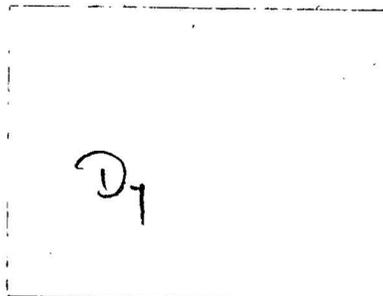
Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that 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 classify 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 Virginia corporation established in January 2012, states it is engaged in the gas station and convenience store business. It claims to be wholly-owned subsidiary of [REDACTED]. The petitioner seeks to employ the beneficiary as the President/CEO of a "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 it would employ the beneficiary in a primarily managerial or executive capacity within one year of the approval of the petition.

On appeal, counsel asserts that director erred by overlooking evidence in the record related to the petitioner's business and hiring plans and intended organizational structure. Counsel submits a brief in support of 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 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. The Issues on Appeal:

### A. Employment in the United States in a managerial or executive capacity

As noted, the director denied the petition based on the petitioner's failure to establish that it would employ the beneficiary in a primarily managerial or executive capacity within one year, as required by 8 C.F.R. § 214.2(l)(3)(v)(C). Upon review of the record, and for the reasons discussed herein, the AAO concurs with the director's determination that the petitioner has not established that it would support the beneficiary's claimed executive or managerial position within one year.

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.

The "new office" provision was meant as an accommodation for newly established enterprises and provided for by U.S. Citizenship and Immigration Services (USCIS) regulation to allow for a more lenient treatment of managers or executives that are entering the United States to open a new office. When a new business is first established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of low-level activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed in that first year. In an accommodation that is more lenient than the strict language of the statute, the "new office" regulations allow a newly established petitioner one

year to develop to a point that it can support the employment of an alien in a primarily managerial or executive position.

However, if a petitioner indicates that a beneficiary is coming to the United States to open a "new office," it must show that it is prepared to commence doing business immediately upon approval so that it will support a manager or executive within the one-year timeframe. 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. *See generally*, 8 C.F.R. § 214.2(l)(3)(v). The petitioner must describe the nature of its business, its proposed organizational structure and financial goals, and submit evidence to show that it has the financial ability to remunerate the beneficiary and commence doing business in the United States. *Id.*

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's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's proposed organizational structure, the duties of the beneficiary's proposed subordinate employees, the petitioner's timeline for hiring additional staff, the presence of other employees to relieve the beneficiary from performing operational duties at the end of the first year of operations, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business.

The petitioner offered the following duty description for the beneficiary in a letter dated March 19, 2012, submitted in support of the I-129 Petitioner for a Nonimmigrant Worker:

As President and CEO of [the petitioner], [the beneficiary] will be responsible for the following:

- Oversee and direct the company;
- Plan and execute the underlying business strategies;
- Oversee the implementation of technological advancements in the marketing of the company's services;
- Consult with [the parent company] corporate directors regarding strategies for increasing profit margins;
- Direct intra-company communication between the two companies.

Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has provided no specifics as to how the beneficiary will carry out the general tasks and goals listed above as a part of his

daily duties. For instance, the petitioner does not provided specifics on what the beneficiary will "oversee and direct"; what technological advancements will be undertaken; what strategies will be implemented to increase profits; and the specific communication that will take place between the petitioner and the foreign employer. Indeed, the duty description is so vague it provides little probative value regarding the beneficiary's duties during the critical first year of business, and curiously makes no specific mention of duties necessary to establish a multi-store gas station/convenience store business in the United States. In fact, the very mention of "technological advancements" with respect to the gas station/convenience store business appears incongruent to the industry and such technological advancements are not mentioned in the petitioner's business plan or elsewhere in the record.

Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). 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)). Indeed, the director was cognizant of the need for a more specific duty description for the beneficiary and explicitly requested in the RFE that the petitioner submit "a comprehensive description of the beneficiary's duties on a daily basis indicating how the beneficiary's duties will be managerial or executive in nature." However, the petitioner did not provide a more comprehensive description as requested. 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).

