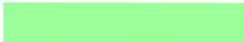


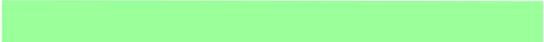


U.S. Citizenship
and Immigration
Services

(b)(6)

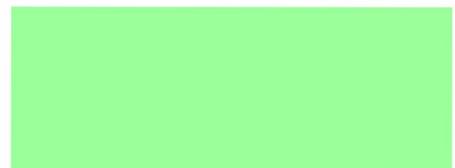


DATE: **DEC 30 2014** OFFICE: VERMONT SERVICE CENTER FILE: 

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)

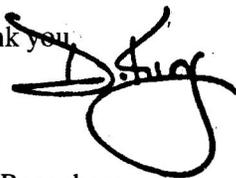
ON BEHALF OF PETITIONER:



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 (the "director"), denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker (Form I-129), 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 New Jersey corporation established on January 17, 2014, indicates on the Form I-129, that it is an "education" business. The petitioner claims to be a subsidiary of [REDACTED] an entity located in China. The petitioner seeks to employ the beneficiary as its chief marketing director.

The director denied the petition, finding that the petitioner failed to establish: (1) the qualifying foreign entity had employed the beneficiary in a qualifying managerial or executive capacity; and (2) it had secured sufficient physical premises for the new office.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to this office. On appeal, counsel for the petitioner asserts that the director failed to consider the documents submitted describing the beneficiary's duties and responsibilities as an executive for the foreign entity. Counsel also submits documentation regarding the petitioner's purchase of a business in California. Counsel asserts the petitioner's purchase of this asset resolves the issue of securing sufficient physical premises as required for a new office petition.

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(1)(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 (1)(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(1)(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 (1)(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.

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 BENEFICIARY'S EMPLOYMENT IN AN EXECUTIVE CAPACITY ABROAD

The first issue addressed by the director is whether the petitioner established that the beneficiary had been employed in a qualifying managerial or executive capacity for the foreign entity for one continuous year within three years preceding the beneficiary's application for admission into the United States. Upon review, we find the record includes sufficient probative evidence to overcome the director's decision on this issue.

A. Facts

On the Form I-129, the petitioner stated that the beneficiary had been employed as the foreign entity's chief marketing director. The petitioner provided an overview of the beneficiary's responsibilities in this role. The petitioner noted the beneficiary "direct[ed] the efforts of the marketing, communications and sale staff and coordinated the strategic and implemental levels with the other functions of [the foreign entity]," among other duties. The petitioner also indicated that the beneficiary had "signed fourteen supply contracts for [the foreign entity]," added 20 new products to the company's retail catalogue," and had "[n]egotiate[d] orders and arrange[d] shipment of imported goods."

In response to the director's RFE, the petitioner provided the foreign entity's organizational chart depicting the beneficiary as directly over the retail sales manager and the marketing development department. The retail sales manager is shown managing four retail stores, with each store employing

managers, vice managers, and sales personnel. The marketing development department includes three marketing and public relations employees. The foreign entity's president, in a letter dated April 22, 2014, explained the beneficiary's duties in relation to his two direct subordinates and the four managers of the retail stores and allocated the number of hours the beneficiary spent directing them. The chief executive officer and president of the foreign entity also provided additional information regarding the beneficiary's duties and responsibilities in relation to the retail stores, supervision of market research and development, and development of the foreign entity's growth strategies. The petitioner included evidence that the beneficiary was employed in March 2012 by the foreign entity and continued his employment for at least one year.¹

On appeal, counsel for the petitioner submits additional evidence of the beneficiary's duties for the foreign entity in an executive capacity.

B. Analysis

Upon review of the initial record, the description of the beneficiary's duties for the foreign entity was insufficient to demonstrate that the beneficiary primarily performed the high level of responsibilities specified in the definitions rather than spending the majority of his time on day-to-day functions. In response to the director's RFE, the petitioner provided additional evidence to demonstrate that the beneficiary was employed at a high level within the foreign entity's organization and that his work included duties in an executive capacity. Upon review of the totality of the record, including the evidence submitted on appeal, the petitioner has provided sufficient documentation to establish, by a preponderance of the evidence, that the beneficiary duties for the foreign entity were primarily executive in nature. Accordingly, we will withdraw the director's decision to the contrary.

