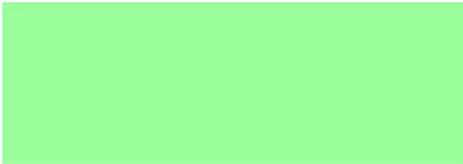
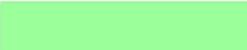


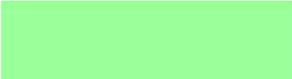


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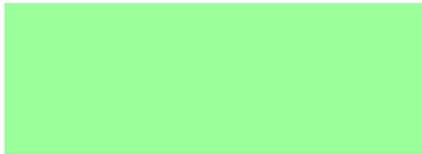


DATE: **AUG 13 2014** Office: VERMONT SERVICE CENTER FILE: 

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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

 Ron Rosenberg
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 The director's decision will be withdrawn and the matter will be remanded to the director for further action and entry of a new decision.

The petitioner filed this nonimmigrant petition seeking to extend the beneficiary's status 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 is a New York limited liability company engaged in software development. The petitioner claims to be wholly-owned by [REDACTED] located in [REDACTED] Netherlands. The petitioner has employed the beneficiary as its president since September 2011 and seeks to extend his L-1A status for two additional years.

The director denied the petition concluding that the petitioner failed to establish that it could financially support the beneficiary's position in an executive capacity. The director also denied the petition, in part, based on the petitioner's failure to submit requested evidence pertaining to its subleased premises.

On appeal, counsel asserts that the director failed to consider all of the evidence in the record in concluding that the petitioner is not financially stable. The petitioner indicated on Form I-290B that it would submit a brief and additional evidence within 30 days of filing this appeal. However, the record reflects that the brief has not been submitted and the record will be considered complete.

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, Petition for a Nonimmigrant Worker, 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)(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:¹

- (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.

II. THE ISSUES ON APPEAL

A. Financial Status of the Petitioner and Foreign Entity

The director denied the petition based on a finding that the petitioner cannot support the beneficiary's position in an executive capacity. The director's basis for this finding was that the foreign entity's bank statement for the month of July 1, 2013 showed a negative balance and because the petitioner's 2012 Form IT-204, New York Partnership Return, showed a loss of \$19,484.

On appeal, the petitioner asserts that the director erred by basing the decision on a single bank statement in which the foreign entity had more payables than receivables. The petitioner emphasizes that the evidence of record establishes that the foreign entity has an annual turnover of €700,000. Further, the petitioner asserts

¹ According to the record, the petitioner initially filed a Form I-129 on the beneficiary's behalf in 2011 so that he could open its new office in the United States. This petition was approved with validity dates from September 8, 2011 through April 1, 2012. The petitioner obtained a one-year extension of the beneficiary's L-1A status from April 2, 2012 through April 1, 2013. As the initial petition was valid for slightly less than seven months, it appears that the director granted the petitioner a second approval under the regulations applicable to new offices at 8 C.F.R. § 214.2(l)(3)(v)(C). Therefore, the regulations at 8 C.F.R. § 214.2(l)(14)(ii) are applicable to this extension request.

that as a start-up company involved in software development, it cannot immediately show a large income but instead relies upon investments which have been documented in the record.

Upon review, the director's findings regarding the financial stability of the petitioner and foreign entity will be withdrawn. The director did not adequately explain how the foreign bank statement and the petitioner's reported net income relate to the eligibility requirements for the requested extension of status. While the petitioner is required to submit evidence of its financial status in support of a petition requesting an extension of a new office petition, there is no specific income or profit requirement applicable to this nonimmigrant classification. While these factors may be considered in determining whether the petitioner and foreign entity are doing business as qualifying organizations in the United States and abroad, the director's decision did not articulate a finding that the companies are not doing business. An officer must fully explain the reasons for denying a visa petition in order to allow the petitioner a fair opportunity to contest the decision and the AAO an opportunity for meaningful appellate review. *Cf. Matter of M-P-*, 20 I&N Dec. 786 (BIA 1994) (finding that a decision must fully explain the reasons for denial to allow the respondent a meaningful opportunity to challenge the determination on appeal).

B. Physical Premises

The director denied the petition, in part, based on the petitioner's failure to submit evidence that the landlord of its building provided written approval for its tenant, [REDACTED] to sublet office space to the petitioning company.

The petitioner provided a complete copy of its sublease with [REDACTED] a complete copy of the master lease between [REDACTED] an insurance policy applicable to its office location, photographs of its office, and evidence that it has been paying rent. The weight of the evidence supports a finding that the petitioner is in fact leasing office premises at the location stated on the Form I-129. As such, while the petitioner did not provide all suggested evidence pertaining to its physical premises mentioned in the director's request for evidence (RFE), it has satisfied its burden of proof.

III. ADDITIONAL ISSUES

The AAO reviews each appeal on a *de novo* basis. *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). Although the director's decision will be withdrawn, the record as presently constituted does not contain evidence that the petitioner and beneficiary meet all eligibility requirements for the requested classification. As such, the petition will be remanded to the director for further review and entry of a new decision pursuant to the discussion below.

A. Doing Business

Pursuant to the regulation at 8 C.F.R. § 214.2(l)(14)(ii)(B), the petitioner is required to provide evidence that it has been doing business for the previous year. "Doing business" is defined as the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad. The petitioner is seeking to extend a petition that was valid for one year commencing on April 2, 2012.

