

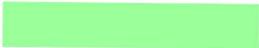


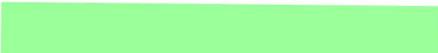
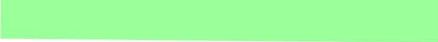
U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **JUL 18 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)

SELF REPRESENTED

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 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, a Florida corporation states that it is engaged in Radio Frequency Identification (RFID) technology services. The petitioner seeks to employ the beneficiary as chief executive officer (CEO) of its new office in the United States for a period of five years.¹

The director denied the petition, concluding that the petitioner failed to provide sufficient evidence establishing the size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and commence doing business in the United States. In addition, the director found that the petitioner failed to provide evidence that it had secured sufficient physical premises to house the new operations as of the filing date of this petition.

The petitioner filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO. On appeal, the petitioner asserts that the petitioner has the financial ability to conduct business in the United States and remunerate the beneficiary through the parent company. The petitioner submits additional evidence in support of these assertions. The petitioner concedes that physical premises have not been secured.

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:

¹ The L Classification Supplement to the Form I-129 indicates that the instant petition seeks to classify the beneficiary as an L-1A intracompany transferee as a managerial or executive employee of a "new office." Pursuant to 8 C.F.R. § 214.2(l)(7)(i)(A)(3), if the beneficiary is coming to the United States to open or be employed in a new office, the petition may be approved for a period not to exceed one year.

- (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 involves 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.

II. ISSUES ON APPEAL

A. Support of the Executive or Managerial Position in the United States

The first issue the director addressed is whether the foreign entity's investment or financial ability were sufficient to remunerate the beneficiary and to commence doing business in the United States within one year of filing this petition. See 8 C.F.R. § 214.2(l)(3)(v)(C).

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on January 23, 2013. The petitioner stated on the Form I-129 that the beneficiary will be employed as CEO of its new office earning USD \$900.00 per week or \$46,800.00 per year. The company claimed no employees or income at the time of filing.

The petitioner stated that it is engaged in Radio Frequency Identification (RFID) technology services and is affiliated with two Colombian companies:

The petitioner identified both of these Colombian companies as the "foreign employer" on the Form I-129, however the foreign employer's address belonged to and the petitioner listed the beneficiary's work experience with this company from 1998 to the present. Nevertheless, the petitioner's September 9, 2012 letter in support of the petition stated that the beneficiary, as founder and partner, has also worked as CEO of since March 12, 2007. In another of several letters dated September 9, 2012, the petitioner explained that needed to establish a new company in the United States and move personnel to that location to expand its RFID technology business. The petitioner claims to be affiliated with both companies based on all three companies' ownership and control by the same individuals. The petitioner refers to both foreign companies as a resource throughout this petition.

The petitioner was established in the State of Florida on April 4, 2012. The petitioner provided invoices and business documents demonstrating that the petitioner had engaged in sporadic business activity from May through July 2012 and during September through October 2012.

The petitioner submitted an organizational structure chart for each foreign company. Both foreign companies were listed at the top of each identical chart. The petitioner submitted foreign registration documents indicating that the two foreign companies are separate legal entities. The petitioner also provided unaudited self-prepared balance sheet documents for both foreign companies, dated August 2012.

On February 19, 2013, the director issued a Request for Evidence (RFE) instructing the petitioner to provide evidence of the size of the United States investment and the financial ability of the foreign entities to remunerate the beneficiary and commence doing business in the United States. The director requested documents such as a capitalization table, recent foreign tax documents, the petitioner's business plan, proof of capital contributions such as initial wire transfers, the foreign companies' most recent annual reports, the foreign companies' bank statements for the last three

months, and annual audited balance sheets and statements of income and expenses showing the foreign entities' financial position, among other things.

In response to the RFE, the petitioner provided documentation demonstrating business performance of both foreign companies including invoices, charts listing business contracts, and letters verifying at least one recent contract.

The petitioner provided a letter, dated April 30, 2013, signed by the director of both foreign companies, stating that both companies agreed "[t]o transfer all the money that the company could need to open a new office in Miami, Florida, USA, operate, and pay salaries and any kind of responsibility acquired by this new office."