III. SUFFICIENT PHYSICAL PREMISES

The second issue addressed by the director is whether the petitioner established that it had secured sufficient physical premises to house its new office.

A. The Facts

In the initial letter submitted in support of the petition, the president of the foreign entity explained its purpose in establishing the petitioner is to "acquire a platform in the USA through which [it] could foster collaboration with multiple international educational institutions, study and practice different education theories and concepts . . . [to] develop a teaching and learning model which enables children to develop their creativity throughout childhood." The petitioner noted that it had sent the beneficiary to the East Coast of the United States to set up the petitioner and that the petitioner "has been in the process to search

¹ The foreign entity explained that the beneficiary, initially admitted to the United States as a J-1 exchange visitor on September 11, 2013, continued his employment with the foreign entity while attending a language school and that he was doing so on behalf of and was funded by the foreign entity. Regardless of the beneficiary's admission to the United States on September 11, 2013, the record includes sufficient documentation to establish that the beneficiary was employed by the foreign entity from March 2012 to March 2013. Thus he was employed for one continuous year in one of the three years prior to his admission into the United States.

for acquiring candidates of daycare center or nursery in New Jersey, Maryland, Virginia and upstate of New York." The petitioner did not submit any evidence that it had secured physical premises for the new office when the petition was filed.

In response to the director's RFE for evidence of its physical premises, the petitioner provided a copy of an apartment lease, located in [REDACTED] New Jersey. The apartment identifies the beneficiary, not the petitioner, as the tenant of the apartment. The apartment also identifies three additional individual occupants for the apartment.

As the director noted in the denial decision, the lease agreement specifically prohibits the use of the apartment "for any business, professional, unlawful or hazardous purpose." Accordingly, the director determined that the record did not include evidence that the petitioner had secured sufficient physical premises to house the new office.

On appeal, counsel for the petitioner submits a contract for sale of business between the petitioner and [REDACTED], located in [REDACTED] California. The contract for sale is dated May 29, 2014, a date subsequent to the date the petition was filed as well as a date subsequent to the director's denial decision.

A rider attached to the contract for sale of business, also dated May 29, 2014, indicates that the contract for sale is contingent upon the transferor obtaining the landlord's consent to the assignment of the lease and is contingent upon the approval of the L-1 visa for the beneficiary within three months. The petitioner provided a copy of its deposit check and the first page of a six-page lease between the landlord of the subject premises and individual tenants. The record does not include evidence that the landlord of the premises consented to the assignment of the lease or that the lease was assigned to the petitioner.

B. Analysis

The record does not include evidence that the petitioner had secured sufficient physical premises for its new office when the petition was filed. We affirm the director's determination that the apartment lease submitted in response to the director's RFE was insufficient for the petitioner's new office. The apartment lease specifically prohibited the use of the apartment for a business, was occupied by four individuals, not the petitioner, and was insufficient to establish the petitioner's stated business of a nursery or daycare center.

The petitioner's submission of documents relating to the proposed acquisition of a daycare center fails to establish that the petitioner had secured sufficient physical premises to house its new office when the petition was filed. 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). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998). In this matter, the contract for the sale of a business is entered into subsequent to the date the petition was filed (April 9, 2014) and is subsequent to the date of the director's denial decision (May 3, 2014). Accordingly,

the contract was not in existence when the petition was filed and was entered into in order to make a deficient petition conform to USCIS requirements.

Moreover, the contract for sale is not evidence that the petitioner has actually acquired physical premises. In that regard, the contract is specifically contingent upon the business premise's landlord's approval of the transfer of the lease. The record does not include this evidence. Additionally, the petitioner's purchase of the business is contingent upon the beneficiary's L-1 approval and thus the purchase is speculative. The record in this matter does not establish that the petitioner had secured sufficient physical premises to house its new office when the petition was filed.

