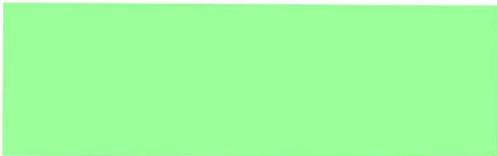




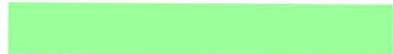
U.S. Citizenship  
and Immigration  
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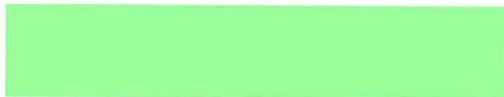
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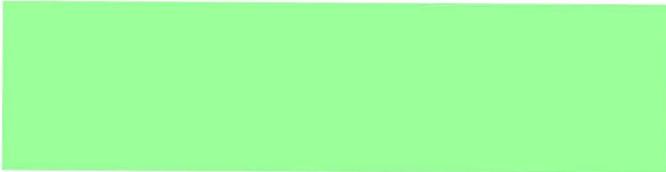
Petitioner:

Beneficiary:



PETITION: Petition for a Nonimmigrant Worker under 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 petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner filed this nonimmigrant petition seeking to classify the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, an Alabama corporation established in 2012, claims to be a subsidiary of [REDACTED]. The petitioner seeks to employ the beneficiary as the President/CEO of its new office for a period of one year.

The director denied the petition, concluding that the petitioner failed to establish that the intended U.S. operation, within one year of the approval of the petition, will support an executive or managerial position.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. Counsel for the petitioner submits a brief in support of the appeal.

#### I. THE LAW

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(l)(3)(v) further provides that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office in the United States, the petitioner shall submit evidence that:

- (A) Sufficient physical premises to house the new office have been secured;
- (B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation; and
- (C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (l)(1)(ii)(B) or (C) of this section, supported by information regarding:
  - (1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;
  - (2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and
  - (3) The organizational structure of the foreign entity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means 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), provides:

The term "executive capacity" means 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 ISSUE ON APPEAL

### A. Managerial or Executive Capacity in the United States

The issue to be addressed is whether the petitioner established that the beneficiary would be employed in a qualifying managerial or executive capacity within one year of approval of the new office petition.

In its June 11, 2012 letter of support, the petitioner claimed that the petitioner intends to “open a chain of retail stores distributing petroleum products and general consumer merchandise.” The petitioner also stated that it has an “initial setup capital in the amount of \$10,000.” The petitioner explained that the beneficiary has been “very instrumental with our success and with our plans to expand our operations.” The petitioner provided the following overview of the beneficiary's proposed duties:

His duties will include supervision of all financial and marketing operations for the company, as well as entering into contracts, over which he will exercise complete discretionary authority. He will be in charge of training marketing representatives to procure orders and improve their performance. Negotiate contracts with banks and clients; requests and approves amendments and or extensions to contracts. He will also be responsible to direct activities of personnel in sale accounting, inventory, record keeping, receiving and shopping operations to implement fulfillment of contracts. Ultimately, it is his responsibility to establish [the petitioner] on a sound footing. He will recruit and train the staff and have hiring and firing authority over them.

In addition, the petitioner provided the following overview of the business plan:

Our strategy in the U.S. is opening up or purchasing convenience stores in underserved areas. In order to differentiate our self from the competitors we will be implementing various strategies in retail management monitoring, merchandising (including fresh foods in its merchandise), and distribution. The Management Monitoring System will allow [the petitioner] to track sales of every item in each store in real time, so we can tailor an assortment to match customers' buying preferences in real time. To help us stay ahead of the competition, we intend to identify and respond to consumer trends, expand regional products and fresh foods, and accelerate product innovation. And have been aggressively pursuing opportunities to consolidate order and delivery schedules to lower the cost of goods and improve the ability of our managers to manage inventory and allocate labor. Knowing what our customers want in real time and delivering it to the store fresher and faster, are helping satisfy the customers better than the competition-giving us the ability to drive sales and profits in each store.

Research has shown what our customers want; a varied assortment of products that meet their needs; excellent, fast and friendly customer services; a clean, safe environment; high-quality goods, services and shopping experience; and all at a great value every day. We intend to keep our customers coming back – the key on retailing general consumer merchandise such as products, pharmaceuticals, newspapers, magazines, beer, cashing services in addition to retailing gasoline and petroleum products.

