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

(b)(6)

DATE: MAY 14 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 petition seeking to extend the beneficiary's employment 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 Louisiana limited liability company established in 2009, is a company. It claims to be a subsidiary of , located in , Uruguay.[1] The beneficiary was previously granted L-1A status for a one-year period in order to open a new office in the United States, and the petitioner now seeks to extend his status in the position of General Manager for two additional years.

The director denied the petition, concluding that the petitioner failed to establish that: (1) the beneficiary would be employed in the United States in a primarily managerial or executive capacity; (2) that the beneficiary's services are to be used temporarily in the United States and that the foreign entity would continue to do business while the beneficiary is in the United States; and (3) that the petitioner has secured sufficient physical premises to house the U.S. business.

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 meets all requirements for L-1A status. Counsel submits a brief and additional evidence 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.

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[1] Although the petitioner claims to be the subsidiary of the foreign entity, the petitioner is better classified as an affiliate of the foreign entity. The documentation in the record reflects that the beneficiary owns 100% of the petitioner. He also owns 50% of the foreign entity and exercises control over the foreign entity.

(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)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

(A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;

(B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;

(C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;

(D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and

(E) Evidence of the financial status of the United States operation.

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

(v) 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

The primary issue to be addressed is whether the petitioner established that the U.S. company will employ the beneficiary in a primarily managerial or executive capacity.

The petitioner filed Form I-129, Petition for a Nonimmigrant Worker. On Form I-129, the petitioner described itself as a ' ' company employing two employees, located at The petitioner described the beneficiary's proposed duties in the United States as:

- Direction and management of all components and functions, goal setting and policy creation (20%);
- Decision-making based upon the best interests of the company (10%);
- Directs and manages the manufacturing of tiles and pavers (30%);
- Directs and manages employees in the U.S. subsidiary (5%);
- Analyze information from the management team to set goals and create policies (10%);
- Promote, and support services, and clients satisfaction (5%);
- Expand and establish new clientele in the area (20%); and
- Sustain and increase the company's financial viability (20%).

In support of the petition, the petitioner submitted a copy of its Business Plan for 2012-2013. The business plan described the petitioner as a "firm specializing in the following flooring engineering services: manufacturing, project development, design, restoration of any kind of tiles and pavers . . . [and] engineer[ing] solutions for construction, heavy duty, repair, renovation, and restoration projects by handcrafting, pigmenting, decorating tiles and pavers." The business plan confirmed that the petitioner employs two employees: the beneficiary and

The business plan described the beneficiary's duties as General Manager as the following:

- Direction and management of all components and functions;

- Goal setting and policy creation, and decision making based upon the best interests of the company. As such, [the beneficiary] will direct and manage the manufacturing, material purchasing for main construction, remodeling and restoration projects and also direct and manage employees in the U.S. subsidiary;
- Analyzes information from the management team to set goals and create policies in the new company that serve to enhance their position in the market;
- Promote, and support our services, products, and clients' satisfaction;
- Expand and establish new clients in the area; and sustain and increase the company's financial viability;
- Makes decisions regarding planning, design and hiring of manpower, as well as all activities related to this function in the U.S. subsidiary.

The business plan described Ms. s duties as the Sales Manager as to: oversee all areas of sales and administration departments; seek business opportunities and strategic alliances with other organizations; support for general and operational management, and human resources; receiving visitors and scheduling meetings; and public relations management and supervision of any other employees.

The petitioner submitted its U.S. Organizational Chart depicting the beneficiary at the top as General Manager, directly overseeing , the Sales Manager, and all other proposed positions. The chart indicated that all the positions of Project Manager, Administrative Manager, Accounting, Business Development Supervisor, Office Manager, Marketing Manager, and Secretary are "To be hired." The petitioner also submitted a "Staff Description as Per Organizational Chart (Enclosed)" which provided position descriptions for the above proposed positions, as well as for three other proposed positions not appearing on the Organizational Chart. Specifically, the "Staff Description as Per Organizational Chart (Enclosed)" indicated that the petitioner would employ: Labor Workers whose duties are to "[w]ork with concrete machines, palletizing, vibrating table, shelves set up" and "[c]leaning and general manufacturing task"; a Factory Supervisor who will have operational supervision over all the technical procedures that occur at the plant including technical, output, labor personnel management, task distribution, shipping and other commercial activities; and a Technician & Maintenance who will maintain the manufacturing machines, perform mechanical repairs, and support the pavers manufacturing operation.