At the time of filing, the petitioner explained that the beneficiary was not in the United States from August 2012 until March 5, 2013 due to unspecified difficulties renewing his visa. As a result of the beneficiary's lengthy absence, the petitioner stated that the company was "not able to achieve its previously projected business plan objectives." Nevertheless, the petitioner asserted that the beneficiary used his time overseas to create and develop a new social media application which the petitioner intends to launch and administer. The petitioner stated that the new application resulted in a change in the company's direction. Therefore, as a part of this petition, the petitioner included a new lease agreement, business plan, financial projections, convertible promissory notes, and licensing agreements which are directly related to the petitioner's new social media application, called "[REDACTED]"

The petitioner reported \$60,611 in gross receipts or sales on its Form 1065, U.S. Return of Partnership Income for 2012 and ended the year with a \$19,484.00 loss. The return indicates that the petitioner paid no salaries and guaranteed only \$7,040.00 payments to the partners. In addition, the petitioner acknowledged that the beneficiary was not in the United States for much of 2012 and the petitioner claimed no other employees until one employee was hired in the first quarter of 2013. The petitioner submitted an organizational chart listing ten vacant positions, five of which would report directly to the beneficiary.

The petitioner provided no documentation such as invoices, contracts, paystubs, or regular banking statements to demonstrate its business throughout the previous year, nor is there evidence that it carried out its initial business plan to develop software applications for the hospitality industry. The only evidence provided is a tax return indicating that the company generated modest revenues from unspecified services provided or goods sold. This evidence is insufficient, especially where the petitioner has not explained how its business managed to function with no employees while the beneficiary worked on a web application overseas for a period of over six months. Pursuant to the regulation at 8 C.F.R. § 214.2(l)(14)(ii)(B), the petitioner is expected to submit evidence that it has been doing business as defined in the regulations since the date of the prior petition's approval. The petitioner has not satisfied this requirement.

Further, the petitioner has not provided documentation in support of its claim that the beneficiary was outside the United States for an extended period for reasons outside of his control. The petitioner indicates that he departed the United States in August 2012 and that his L-1 visa was issued on March 5, 2013; however, the petitioner submitted a copy of the beneficiary's passport, which reflects that his L-1 was issued at the [REDACTED] on January 23, 2013. He returned to the United States on March 5, 2013.

As the petitioner did not submit sufficient evidence that it was doing business for the year preceding the filing of the petition, the matter will be remanded and director will be instructed to review the record and request additional evidence to establish that this eligibility requirement has been met.

B. Managerial Executive Capacity in the United States

While not directly addressed in the director's decision, the record as presently constituted is not persuasive in demonstrating that the beneficiary will be employed in a qualifying managerial or executive capacity under the extended petition. The petitioner's letter states "[the beneficiary's] continued presence in the United States is required in order to ensure that all issues after the application's release are resolved – such as fixing crashes

or errors reported by [REDACTED] users, adding new features as requested, and providing user support while scaling the cost of the project." Further the beneficiary "will ensure the success of the [REDACTED] product by consistently making updates, improvements, adding new features, bug fixes, responding to consumer issues, etc."

The petitioner described the beneficiary's responsibilities as follows:

- Executing [petitioner's] initial Business Plan;
- Overseeing product design, development and integration;
- Meeting with clients to introduce [petitioner's] products and services;
- Developing short and long term goals according to the current market demand;
- Reviewing activity reports and financial statements to determine progress and status in attaining objectives and revise objectives and plans in accordance with current conditions;
- Directing and coordinating formulation of financial programs to provide funding for new or continuing operations to maximize returns on investments, and to increase productivity;
- Maintaining managerial control over all administrative functions including Accounting, Finance, Advertising, Marketing, and Insurance;
- Managing Sales, Purchasing, and Customer Service aspects of our business;
- Hiring, training and firing of all employees; and,
- Maintaining executive control over the entire company and its employees.

Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "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 lists the beneficiary's duties as including both managerial and administrative or operational tasks, but fails to quantify the time the beneficiary spends on them. This failure of documentation is important because along with the list of responsibilities, the beneficiary will also be responsible for the implementation and launch of the new web application. These duties do not fall within traditional managerial or executive duties and the record does not establish that the petitioner had employees to assist him with these activities when the petition was filed. While the petitioner intends to hire additional staff, it 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).

C. Qualifying Relationship

A remaining issue not addressed by the director is whether the petitioner established that it has a qualifying relationship with the foreign entity. 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).

The petitioner claims to be wholly owned by the foreign entity. In support of this claim, the petitioner provided an undated membership certificate Number 1 indicating the foreign entity's ownership of 100

membership units. The petitioner also provided documentation to show that the beneficiary owns the foreign entity. However, the petitioner provided its Internal Revenue Service (IRS) Form 1065 U.S. Return of Partnership Income for 2012, Schedule B- 1, which reflects that the beneficiary owns 60% of the petitioning company and [REDACTED] owns the remaining 40% of the company. 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, in order to establish eligibility, it is imperative that the petitioner provide competent and consistent evidence to establish that petitioning company and the foreign entity have a qualifying relationship.

IV. CONCLUSION

Although the director's decision will be withdrawn, the record as presently constituted does not contain evidence that all eligibility requirements for the requested classification have been met. Accordingly, the matter will be remanded for review and entry of a new decision. The director may issue a notice requesting any additional evidence she deems necessary in order to determine the petitioner's eligibility for the benefit sought.

ORDER: The decision of the director dated October 8, 2013 is withdrawn. The matter is remanded for further action and consideration consistent with the above discussion and entry of a new decision, which, if adverse, shall be certified to the AAO for review.