



U.S. Citizenship  
and Immigration  
Services

(b)(6)

DATE: **SEP 09 2014** OFFICE: VERMONT SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

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 and 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 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 Texas limited liability company established in 2013, intends to operate a food processing and packaging equipment distribution company. It claims to be an affiliate of the beneficiary's foreign employer, [REDACTED], located in Mexico. The petitioner seeks to employ the beneficiary in the position of "project vice president" in its new office for a period of three years.<sup>1</sup>

The director denied the petition concluding that the petitioner failed to establish that it would support an executive or managerial position within one year of the approval of the petition. The director's determination was based on a finding that the petitioner did not provide evidence that it has the required funding from the foreign entity to cover its start-up costs and the beneficiary's stated salary.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO. On appeal, counsel asserts that the evidence of record establishes that the petitioner's Mexican affiliate has sufficient assets, net worth, cash flow and profits to fund the petitioner's start-up expenses and continued growth. The petitioner submits a brief from counsel and additional evidence in support of the appeal.

## I. THE LAW

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

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

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.

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<sup>1</sup> 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.

- (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), 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 ISSUE ON APPEAL

The sole issue addressed by the director is whether the petitioner established that the intended United States operation, within one year of the approval of the petition, will support an executive or managerial position. Specifically, the director found that the petitioner had not established the size of the United States investment or the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States. *See* 8 C.F.R. § 214.2(l)(3)(v)(C)(2).

### A. Facts

The petitioner filed the petition on August 9, 2013. In a letter in support of the petition, the petitioner stated that it is a food service machinery and equipment distribution company established in Texas in January 2013. The petitioner stated that its Mexican affiliate, [REDACTED] has been operating in the same industry for over 20 years, has an established relationship with many global

equipment manufacturers, and distributes food service equipment to some of the leading companies in the food and beverage industry.

The petitioner further described its intended U.S. business plans as follows:

As a new enterprise [the petitioner] plans to develop new business relationships and strengthen current business dealings with U.S. food service industry manufacturers and suppliers. Specifically, the company plans on further developing its relationship with [REDACTED], a company comprising nearly 25% of [the foreign entity's] book of business. [REDACTED] has represented [REDACTED] since 1996 and their business relationship is critical to the export of [REDACTED] products into the Mexican market. . . . In addition to growing its business with [REDACTED] [the petitioner] plans to increase [REDACTED] operations with [REDACTED] located in [REDACTED] Texas.

The petitioner submitted a copy of its limited liability company operating agreement, which indicates at Exhibit "A" that each of its four members have made capital contributions totaling \$100,000. The petitioner also submitted a copy of a marketing agreement it made with [REDACTED]. Under the terms of the agreement, the petitioner will receive compensation from [REDACTED] for sales of products and equipment offered by the vendors with which the foreign entity has an agreement. Specifically, the petitioner would receive 80% of the commission and fees paid by the foreign entity's vendors to [REDACTED] for each sale.

The petitioner stated that the beneficiary's proposed duties as Project Vice President would include the following:

- Manage, direct and oversee all new and existing company projects.
- Manage, direct and oversee work activities and resources necessary for the movement of inventory in accordance with cost, quality and quantity specifications.
- Manage, direct and coordinate production, purchasing, warehousing, distribution, and financial forecasting services and activities to limit costs and improve accuracy, customer service, and overall safety.
- Examine existing procedures and opportunities for streamlining activities in order to meet product distribution needs.
- Manage, direct and oversee client technical support to ensure product functions meet client needs.
- Network within communities to find and attract new business.
- Manage, direct and oversee the movement, storage or processing of inventory.

The petitioner submitted a proposed organizational chart which identifies a total of seven positions, including a CEO, an administrative vice president, a purchase and sales vice president, and a projects vice president (the beneficiary). The petitioner indicated that these positions would be filled by the four owners of the company. The chart shows that the administrative vice president would supervise

an assistant, the purchase and sales vice president would supervise a sales representative, and the projects vice president would supervise a technician.

The petitioner submitted a copy of the foreign entity's financial statements as of April 30, 2013 which showed sales of 7.4 million pesos in the first four months of the year. The petitioner also submitted copies of recent bank statements for the foreign entity, but these documents were in Spanish not accompanied by English translations or foreign currency conversion rates.<sup>2</sup>

The petitioner also provided copies of its recent bank statements, which indicate that the company had a total of \$8,078 in its U.S. account as of August 5, 2013. The petitioner received two international wire transfers from "[REDACTED]" on this date which totaled \$7,500.