The petitioner submitted a copy of its 2011 IRS Form 1099-MISC issued to Hope Marie Johnson for $5,000 in nonemployee compensation. The petitioner also submitted a copy of the beneficiary's IRS 2011 Form 1040, U.S. Individual Income Tax Return and accompanying Schedule C, Profit or Loss from Business (Sole Proprietorship), reflecting that the beneficiary is the sole owner of the petitioner and paid a total of $5,000 in contract labor and no wages.

The petitioner submitted a copy of its dated December 2, 2010, specifying that the petitioner is a "manufacturer and seller in Louisiana" and that will be the exclusive distributor of the petitioner's products in the State of Florida.

The director issued a request for additional evidence ("RFE"), in which he requested, *inter alia*, additional evidence to establish that the beneficiary will be performing the duties of a manager of executive with the U.S. company. The director advised that such evidence may include, but is not limited to, the following: (1) evidence of the staffing of the U.S. organization including the number of employees and the duties performed by each employee; (2) a more detailed description of the full scope of the U.S. business, including the services

to be rendered by the organization and the products and/or commodities to be sold; and (3) evidence to establish that the petitioner has secured physical premises including an original lease agreement and a statement from the lessor identifying the square footage of the leased premises.

In response to the RFE, the petitioner submitted a different business plan confusingly entitled " – Executive Summary." The new business plan described the petitioner's primary business service and product as "manufactur[ing] and distribut[ing] a one foot by one foot square stamped concrete block that resembles cobblestone from old European cities" that can be used in residential and commercial settings. The new business plan indicated that the business "should launch with a staff of the 4 key people who will make up the core of the business," namely, the General Manager (, two Sales Staff, and an Admin/Social Networking/Bookkeeping employee.

The petitioner also submitted a Residential/Commercial Lease/Rental Agreement lease, dated May 1, 2010, between itself ("lessor") and ("lessor") for premises located a from May 1, 2010 to April 2011. The lease stated that the premises are to be used "as a private residence only" and that the occupants are the beneficiary and the petitioner. The petitioner submitted a letter dated June 19, 2012 from confirming that the beneficiary has been a resident of the 4,000 square feet warehouse located at it the corner of from November 20, 2008 to present. The petitioner submitted photographs of the petitioner's office and warehouse space. Previously, the petitioner submitted copies of its bank statements showing several rent checks made to and deposited by

Finally, the petitioner submitted an affidavit from the beneficiary attesting that he accepted the General Manager position at the U.S entity for a term of three years, with an optional renewal of two additional years, after which time he would return to his previous position of General Manager at the foreign entity. The petitioner also provided copies of the foreign entity's recent employee paystubs, 2012 payroll listings with the Department of Labor and Social Security, and Common Certification from the Tax Department and Collection of the Social Security Bank certifying the foreign entity's regular payments of social security and related taxes valid from December 15, 2011 to June 12, 2012.

The director denied the petition, concluding that the petitioner failed to establish that: (1) the beneficiary would be employed in the United States in a primarily managerial or executive capacity; (2) that the beneficiary's services are to be used temporarily in the United States and that the foreign entity would continue to do business while the beneficiary is in the United States; and (3) that the petitioner has secured sufficient physical premises to house the U.S. business. In denying the petition for the first reason, the director found that the petitioner failed to establish that the beneficiary has been relieved from performing the non-qualifying every day duties of the business. The director also found that the U.S. business has not grown in size and scope to support the beneficiary in a primarily managerial or executive position.