The petitioner submitted a business plan projecting its sales of USD \$127,850.00 and expenses of USD \$161,711.00 in 2013. Thus, the petitioner expected a loss of USD \$33,861.00 for the first year. The plan also listed an investment of USD \$5,400.00 for 2013 but the source of the investment is not provided. The record as presently constituted contains no evidence of any funds previously provided to the U.S. entity by the either foreign company for the purpose of establishing the petitioning company.

The petitioner submitted its bank statements for February, March and April 2013. The February 2013 bank statement indicated no credits and a single wire payment leaving a balance of USD \$37.48. The March 2013 statement indicated that one of the foreign companies made two transfers to the petitioner totaling USD \$850.00; the petitioner paid three wire transfer fees, a maintenance fee and a business payment leaving a balance of USD \$246.48. The final statement indicated that during April 2013, the foreign company transferred USD \$975.00 to the petitioner and most of that money was used to pay another company. After wire transfer fees and maintenance fees, a balance of USD \$479.73 remained in the petitioner's account at the end of April 2013.

The petitioner submitted an untranslated extract from [REDACTED] bank statement covering the period from April 24 through May 8, 2013 that appears to show a balance of Colombian Peso (COP) \$142,636,925.78, which was equivalent to approximately USD \$75,072.00. The petitioner also submitted [REDACTED] untranslated balance document dated December 31, 2012, a translated income statement dated April 2013, and [REDACTED] s comparative balance dated December 31, 2012.

The petitioner's April 30, 2013 letter indicated that the petitioner would initially have three employees. These three employees were identified in the petitioner's business plan as the beneficiary earning \$3,600.00 per month, [REDACTED] as strategy director earning USD \$3,600 per month, and [REDACTED] as sales/marketing director earning USD \$3,200.00 per month. The petitioner's projected cash flow chart indicated the intent to begin salary payments of USD \$8,000 per month in July 2013 and increase salary payments to \$10,200 in November and December 2013. The petitioner did not specifically indicate which of the three employees would receive payments during that period. Nevertheless, the business plan also indicated that the petitioner expected to hire four additional employees in 2013 while the petitioner's letter indicated that the business would hire 14 more employees as soon as the new office was open.

The director denied this petition, finding that after a review of the foreign entity's bank balance, the petitioner's bank balance, the petitioner's wages to be paid, and all of the other business expenses, the foreign companies would not have the ability to pay the beneficiary and begin doing business in the United States, therefore it could not support the beneficiary's position within one year of petition approval.

On appeal, the petitioner asserts "we have sales for COP 895.000.000 (both companies) which is equivalent to about USD 458.504 yearly" therefore, the companies are capable of supporting the new United States office. In addition, the petitioner states that one of the foreign companies has recently obtained a new project expected to last five years and will provide financial stability. The petitioner explains that the foreign companies have low bank account balances due to recent property purchases but with these purchases the foreign companies expect to reduce monthly expenses which would allow the support of the petitioner's new office. The petitioner requests to remove two previously identified new office employees from consideration under this petition, specifically, [REDACTED]. The petitioner asserts that with the reduced salary requirements the foreign companies can support the beneficiary and the new office. The petitioner also submitted a new business plan dated August 28, 2013 identifying the beneficiary as the petitioner's sole employee for 2013 and adjusting its first year loss projection to USD \$32,700.00. The petitioner submitted a brief and additional documents with this appeal.

Upon review, we agree with the director that the petitioner failed to establish its ability to remunerate the beneficiary and commence doing business in the United States in a manner which will result in the enterprise succeeding and rapidly expanding 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. The record indicates that the United States petitioner will not generate sufficient revenue to commence doing business and cover the first year expenses. The petitioner has not sufficiently demonstrated the size of the United States investment or the foreign companies' ability to remunerate the beneficiary and commence doing business in the United States. Therefore, it has not been persuasively demonstrated that the United States operation, within one year, will support a managerial or executive position. 8 C.F.R. 214.2 (l)(3)(v)(C)(2)