For this reason, the petition must be denied.

IV. BEYOND THE DECISION OF THE DIRECTOR

We also find that the record is insufficient to establish that the intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in the statute and regulations.

When a new business is 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 activities not normally performed by employees at the executive or managerial level and that often the full range of executive or managerial responsibility cannot be performed. In order to qualify for L-1 nonimmigrant classification during the first year of operations, the regulations require the petitioner to disclose the business plans and the size of the United States investment, and thereby establish that the proposed enterprise will support an executive or managerial position within one year of the approval of the petition. *See* 8 C.F.R. § 214.2(1)(3)(v)(C). 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.

Accordingly, 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. *See generally*, 8 C.F.R. § 214.2(1)(3)(v). At the time of filing the petition to open a "new office," a petitioner must affirmatively demonstrate that it has acquired sufficient physical premises to house the new office, as noted above, and that it will support the beneficiary in a managerial or executive position within one year of approval. Specifically, 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.*

Here, while the petitioner has established the size of the financial investment in the United States, it has not provided evidence of an office and it has not provided sufficient information regarding the company's proposed staffing. It has not established how the beneficiary would be relieved from performing non-executive and non-managerial duties within one year. The record does not include a business plan that explains the petitioner's staffing requirements, a timetable for hiring, and job descriptions for all proposed

positions. The record does not include information regarding how many and which positions will be filled at the petitioner during the first year of operations, in part, because the petitioner had not yet acquired an asset(s) when the petition was filed. The petitioner has not detailed how its goals and financial projections for the petitioner will be achieved.

When examining the executive or managerial capacity of the beneficiary, we look first to the petitioner's description of the job duties. See 8 C.F.R. § 214.2(l)(3)(ii). The petitioner initially provided an abstract description of the beneficiary's proposed duties, stating generally that the beneficiary would be "the on-the-spot decision maker and top manager." The petitioner noted that the beneficiary, while still employed by the foreign entity was searching for daycare centers to acquire. On the last page of the business plan provided which sets out the foreign entity's mission and provides market analyses for the foreign entity, it is explained that after acquiring a nursery, the petitioner will retain most of the managerial and professionals of the acquired company. The initial record does not include any specific duties the beneficiary will be expected to perform during the first year of the new office operations or subsequent to the initial first year.

Although the director does not specifically request evidence on this issue in the RFE, the director noted the regulatory requirements to open a new office in the United States which includes evidence that the petitioner will support an executive or managerial position within one year of the approval of the new office petition.

While it appears that the petitioner would employ staff to operate any acquired daycare business, the petitioner does not identify with specificity, the beneficiary's duties the first year of operations. 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 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Nor does the petitioner provide the petitioner's business plan, detailing the marketing analysis to carry out the petitioner's mission and how it expects it will support an executive or managerial position within one year of the approval of the petition. To establish eligibility, the petitioner must show that the beneficiary will perform the high level responsibilities that are specified in the definitions, and must prove that the beneficiary will *primarily* perform the specified responsibilities and will 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). In the case of a new office petition 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 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. Here, the record does not include any probative evidence establishing this essential element.

Based on the evidentiary deficiencies addressed above, we find beyond the decision of the director, that the petitioner has not explained how it would develop over one year so that it would plausibly support the beneficiary in a primarily managerial or executive capacity. 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)).

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).

Moreover, when we deny a petition on multiple alternative grounds, a petitioner can succeed on a challenge only if it shows that we abused our discretion with respect to all of the enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*. 345 F.3d 683.

V. CONCLUSION

We will withdraw the director's determination that the petitioner did not establish the foreign entity employed the beneficiary in an executive capacity. We will uphold the director's determination that the petitioner failed to establish it had secured sufficient physical premises for the new office. Further we find, beyond the decision of the director, that the record is insufficient to establish that the petitioner would employ the beneficiary in a qualifying managerial or executive capacity within one year of the approval of the new office petition. Accordingly, the appeal will be dismissed. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that petitioner has not met that burden.

ORDER: The appeal is dismissed.