On appeal, counsel for the petitioner asserts that the petitioner will employ the beneficiary in a primarily executive capacity. Counsel disputes the director's finding that the beneficiary has not been relieved from performing day to day operations by submitting the petitioner's new invoices with showing that new sales have been made in the last two months, and pointing out that the beneficiary has not been in the United States since March 11 2012. Counsel asserts that since March 11, 2012, the beneficiary has been abroad "still making the effort to negotiate, promote, and develop a 'long distance' business" and approving and endorsing the Sales Manager's main decisions. Counsel emphasizes that six months, the duration of the beneficiary's

first stay in the United States as a L-1A nonimmigrant, is insufficient for a business to develop. Finally, counsel explains that the submitted lease was a pre-printed general/standard version lease filled out by the landlord and represents a commercial lease in a warehouse that does not have any residential accommodations. Counsel points to the photographs as proof of the industrial profile of the premises.

Upon review, and for the reasons discussed herein, the petitioner has not established that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition.

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 organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, 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.

In the instant matter, the petitioner describes the beneficiary's duties in broad and vague terms, such as his duties of "[d]irection and management of all components and functions, goal setting and policy creation"; "[d]ecision-making based upon the best interests of the company"; "[d]irects and manages the manufacturing of tiles and pavers"; "[d]irects and manages employees in the U.S. subsidiary"; and "[a]nalyze information from the management team to set goals and create policies. 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 failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *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). Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Id.*

While several of the duties generally described by the petitioner would generally fall under the definitions of managerial or executive capacity, the lack of specificity raises questions as to the beneficiary's 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. Accordingly, the totality of the record must be considered in analyzing whether the proposed duties are plausible considering the petitioner's staffing levels and business scope.

The record reflects that the petitioner has only two employees: the beneficiary and a Sales Manager. According to the petitioner's descriptions, the Sales Manager is responsible for sales and general administrative duties, such as seeking business opportunities, receiving visitors, and scheduling meetings. The petitioner claims that it intends to hire additional employees in the future, including a Project Manager, Administrative Manager, Accounting, Business Development Supervisor, Office Manager, Marketing Manager, Secretary, Labor Workers, a Factory Supervisor, and a Technician & Maintenance.

Considering the Sale Manager's limited scope of duties, the petitioner has failed to explain and document who performs the day-to-day operational tasks necessary to produce the products and to provide the services

of the U.S. business. Here, it is critical to consider the nature and scope of the petitioner's business as a ' ' company that offers services such as manufacturing concrete pavers, project development, design, restoration of tiles and pavers, repair, renovation, and restoration projects by handcrafting, pigmenting, decorating tiles and pavers. The petitioner's business plans and other documentation indicate that the petitioner manufactures, sells, and performs its other services from within the United States. The tasks necessary to produce the products and to provide the services of the U.S. business would reasonably require employees in the United States to perform operational tasks such as physically manufacturing the concrete pavers, designing the concrete pavers, managing projects, and restoring tiles and pavers. The petitioner has not explained who performs these operational duties. Overall, the petitioner's description of its staffing and organizational structure is not credible in light of the scope of the petitioner's claimed business services. Without a credible explanation of the petitioner's actual organizational structure and staffing, the petitioner has failed to establish that the beneficiary has been relieved from performing non-qualifying duties.

The petitioner indicates that it plans to hire Labor Workers whose duties are to work with concrete machines and perform the general manufacturing tasks. The petitioner also indicates that it plans to hire a Factory Supervisor who will supervise the manufacturing plant and direct the shipping and other commercial activities, a Technician & Maintenance worker who will maintain the manufacturing machines, perform mechanical repairs, and support the pavers manufacturing operation, and several staff involved in administrative support duties. However, the petitioner's future hiring plans are insufficient to establish eligibility for the benefit sought. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978). In other words, the petitioner must have already reached the point where it can employ the beneficiary in a predominantly managerial or executive position at the time it filed the petition. Notably, the petitioner's new business plan indicated that the U.S. business "should launch with a staff of the 4 key people who will make up the core of the business," namely, the General Manager two Sales Staff, and an Admin/Social Networking/Bookkeeping employee. The petitioner's actual staffing falls short of its projected initial staffing.