We recognize that both foreign companies agreed to establish and support the petitioner's new office but the petitioner provided insufficient evidence demonstrating the ability of either foreign company to establish or support the new office at the time the petition was filed. 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)). Furthermore, the letter agreeing to support the new office was signed by shareholders of the two foreign companies several months after 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). In an RFE, the director specifically requested additional documentation to demonstrate foreign capital contributions to the petitioner prior to the filing of this petition but the petitioner did not comply with that request. Failure to submit requested evidence

that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

The petitioner provided income statements, balance sheets and other financial documents to demonstrate that the two foreign companies, collectively, have the financial ability to establish and support the petitioner's new office. Several of these documents are not properly translated however, and none of the documents have been audited or reviewed, as requested by the director. *Id.* At 8 C.F.R. § 103.2(b)(14). Due to the petitioner's failure to submit certified translations of all the documents, we cannot determine whether the evidence provided in those particular documents supports the petitioner's claims. *See* 8 C.F.R. § 103.2(b)(3). We note that even if the income statements and balance sheets submitted by the petitioner were considered, they would not establish an ability to support the petitioner's new office, in part, because the meaning of various entries on these documents is not clear. Accordingly, the evidence is not probative and will not be accorded any weight in this proceeding.

As found by the director, the petitioner's most recent bank account statement indicated that the company had USD \$479.73 and the bank statement provided for one of the foreign companies indicated an approximate balance of USD \$75,072.00. The petitioner projects expenses amounting to USD \$161,711.00 in its first year of operation, yet there is insufficient evidence to demonstrate that the petitioner or the foreign companies will be capable of meeting those financial requirements. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, at 165.

The one-year "new office" provision is an accommodation for newly established enterprises, provided for by 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. 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. *See generally*, 8 C.F.R. § 214.2(1)(3)(v). 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.*

In this matter, the record indicated that the petitioner had no employees when the petition was filed but that two named employees were to join the beneficiary in the first year. The petitioner intended to hire another four or 14 employees within the first year; the number is unclear since it fluctuated between the petitioner's letter and business plan. 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). Nevertheless, the petitioner asserted that it intended to hire at least four additional employees during 2013 but the petitioner's projected cash flow for 2013 did not include an increase of salary for any employees other than the three already named. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

On appeal, the petitioner now requests that two of the three salaried employees be removed from consideration thus reducing the petitioner's financial needs but leaving the petitioner with the beneficiary as the sole employee. Further, the petitioner refers to a new contract that will bolster the financial position of the foreign companies. Finally, the petitioner explains that a land purchase resulted in the foreign companies' reduced funds. These claims and changes made on appeal will not further this claim because 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 visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). 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).

Accordingly, the petitioner has failed 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 required by 8 C.F.R. § 214.2(l)(3)(v)(C), and for this reason the petition may not be approved

B. Physical Premises

The second issue is whether the petitioner established that sufficient physical premises to house the new office have been secured, as required by 8 C.F.R. § 214.2(l)(3)(v)(A).

In the RFE, the director instructed the petitioner to provide evidence to show that it had acquired a lease for premises of sufficient size to conduct international trade such as a lease agreement or a letter from the lessor. The director also requested exterior and interior photographs depicting the petitioner's physical location as listed on the petition.

The petitioner did not provide evidence in response to this request. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

On appeal the petitioner states “[a]t this moment we have not leased an office because we are waiting to obtain the Visa in order to start business actively.” As a part of the appeal the petitioner included quotes and emails exchanged between realtors demonstrating the petitioner’s inquiries regarding future physical premises.

Upon review we find the petitioner has not established that it had secured sufficient physical premises at the time the petition was filed on January 28, 2013. The petitioner did not establish that it had secured physical premises at the time this petition was filed and on appeal the petitioner states that it has still not secured physical premises for its operation. Although the petitioner provided a business address on the Form I-129, the petitioner did not provide photographs of that location as requested by the director. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The petitioner did not claim that its current business address is sufficient to house its operation. In fact, on appeal the petitioner concedes that physical premises sufficient to house its operation have not been leased. 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. Therefore, as of the date the petition was filed, the petitioner had not secured sufficient physical premises, and for this additional reason the petition may not be approved.

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).

III. CONCLUSION

The appeal will be 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.