Additionally, whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties will be "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Here, the petitioner fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. The petitioner vaguely asserts that the beneficiary will perform only managerial or executive duties. However, the petitioner has not shown any current employees necessary to operate a gas station/convenience store business, thus it is logical to assume that at least some of the beneficiary's duties will entail the performance of some day-to-day operational duties until the business is presumably at full operation after one year. But, as noted, the petitioner asserts that the beneficiary will only perform managerial and executive duties during the first year, thereby casting doubt on the beneficiary's asserted duties and whether the petitioner is capable of commencing business immediately if the petition were approved. 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). Therefore, without a credible or meaningful description of the beneficiary's proposed duties, the AAO cannot determine whether the beneficiary will be primarily performing the duties consistent with a manager or executive.

While some of the duties described by the petitioner may generally fall under the definitions of managerial or executive capacity, the overly vague explanations of the beneficiary's position raises questions as to his actual proposed responsibilities. Overall, the position description alone is insufficient to establish that the beneficiary's duties would be primarily in a managerial or executive capacity, particularly in the case of a new office petition where much is dependent on factors such as the petitioner's business and hiring plans and evidence that the business will grow sufficiently to support the beneficiary in the intended managerial or executive capacity. The petitioner has the burden to establish that the new U.S. company would realistically develop to the point where it would require the beneficiary to perform duties that are primarily managerial or executive in nature within one year. Accordingly, the totality of the record must be considered in analyzing whether the proposed duties are plausible considering the petitioner's anticipated staffing levels and stage of development within a one-year period.

The AAO's analysis of the viability of the new business is severely restricted by the petitioner's failure to submit a credible business plan. As contemplated by the regulations, a comprehensive business plan should contain, at a minimum, a description of the business, its products and/or services, and its objectives. *See Matter of Ho*, 22 I&N Dec. 206, 213 (Assoc. Comm. 1998). Although the precedent relates to the regulatory requirements for the alien entrepreneur immigrant visa classification, *Matter of Ho* is instructive as to the contents of an acceptable business plan:

The plan should contain a market analysis, including the names of competing businesses and their relative strengths and weaknesses, a comparison of the competition's products and pricing structures, and a description of the target market/prospective customers of the new commercial enterprise. The plan should list the required permits and licenses obtained. If applicable, it should describe the manufacturing or production process, the materials required, and the supply sources. The plan should detail any contracts executed for the supply of materials and/or the distribution of products. It should discuss the marketing strategy of the business, including pricing, advertising, and servicing. The plan should set forth the business's organizational structure and its personnel's experience. It should explain the business's staffing requirements and contain a timetable for hiring, as well as job descriptions for all positions. It should contain sales, cost, and income projections and detail the bases therefore. Most importantly, the business plan must be credible.

*Id.*

In this matter, the petitioner has not provided a credible business plan to support a conclusion that the U.S. employer will support a manager or executive within the one year timeframe. In the provided business plan, the petitioner has not provided sufficient financial information or supported income and expense projections related to the business. In fact, the petitioner's plan provides little beyond vague generalities and includes little in the way of specifics regarding the business. On appeal, counsel stresses the notion that the petitioner plans on opening not only one gas station/convenience store, but multiple stores during the first three years of operation. However, the business plan, and the record as a whole, provides little

information on how this will be accomplished. Based on the limited information provided in the business plan, it appears that only one store is anticipated within the first 12 months of operation. 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 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

Further, the petitioner's plans beyond the first year are largely irrelevant to analyzing whether the petitioner will be able support the petitioner beyond the first year. In fact, counsel all but concedes that the acquisition of additional stores is necessary to supporting the beneficiary's managerial or executive position by stressing this fact on appeal, casting serious doubt on whether the one store acquired during the first year will be sufficient to support the beneficiary in her offered role. In sum, the petitioner's business plans are too vague and unsupported to establish by the preponderance of the evidence that the company will succeed and rapidly expand such that there would be an actual need for a manager or executive who will primarily perform qualifying duties. *See generally*, 8 C.F.R. § 214.2(l)(3)(v).