In the business plan submitted by the petitioner, it stated that the petitioner has done “extensive market research and as a result we plan on owning and operating at least ten retail stores by the end of fourth quarter in year 2013,” and on “investing in real property and its management.” The plan also stated that “market research shows that real estate and commercial enterprise development in southern and central Alabama remains promising as the country’s economy stabilizes.”

The business plan also provided a list and job description for the employees the petitioner plans to hire in the next year. The organizational chart lists a vice president of operations; a district director, an office manager, a receptionist, a purchasing officer, a warehouse manager, a warehouse assistant, a delivery driver, a staff accountant, a bookkeeper/accounts payable clerk, 10 store managers, 20 assistant store managers, 30 sales clerks, and, 10 helpers and cashiers. The plan also indicated a revenue target for 2012 of \$30 million dollars. The plan also indicated an anticipated \$9 million in gross income for 2012 and \$500,000 in net income. The plan also indicated the growth strategy as the petitioner will “develop a new customer base from the overseas market through media advertising and through establishing relationship with brokers and agents in targeted market.”

The petitioner submitted a copy of a lease agreement with [REDACTED] for the period from June 15, 2012 through June 14, 2013 for 600 square feet of space, and the premise is located at [REDACTED] with a monthly rental fee of \$400. The lease indicated that the use of the space is for office space.

The petitioner also provided a print out from “Regions Connect” that indicated a ledger balance of \$10,000.00 for an account in the petitioner’s name.

The director issued a request for evidence (RFE) on August 27, 2012. The director noted that the petitioner submitted a general business plan and requested additional information of the market research performed, including when it was done, who performed the research and for whom the research was done. In addition, the director requested documentation evidencing that the foreign company made an initial investment of \$10,000.00 to the petitioner. The director also requested additional evidence to show how the petitioner will grow to be of sufficient size to support a managerial or executive position.

In a response letter, dated November 14, 2012, the petitioner explained that the market research for the new operations in the United States was done by the beneficiary in Spring 2012 "in contemplation of filing an L-1A visa." The petitioner also reiterated the same information as in the business plan with the initial filing. In addition, the petitioner submitted an article entitled, "Identifying and Addressing Workforce Challenges in America's Retail Industry, State of the Retail Industry," and statistical data from the Office of National Statistics.

In response to the director's request for evidence to show how the petitioner will grow to be of sufficient size to support a managerial or executive position, the petitioner stated the following:

We have sufficient capital, assets and managerial experience in the retail industry in India to ensure a successful start-up in the U.S. We are eager to have [the beneficiary] commence our expansion in the western hemisphere.

The petitioner also attached a bank statement with the currency converter "showing that the foreign entity has sufficient capital to invest in the U.S." According to the currency converter calculation submitted by the petitioner, the foreign company has \$64,404.98 in assets. This amount differs from the evidence initially presented that indicated the foreign company has \$330,000.00 in assets.

The director denied the petition concluding that the petitioner failed to establish that the beneficiary would be employed in a qualifying managerial or executive position within one year of approval of the "new office" petition. The director noted that the business plan indicated that the petitioner will purchase and open gas stations and convenience stores but the petitioner failed to show projected costs associated with the purchase or opening of these stores, or when the petitioner will purchase the stores.

On appeal, the petitioner contends that the beneficiary qualifies as an executive of the U.S. company and restates the contentions previously offered in response to the RFE. No new documentary evidence is submitted on appeal. In the appeal brief, counsel for the petitioner further explains the business plan as follows:

Upon receiving an approval of the L-1A change of status, the target revenue for 2012 is \$30,000,000. This will be achieved by leasing approximately six commercial retail space which are currently vacant or closed stores that were formerly convenience stores and stock them with inventory. Petitioner plans to pledge its assets to obtain loans from international banks to lease and purchase merchandise to stock the stores. Approximately \$50,000 - \$80,000 funding will be needed per convenience store with \$2,000 - \$5,000 towards the leased monthly rental rate, \$2,500 - \$6,000 in renovations, with the remaining \$39,000 - \$69,000 for inventory. Each convenience store shall approximately generate \$4,000,000 - \$6,000,000 in

sales with approximately \$1,200,000 - \$1,800,000 in grocery sales, \$1,800,000 - \$2,200,00 in petroleum sales, and \$400,000 - \$600,000 in lottery sales. Obtaining an estimated six convenience stores, each approximately generating \$5,000,000 in sales will reach the target revenue of \$30,000,000.

Upon review, and for the reasons stated herein, the petitioner has not established that it would employ the beneficiary in a qualifying managerial or executive capacity within one year of commencing operations in the United States.

