

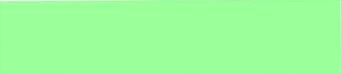


U.S. Citizenship  
and Immigration  
Services

(b)(6)



DATE: JUN 20 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 qualify 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 Tennessee limited liability company established in 2006, states that it is involved in the land development and real estate industry. It claims to be an affiliate of [REDACTED] located in Russia. The beneficiary was previously approved as an L-1A nonimmigrant intracompany transferee in the position of General Manager for the petitioner. The petitioner now seeks to extend the beneficiary's employment for two additional years.

The director denied the petition, concluding that the petitioner had failed to establish that the foreign entity was a qualifying organization, doing business, as defined by the regulations. Additionally, the director found that the petitioner had not established that the beneficiary is employed in a 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. On appeal, counsel asserts that the beneficiary is performing the duties of an executive and manager and that the beneficiary has managerial subordinates to whom he delegates non-qualifying day-to-day operational duties.

### 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 entity 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.

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. The Issues on Appeal:

### A. Qualifying Organizations:

The first issue to be addressed is whether the petitioner has established that the foreign entity is a “qualifying organization,” as defined by the regulations at 8 C.F.R. § 214.2(l)(3)(ii)(H). Specifically, the director found that the petitioner failed to establish that the foreign entity is doing business, as defined by the pertinent regulations. “Doing business,” is defined as the regular, systematic, and continuous provision of goods or services. *See* 8 C.F.R. § 214.2(l)(14)(ii)(A) and 8 C.F.R. § 214.2(l)(1)(ii)(H). In a request for evidence (RFE), the director noted that the record was insufficient to establish that the foreign entity was doing business, as defined by the Act and regulations and requested that the petitioner provide additional documentary evidence of the foreign entity’s business activities during the previous year, including *inter alia*: purchase contracts, purchase orders, invoices, bills of lading and/or copies of U.S. Customs documentation. In response, the petitioner submitted a one page letter on foreign entity letterhead stating sales volumes, rent collected, maintenance costs incurred, and other related costs of the foreign entity from July to August of 2012. Further, the petitioner provided three screenshots of internet real estate postings, which listed the foreign entity as a contact.

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 RFE 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). However, the petitioner failed to produce documentary evidence relevant to establishing that the foreign entity conducts business. The petitioner submitted an internally generated income statement for one month of the foreign entity’s operations and internet screenshots of little probative value in establishing that the foreign entity conducts business in a regular, systematic and continuous fashion. 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). 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)).

On appeal, the petitioner submits documentation including: an Advertising Agency Agreement entered into in July 2012, a Consulting Agreement entered into in November 2012, a four year lease entered into in 2010, and a “Road Maintenance Agreement” entered into on September 2, 2012. Additionally, the petitioner provides an internally generated rental revenue statement for the foreign entity noting its’ income and expenses from 2010 through 2012. The documentation submitted on appeal also includes pie charts reflecting volumes of property transactions, and additional internet screenshots of properties, which list the foreign entity as a contact.

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.

Regardless, even if the AAO considered the above provided evidence, the petitioner still would not have demonstrated that the foreign entity conducts business in a regular, systematic, and continuous fashion. As noted, the income statements provided for the foreign entity are internally generated, and insufficient supporting documentation is provided to confirm the provided financial numbers. For instance, a rental income statement for the foreign entity reflects that it earned \$1,980,330.00 in rental income in 2012. But, the petitioner has not provided any lease agreements, documentation demonstrating lease payments received, or documents supporting a conclusion that the foreign entity owns sufficient land to garner substantial rental income. Further, a pie chart illustrating sales of single family homes by the foreign entity from July 2011 through July 2012 denotes that there were 278 such transactions during the aforementioned one year period. However, the petitioner has not submitted any supporting documentation such as agreements of sale, evidence of property transference, titles to property, or any other evidence to support the large number of home sale transactions the petitioner asserts were completed by the foreign entity aboard. 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)). Further, on appeal, the petitioner has only submitted vendor agreements, and not agreements or other documentation directly confirming the foreign entity's regular, systematic and continuous provision of goods or services. Also, it is not clear from the record whether the foreign entity owned and sold the aforementioned properties, acted as an agent for sale of the properties, developed and/or built the properties for sale, or completed all of the aforementioned actions. Lastly, the petitioner does not explain the relevancy of the documentation and agreements submitted on appeal thereby weakening its probative value. In sum, even considering all the evidence submitted, the petitioner has not provided sufficient evidence to establish that the foreign entity is doing business aboard as defined by the regulations.