In addition, the petitioner's failure to provide detailed duty descriptions and other requested information regarding the beneficiary's subordinates casts doubt on whether the beneficiary will be relieved from primarily performing non-qualifying operational duties and be more than a first-line supervisor managing non-professional employees. As noted by the director, if it is claimed that a beneficiary's duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* § 101(a)(44)(A)(ii) of the Act. As such, the director requested in the RFE job duty descriptions of the beneficiary's proposed subordinates, not only to assess whether the claimed subordinates will qualify as managers, supervisors or professionals, but whether such employees will sufficiently relieve the beneficiary from performing non-qualifying duties after one year.

However, despite counsel's assertions, detailed duty descriptions related to the beneficiary's subordinates were not provided in response to the RFE. Now, counsel attempts to submit such descriptions on appeal. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). 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). 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.* Therefore, absent detailed duty descriptions for the beneficiary's proposed subordinates, it is not possible to conclude that such employees subordinates will be managers, supervisors, or professionals, or that they would otherwise relieve the beneficiary from performing non-qualifying duties associated with the operation of the business.

Lastly, the petitioner has not established 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 as required by 8 C.F.R. § 214.2(l)(3)(v)(C)(2). At various points in the record, the petitioner states that "the foreign company will provide the necessary financial support to the U.S company during its expansion endeavors in the United States." Although the record does reflect that the foreign employer agreed to pay \$500,000 for 1,000 shares and 100% ownership control of the petitioner, the petitioner does not specify whether this amount was an investment to be used towards start-up costs, nor does it document the actual transfer of funds to the petitioner. Further, the record does not provide any additional information on foreign employer investment in the petitioner beyond generalities, a material oversight, given that the development of the petitioner in the United States is reliant on the acquisition of gas stations/convenience stores in the United States. 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)). It is not enough for the petitioner to vaguely state that the foreign employer will provide all necessary financial support for the petitioner, consistent with 8 C.F.R. § 214.2(l)(3)(v), this must be specifically articulated and sufficiently supported with documentary evidence. The petitioner has not met this burden.

In conclusion, when analyzing the totality of the record, the AAO cannot conclude that the record supports a finding that the beneficiary would be employed in a qualifying managerial or executive capacity within one year. This conclusion is based on: the vague duty description submitted for the beneficiary; a lack of specificity, and discrepancies in, the petitioner's business plans; a failure to show that the beneficiary will be relieved from performing non-qualifying duties within one year; and a failure to establish specifically the amount of the investment in the petitioner and its ability to remunerate the beneficiary. For these reasons, the appeal will be dismissed.

**B. Employment with the foreign employer in a managerial or executive capacity:**

Beyond the decision of the director, the petitioner has not established that the foreign entity has employed the beneficiary in a primarily managerial or executive capacity, as required by 8 C.F.R. § 214.2(l)(3)(v)(A). As noted previously, 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's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.*

In the instant matter, the petitioner has not provided a sufficient description of the beneficiary's foreign job duties, nor sufficient supporting documentary evidence related thereto. Rather, the petitioner merely stated that the beneficiary has served as the foreign employer's vice president since 2009 and oversaw the "publicity and marketing of the company."

The definitions of executive and managerial capacity have 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). Yet, the petitioner has not submitted sufficient evidence related to the beneficiary's foreign employment to make such a determination. An individual will not be deemed a manager or executive under the statute simply because she has a managerial or executive title or because she is on the payroll of the foreign employer. It is the petitioner's burden to show with specific duty descriptions and documentary evidence that a beneficiary acts primarily as a manager or executive with a foreign employer. See 8 C.F.R. § 214.2(l)(3)(ii). As such, due to the lack of evidence provided by the petitioner regarding the beneficiary's foreign employment, it cannot be found that the foreign entity employed her in a qualifying managerial or executive capacity, as required by 8 C.F.R. § 214.2(l)(3)(v)(A). For this additional reason, 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 reviews appeals on a *de novo* basis).

### 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.