Counsel repeatedly asserts that the petitioner only had six months from the time of the beneficiary's initial entry into the United States in August 2011, and that six months is an insufficient amount of time for the petitioner to develop its business. However, 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation only one year within the date of approval of the initial new office petition to support an executive or managerial position. There is no provision in USCIS regulations that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension. In the instant matter, the beneficiary was initially granted L-1A status for one full year, from March 17, 2011 to March 16, 2012, to develop the petitioner's business to the point that it can employ the beneficiary in a predominantly managerial or executive position. Within this one-year timeframe, the petitioner failed to reach the point that it can employ the beneficiary in a predominantly managerial or executive position. Therefore, the petitioner is ineligible by regulation for the requested extension. The petitioner is not relieved from meeting the statutory requirements under 8 C.F.R. § 214.2(l)(3)(v)(C), despite its assertion that it is still in a preliminary stage of development because the beneficiary only entered the

United States in August 2011.[2] In other words, the petitioner may not be granted a second "new office" L-1A visa approval to develop its business.

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.

On appeal, counsel asserts that the beneficiary cannot be performing non-qualifying tasks in the United States because he has not physically been in the United States since his departure in March 2012. Counsel asserts that the beneficiary has been managing his "long distance" business within the scope of his managerial capacity "with the local Sales Manager and its temporary staff support." However, counsel's assertions are unpersuasive. Counsel fails to provide any detailed explanation of the beneficiary's duties abroad with respect to the U.S. company. The fact that the beneficiary is physically abroad does not establish that the beneficiary is not performing non-qualifying services for the U.S. entity. In addition, the fact that the U.S. entity recently executed additional sales with with whom it already has an existing exclusive distributorship agreement, does not establish that the beneficiary has been relieved of performing non-qualifying duties. Moreover, counsel's claims on appeal that the petitioner has a "temporary staff support" in addition to the Sales Manager is unsupported by any documentary evidence, and is contradictory to the petitioner's previous claims that it employs only the beneficiary and the Sales Manager.

The definitions of executive and managerial capacity each 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 show 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). The fact that the beneficiary manages a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of sections 101(a)(15)(L) of the Act. *See* 52 Fed. Reg. 5738, 5739-40 (Feb. 26, 1987) (noting that section 101(a)(15)(L) of the Act does not include any and every type of "manager" or "executive"). While the AAO does not doubt that the beneficiary exercises discretion over the petitioning entity in his role as owner and General Manager for the petitioner, the petitioner has failed to demonstrate that the beneficiary's day-to-day duties will be primarily managerial or executive in nature. For the above reasons, the appeal will be dismissed.

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.

Although the appeal will be dismissed, the AAO will withdraw the director's findings that the petitioner failed to establish that: (1) the beneficiary's services are to be used temporarily in the United States and that

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[2] The petitioner submitted no explanation for why the beneficiary entered the United States in August 2011, when his L-1A visa status was granted in March 2011.

the foreign entity would continue to do business while the beneficiary is in the United States; and (2) that the petitioner has secured sufficient physical premises to house the U.S. business.

The evidence in the record, including the beneficiary's sworn affidavit that he would return to work at the foreign entity upon the completion of his services in the United States, is sufficient to establish that the beneficiary's intended services in the United States are temporary. Furthermore, the petitioner submitted sufficient evidence to establish that the foreign entity continues to employ personnel and conduct business activities while the beneficiary was in the United States. Finally, the petitioner's lease when read in its entirety, the letter from the petitioner's landlord confirming that the petitioner presently leases 4,000 square feet of warehouse space, the photographs of the petitioner's office and warehouse space, and copies of the petitioner's recent rent checks, are sufficient to establish that the petitioner has secured sufficient physical premises to house its U.S. operations. The AAO acknowledges the director's concerns regarding the lease's provision limiting the premises to residential purposes; however, the AAO finds counsel's explanation that the lease was a pre-printed form to be persuasive in light of the weight of the supporting evidence.

ORDER: The appeal is dismissed.