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

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 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.*

On review, the petitioner's general description of the beneficiary's duties fails to establish that the beneficiary will be engaged in either a primarily managerial or primarily executive position. The description provided in the letter of support is more indicative of an employee that needs to negotiate for new contracts, scout for new business opportunities and marketing, and not of an executive at the U.S. company. 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).

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

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. The petitioner is required to describe the nature of the office, the anticipated scope of the entity, its proposed organizational structure and its financial goals. *See* 8 C.F.R. § 214.2(l)(3)(v)(C).

Even though the enterprise is in a preliminary stage of organizational development, the petitioner is not relieved from meeting the statutory requirements. In its business plan, the petitioner provided a generalized overview of the nature of the company (open gas stations and convenience stores in underserved areas). The business plans estimates that it will generate \$30 million in revenue by the end of the year. On appeal, counsel explains that the petitioner will purchase six commercial retails. However, the record provides no evidence that the petitioner is working with a commercial realtor and has found six properties for gas station/convenience stores in the area where the petitioner wishes to work. The petitioner also explained that it will work with banks in order to obtain loans to purchase the retail spaces; however, there is no evidence that the petitioner has any contracts with banks or has looked into any of the requirements of obtaining loans to purchase six stores. Furthermore, on appeal, counsel contends that the petitioner will need approximately \$50,000 - \$80,000 per store to purchase, renovate, and buy inventory; however, the petitioner did not provide any market research indicating where they obtained these estimates. In addition, the petitioner did not provide any evidence of how the petitioner will obtain this amount for each of the six stores the petitioner wishes to purchase in one year. The petitioner has only \$10,000 as an initial investment that does not reach the need for an investment as stated by counsel. Although the foreign company may have additional assets, it is not clear if they are willing to spend \$50,000.00 to \$80,000.00 per store with the intention of buying six stores. Furthermore, counsel on appeal estimates that each store will generate \$5 million in sales; however, it is unclear how the petitioner can confidently predict the sales figures and profit margins it provides in its business plan. The record contains no

product-specific market research or forecasting to support the petitioner's projected financial statement and project profit.

Moreover, the business plan listed 80 employees that the petitioner projects to hire. It appears that the business plan projects hiring all 80 employees within one year. However, the petitioner did not provide a clear hiring plan for 80 employees in one year. In addition, the petitioner also did not explain how it will obtain the salaries necessary to pay 80 employees.

The AAO recognizes that the petitioner will be commencing business and acquiring staff on a piecemeal basis during the first year of operations. The regulations, however, require the petitioner to demonstrate that, by the end of that first year, the beneficiary will have sufficient subordinate employees to relieve him from performing non-qualifying duties. In the instant case, the petitioner does not provide a hiring plan and it is not clear who will be employed by the petitioner during the first year of operation. 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Absent a more specific business plan outlining the timeframe of its hiring process and the manner in which the petitioner will pay the required salaries, the AAO is unable to determine how and when the U.S. entity will ultimately meet the hiring goals set forth on the organizational chart.

Due to the lack of evidence submitted the petitioner has not met its burden to establish that the beneficiary would be relieved from performing non-qualifying duties within one year of commencing operations. The regulations require the petitioner to present a credible picture of where the company will stand in one year, and to provide sufficient supporting evidence in support of its claim that the company will grow to a point where it can support a managerial or executive position. The petitioner expects gross sales in the amount of \$30 million during its first year of operations, yet does not identify any gas stations/convenience stores that are available for purchase in the designated area, or agreements with vendors to obtain inventory for the stores, or information regarding loans in order to purchase the stores.

Aside from its own contentions, the petitioner fails to submit evidence that the business will be able to support a managerial or executive position for the beneficiary by the end of the first year of operations. 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)).

The definitions of executive and managerial capacity each have two parts. First, the petitioner must show that the beneficiary will perform the high-level responsibilities that are specified in the definitions. Second, the petitioner must show that the beneficiary will *primarily* perform these



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). Absent evidence that the company will hire employees to perform the day-to-day functions of the business during the first year of operations, the petitioner has not met this burden.

Based on the evidentiary deficiencies addressed above, the AAO will uphold the director's determination that the petitioner failed to establish that the beneficiary would be employed in a qualifying managerial or executive capacity within one year of the approval of the new office petition. Accordingly, the appeal will be dismissed.

### III. CONCLUSION

The petition will be denied and the appeal dismissed for the above stated reasons. 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, the petitioner has not met that burden.

**ORDER:** The appeal is dismissed.