The petitioner submitted a copy of its business plan, which identified "initial set up costs" of \$54,670, which includes office furniture, equipment and supplies, a rent deposit, accounting and attorney fees, a car and insurance. The business plan's pro forma net cash flow computation stated that these initial costs would be covered by capital contributions totaling \$60,000. For the first year of operations, the petitioner indicates anticipated sales of \$88,000, operating costs of \$91,378, and a net loss of \$3,378. The petitioner's financial projections assume annual salary and wage payments of \$24,000-\$24,970 during the first three years in operation. In the accompanying notes, the business plan states: "In years one, two, and 3, the company will have one administrative [sic] assistant with a base pay in year one of \$24,000." The notes indicate that the petitioner would add a second assistant and a sales/technician employee during year four.

At page 7 of the same business plan, the petitioner stated that in 2013-2014, it will have one engineering employee, two sales employees (including one manager), one customer support employee, and three "general and administrative employees" (including two managers), for a total of seven employees.

The director issued a request for additional evidence (RFE) on August 22, 2013. The director instructed the petitioner to provide additional evidence to demonstrate the foreign entity's financial ability to remunerate the beneficiary and commence operation of its U.S. business. The director noted that the petitioner provided documentation that was in a foreign language and currency, and did not show that it had the funding to cover "\$91,378 in start-up costs," as it had received only \$7,500 in cash deposits. The director provided a list of documentation that could be submitted to satisfy this requirement, such as proof of capital contributions, the foreign entity's tax documents, annual reports, U.S. and foreign bank statements, bank letters and other evidence.

In response, counsel for the petitioner emphasized that the foreign entity has realized a 37% increase in sales between 2010 and 2012 and is well-positioned to open a new office. Counsel noted that the foreign entity has paid for the petitioner's initial accounting and legal fees, and noted that the

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<sup>2</sup> Because the petitioner failed to submit certified translations of the documents, the AAO cannot determine whether the evidence supports the petitioner's claims. See 8 C.F.R. §103.2(b)(3). Accordingly, the evidence is not probative and will not be accorded any weight in this proceeding.

president of the foreign entity, [REDACTED] paid \$7,500 for the purpose of providing funds for the petitioner's initial operations.

The petitioner's response to the RFE included, in part, the following evidence: (1) a letter from [REDACTED], an accountant for [REDACTED], who states that the foreign entity "has the economic solvency to carry out the economic remuneration of [the beneficiary] and [REDACTED] also the company has the financial resources to carry out the task of opening a company"; (2) a second letter from [REDACTED] indicating that the foreign entity has had a net accrued earning of 511,969 pesos as of July 31, 2013; (3) copies of the foreign entity's Mexican bank statements accompanied by tables of conversion rates for each month; (4) copies of the foreign entity's tax returns; and (5) copies of invoices paid for expenses incurred for goods and services rendered in setting up the petitioner's business.

The director denied the petition on November 29, 2013, concluding that the petitioner did not establish that the intended U.S. operation, within one year of the approval of the petition, will support an executive or managerial position. In denying the petition, the director emphasized the petitioner's statement that it anticipates start-up costs of \$54,670 and noted that neither the petitioner nor its parent has shown the ability to cover such costs based on the submitted evidence. The director found that based on the size of the United States investment and the submitted financial documents, it could not be concluded that the foreign entity has the financial ability to support commencement of the new office in the United States, pursuant to 8 C.F.R. § 214.2(1)(3)(v)(C)(2).

On appeal, counsel for the petitioner asserts that the director "has gone beyond the scope of the regulations" in denying the petition on the grounds stated. Counsel asserts that the petitioner has clearly demonstrated that the foreign entity has the ability to financially support commencement of the new office in the United States and provided sustained financial support throughout the first year of operations. Counsel contends that the petitioner's submission of bank statements, financial statements, tax returns, a marketing agreement and letters from the foreign entity's accountants was more than sufficient to meet its burden of proof in this regard.

The petitioner provides additional financial information for the foreign entity in support of its assertion that the foreign entity has sufficient current assets and profits to support the U.S. operation. Further, counsel explains that the relatively low balances reflected in the foreign entity's bank statements are typical of a distributorship business which functions as a high cash flow, high volume, commission-based business. In addition, counsel contends that the foreign entity's long-standing relationships with U.S. manufacturers, as well as the foreign entity's marketing agreement with the petitioner, will ensure financial stability and generation of revenue for the U.S. business. Finally, counsel asserts that the denial of this petition is contrary to the initiatives set forth by the U.S. Department of Homeland Security with the introduction of the Entrepreneurs in Residence (EIR) program in 2011.

B. Analysis

Upon review, and for the reasons discussed herein, the petitioner has not established that the intended United States operation, within one year of the approval of the petition, will support an executive or managerial position.

In order to qualify for L-1 nonimmigrant classification during the first year of operations, the regulations require the petitioner to disclose its 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(l)(3)(v)(C). The petitioner's 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.