Additionally, discrepancies on the record related to the foreign entity's claimed operations cast further doubt on whether the entity is conducting business. On appeal, the petitioner provides a magazine article from February 2013, profiling the beneficiary's land related business activities in Tennessee. The article notes that the beneficiary and the foreign entity fell out of favor with the Russian government, that the foreign entity was raided on many occasions, and that the beneficiary decided to flee to the United States as a result. The beneficiary is quoted as stating "I just realized that it was time to run." The article also indicates that the beneficiary, the sole owner of the foreign entity, is not able to return to Russia due to fears of indictment. In sum, the events set forth in the aforementioned article cast material doubt on whether the foreign entity is still conducting business since its sole owner has fled from the country within which he is stated to conduct business. 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. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

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).

In conclusion, the petitioner has not established that the foreign entity is doing business, or that it is a qualifying organization, consistent with the regulations. For this reason, the appeal must be dismissed.

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

The next issue to be discussed is whether the petitioner established that the beneficiary acts in a managerial or executive capacity with the petitioner. The director concluded that the petitioner failed to establish that the beneficiary is primarily employed in a managerial or executive capacity as defined by the Act. Upon review of the petition and the evidence, and for the reasons discussed herein, the AAO concurs that the petitioner has not established that the beneficiary has and will act in an executive or managerial capacity for the petitioner.

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). In support of the I-129 Petition for a Nonimmigrant Worker, the petitioner submitted the following job duty description for the beneficiary:

As General Manager for [the petitioner], [the beneficiary] utilizes his executive-level expertise, specifically as it related to business development, to direct all operations, business policies and decisions incident to the business expansion and land development projects of [the petitioner]. [The beneficiary] directs the development of the business and has established a solid business network in the region, with the strong support of local government officials. In this regard, he prepares, implements, and oversees the company's strategic direction. He also determines ongoing objectives, supervises the implementation of those policies and coordinates and directs land development strategies, real estate negotiations, and related marketing and logistics strategies. [The beneficiary] draws upon his land development experience to establish financial and operational strategies and goals and he is ultimately responsible for all investment decisions. Further, he is responsible for any profit, loss and asset management and for the ultimate financial viability of the company. He reviews development opportunities and recommendations of the Director of Sales and Logistics and the Property Manager and other contract consultants and property advisors to determine progress and status in attaining objectives and revises objectives and plans based on the business climate. [The beneficiary] also evaluates potential business partnerships for expansion in order to maximize investment returns.

In the RFE, the director requested that the petitioner provide additional evidence to establish that the beneficiary would be employed in a managerial or executive capacity, including a complete position

description for all of the petitioner's employees and a breakdown of the number of hours each employee devoted to their job duties on a weekly basis. The director also requested an hourly breakdown of job duties for the beneficiary. In response, the petitioner provided few additional specifics related to the beneficiary's duties, and did not provide an hourly breakdown of the beneficiary's job duties. Further, the petitioner did not submit a complete position description for all of the petitioner's employees including hours devoted by each to their tasks. The AAO notes that 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). On appeal, counsel submits an updated organizational chart for a newly created entity previously discussed herein, [REDACTED], including position descriptions for seven employees it states now report to the beneficiary within the new company. 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. Further, the beneficiary's subordinates within a newly created entity, [REDACTED] are not relevant to determining whether the beneficiary acts as a manager or executive for the petitioner.

Additionally, the petitioner submitted overly vague job duties for the beneficiary. 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. As noted, the director specifically requested a more detailed hourly breakdown of the beneficiary's duties in the RFE, but this evidence was not provided by the petitioner. This failure of documentation is of particular importance since the beneficiary's originally provided duties included no specifics regarding how the beneficiary carries out the general tasks and goals listed in his duties. For instance, the petitioner did not provide specifics, examples, or supporting documentation necessary to afford credibility to various duties referenced in the beneficiary's job duty description such as business development or land projects undertaken; the company's strategic vision; policies or marketing and logistics strategies implemented; or financial investments made. As such, the lack of specificity or examples in the provided duties casts doubt as to their credibility. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature. 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)). Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *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); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at \*5 (S.D.N.Y.).

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).