As noted, the director's finding was based on a conclusion that the petitioner had not established the size of the United States investment or the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States, as required by 8 C.F.R. § 214.2(l)(3)(v)(C)(2).

At the time of filing, the petitioner submitted a copy of its limited liability company operating agreement indicating that its four individual members had made \$100,000 in capital contributions. The petitioner also submitted a copy of its business plan. The business plan's pro forma net cash flow computation stated that the company's initial start-up costs would be covered by capital contributions totaling \$60,000. However, the petitioner has not provided evidence that it has received capital contributions of either \$60,000 or \$100,000. Rather, as noted by the director, the petitioner had received cash deposits of only \$7,500 from one of its four members at the time the petition was filed. 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). In reviewing whether the petitioner has established the size of the United States investment, it is reasonable to expect the petitioner to both state the amount to be investment and, where the petitioner has indicated that the funds were already invested, to provide corroborating evidence that it has received funding in the stated amount.

Rather than providing evidence that it has received capital contributions as stated in its operating agreement or in its business plan, the petitioner responded to the RFE with assurances that the foreign entity can support the U.S. entity during its first year of operations and pay the beneficiary's salary. Such statements do not clarify the actual amount of the initial investment or resolve the initial evidence indicating that the petitioner had already received \$100,000 in capital contributions. The petitioner did not initially claim that it would rely on the foreign entity for its initial operating expenses, but rather made this claim only after the director observed that the company had a mere \$7,500 in its account at the time of filing. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 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).

While the petitioner has established that the foreign entity is actively doing business and achieving profits on an annual basis, the record still does not support that the petitioner has received or will receive the capital contributions as stated in its operating agreement and business plan.

Further, although not specifically addressed in the director's decision, there are other deficiencies in the evidence which preclude a finding that the beneficiary would be employed in a qualifying managerial or executive capacity within one year. To establish eligibility, the regulations require the petitioner to not only disclose the size of the United States investment, but also describe its hiring plans, intended organizational structure and financial objectives for the first year of operations. *See generally* 8 C.F.R. § 214.2(l)(3)(v)(C).

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). Here, the petitioner provided a broad statement of the beneficiary's assigned responsibilities, but failed to describe his specific proposed tasks or to indicate who would carry out the day-to-day activities associated with the areas that the beneficiary will purportedly manage as projects vice president. For example, the petitioner stated that the beneficiary will "manage, direct and oversee all new and existing company projects," but did not identify any project staff or indicate the specific duties associated with this area of responsibility. Similarly, the petitioner did not identify what specific tasks would be involved in the beneficiary's responsibility for overseeing the movement of inventory or the coordination of production, purchasing, warehousing, distribution and financial forecasting services, or explain who would perform the non-managerial aspects of these functions. 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 proposed 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).

Further, the position description alone is insufficient to establish that the beneficiary's duties would be primarily in a managerial or 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. As noted, 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. 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. *See generally*, 8 C.F.R. § 214.2(l)(3)(v)(C).

The petitioner has failed to provide a consistent or reliable description of its intended hiring plans for the first year of operations and, as such, has not established that it will support the beneficiary's proposed managerial or executive position within that timeframe. The petitioner submitted an

organizational chart indicating that the petitioner would employ a CEO and three vice presidents, all owners of the company, with responsibility for administrative matters, purchase and sales, and projects, respectively. According to the chart, each vice president would supervise one employee and the lower level staff would include an assistant, a sales representative, and a technician (the beneficiary's claimed subordinate).

However, the petitioner stated in its business plan that in 2013-2014, it will have one engineering employee, two sales employees (including one manager), one customer support employee, and three "general and administrative employees" (including two managers), for a total of seven employees. Finally, in the same business plan, the petitioner stated that it has projected employing a single administrative assistant with a base pay of \$24,000 during the first three years of operation, with no other employees projected during that timeframe. Therefore, the petitioner has presented three different claims regarding its projected hiring plans and intended organizational structure for the first year of operations. Again, 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. at 591-92. Based on the evidence submitted, the petitioner may intend to hire only one administrative assistant during the first year of operations, and, at most, it appears that the beneficiary may supervise one technician. The petitioner has not established that a single technician or assistant would relieve the beneficiary from performing non-managerial duties associated with the warehouse, inventory, distribution, financial forecasting, production, purchasing and project tasks that he is claimed to "manage, direct and oversee." As such, the record does not support a finding that he would be performing primarily managerial duties associated with these areas of responsibility within one year.

For all of these reasons, the record does not support a finding that the beneficiary would be employed in a qualifying managerial or executive capacity within one year. Accordingly, the appeal will be dismissed.

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 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, that burden has not been met.

**ORDER:** The appeal is dismissed.