On appeal, counsel asserts that the beneficiary performs the duties of an executive and manager, and states that he delegates day-to-day non-qualifying operational duties to managerial subordinates. However, this assertion of counsel is not adequately supported on the record, and various material discrepancies regarding the petitioner's stated operations cast doubt on whether the beneficiary is acting primarily in an executive or managerial capacity. In response to RFE, the petitioner asserted that it owns over 150 houses and apartment complexes that generate around \$80,000 in rental income. Further, the petitioner stated that owns various tracts of land in Tennessee slated for future development. But, the petitioner has not established that it owns any property. The petitioner further stated in response to the director's RFE that the beneficiary supervises three employees and over fifteen independent contractors such as construction managers, maintenance managers, architects, structural engineers, accountants, and other independent professionals. Again, the petitioner did not provide any evidence to support the petitioner's assertion that the beneficiary oversees various independent contractors, such as IRS Form 1099's, contracts with independent contractors, or amounts paid to contractors for services. 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)). Also, the record does not support a conclusion that the beneficiary has managerial subordinates within the petitioner's organization. In fact, as previously noted, the petitioner now asserts on appeal that it is not currently doing business, but that it has established a new entity, [REDACTED] now responsible for all of its previous operations. Indeed, IRS Form W-2 Wage and Tax Statement documentation and IRS Form 941 Employer's Quarterly Tax Returns submitted for the petitioner support a conclusion that the petitioner operations have been wound down and suspended. The aforementioned tax documentation illustrates that the petitioner had a maximum of six employees in during the 1<sup>st</sup> quarter of 2010, and that this was reduced to only two employees in all of the 2011. Currently, the record suggests that the petitioner now has no employees, since the petitioner directly states that the petitioner is no longer conducting business and fails to submit any supporting wage documentation for the petitioner for 2012. In sum, the record does not establish that the petitioner has sufficient managerial subordinates with the petitioner necessary to relieve him from primarily performing day-to-day operational duties as necessary to allow him to act primarily in an executive or managerial capacity with the petitioner. Further, as noted, evidence related to whether the petitioner may act as a manager or executive with another unrelated company, [REDACTED] is not relevant to establishing that the beneficiary acts in an executive or managerial capacity with the petitioner. Again, if counsel wanted to qualify the beneficiary as a manager or executive pursuant to his employment with another company, he should have filed a new petition relevant to that company.

In conclusion, the petitioner has not established that the beneficiary acts in a managerial or executive capacity with the petitioner as defined by the Act. For this additional reason, the appeal must be dismissed.

### C. BEYOND THE DIRECTOR'S DECISION

Beyond the decision of the director, the petitioner has also not established that it is doing business as defined by the regulations. First, the petitioner states directly on appeal that it is no longer doing business, "due to the poor state of the U.S. economy," and that the beneficiary has reconstituted his real estate business operations in the form of another Tennessee limited liability company established in May 2012

called [REDACTED]. The petitioner submits evidence related to this new limited liability company on appeal, including an organizational chart, position descriptions, and 2012 employee wage documentation. However, the petitioner does not submit any evidence suggesting that it is currently doing business as defined by the regulations. In fact, IRS Form 941 Employer Quarterly Federal Tax Return Quarterly documentation supports the winding down of the petitioner's operations as it indicates that the petitioner went from having six employees in the first quarter of 2010 to having only two employees in all of 2011. Additionally, the petitioner has not submitted any quarterly wage documentation relevant to the petitioner for 2012, but only such documentation for [REDACTED] further suggesting that the petitioner has suspended operations. Counsel also asserts that since the petitioner is a sole member limited liability company that its revenues are reflected in the beneficiary's personal tax returns, since the beneficiary is the sole owner and member. Accepting counsel's assertion as true, Schedule C (Profit or Loss from Business) of the beneficiary's IRS Form 1040 Individual Income Tax Return reflects that the petitioner earned only \$188,197 in 2011 and took a loss of \$110,649 from the petitioner's operations. The aforementioned financial numbers for the petitioner do not indicate that the petitioner was, or is, doing business in a regular, systematic, and continuous fashion.

Lastly, the petitioner provides a lease agreement for the petitioner dated July 11, 2011. But, the lease explicitly states in Article 1.7 that the premises can be used only as an electronics retail store and for "no other purposes whatsoever," and Exhibit F-1 "Prohibited Uses" expressly states that the property cannot be used as a real estate office. Therefore, the petitioner has also not demonstrated that it has sufficient premises to conduct its real estate business. A petitioner is not absolved of the requirement to maintain sufficient physical premises simply because it has been in existence for more than one year. In order to be considered a qualifying organization, a petitioner must be doing business in a regular, systematic and continuous manner. *See* 8 C.F.R. § 214.2(l)(1)(ii)(G) and (H). Inherent to that requirement, the petitioner must possess sufficient physical premises to conduct business. In this case, the lack of sufficient business premises and the conflicting evidence of record fail to establish that the petitioner has been and will be doing business. Therefore, the petitioner has not established that the petitioner is a qualifying organization as defined by the regulations. To the extent counsel desired to qualify the beneficiary pursuant to his duties as a manager or executive for another company, a new petition relevant to that entity should have been filed.

### 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.