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**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF H-A-USA, LLC

DATE: NOV. 13, 2015

APPEAL OF VERMONT SERVICE CENTER DECISION

PETITION: FORM I-129, PETITION FOR A NONIMMIGRANT WORKER

The Petitioner, a provider of services to foreign students in the United States, seeks to classify the Beneficiary as an L-1A nonimmigrant intracompany transferee. *See* section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The Director, Vermont Service Center denied the petition. The matter is now before us on appeal. The appeal will be dismissed.

The Petitioner, a Pennsylvania limited liability corporation established in [REDACTED] claims to be an affiliate of [REDACTED] [REDACTED] a water filtration chemical company, located in China. The Petitioner seeks to employ the Beneficiary as the President and Chief Executive Officer (CEO) for a period of three years.

The Director denied the petition concluding that the evidence of record did not establish that the Beneficiary will be employed primarily in a qualifying managerial or executive capacity in the United States.

The Petitioner subsequently filed an appeal. The Director declined to treat the appeal as a motion and forwarded the appeal to our office. On appeal, the Petitioner asserts that the Beneficiary will be employed in a primarily managerial or executive capacity in the United States. 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.

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.

If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, U.S. Citizenship and Immigration Services (USCIS) must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. *See* section 101(a)(44)(C) of the Act.

II. THE ISSUE ON APPEAL

A. Employment in a Qualifying Managerial or Executive Position in the United States

The first issue to be addressed is whether the Petitioner established that it will employ the Beneficiary in a qualifying managerial or executive capacity in the United States.

1. Facts

The Petitioner filed the Form I-129 on July 7, 2014 and indicated that it had three current employees in the United States. The Petitioner states that the Beneficiary will be employed fulltime as its President and CEO.¹ As the owner of the Petitioner, the Beneficiary writes that in his proffered position:

I will direct the development of the business in the U.S. I have and will continue to have ultimate authority over all programmatic, staffing, and financial

¹ Throughout the record, the Petitioner states that the Beneficiary will spend approximately eight months abroad each year, during which time he will also pursue his other business responsibilities in China, in addition to his work with the Petitioner. This appears to contradict the Petitioner's claim that the position in the United States is fulltime, as was indicated on the Form I-129. 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).

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matters. I will manage business finances to maximize program investments and efficiency, and will assess staffing needs and program partnerships to ensure that we are providing our students with the highest level of care and service. I will also direct the establishment and maintenance of new programming initiatives, and will seek to expand existing programs and overall environment.

The Petitioner also states that the Beneficiary intends to work in the United States for approximately four months out of the year and to work remotely from China for the remainder of the time.

The Director issued a request for evidence (RFE), advising the Petitioner that the description of duties provided for the Beneficiary's position at the U.S. company is not sufficient to show that he will be primarily employed in a managerial or executive capacity in the United States. The Director instructed the petitioner to submit evidence demonstrating that the proposed position in the United States will be managerial or executive.

In response to the RFE, the Petitioner submitted a letter from the Beneficiary describing the proffered position and stating:

[I]t is important to understand that I am not involved in the day-to-day operations of [REDACTED] business, which are directed instead by our U.S.-based Director. Rather I provide executive and managerial direction to our U.S. staff regarding ongoing programming and develop new ideas for the company. Through weekly meetings with staff, conducted via webinar from China, I guide our staff in the development of a new program offerings and determine how new programs and company protocols are to be implemented. My responsibilities are broken down as follows:

- 10% - Creating and developing new business plans and programming ideas for implementation
- 10% - Managing financial aspects of the business. Includes funding determinations for projects as well as analysis and approval of new endeavors.
- 40% - General oversight of the business. Includes running weekly webinar meetings with all company staff, during which the Director reviews the week's activities achievements and I provide comments on general operations and review plans for the coming week and beyond.
- 10% - Personnel oversight. Although I am not involved in direct personnel management, which is facilitated by the Director, I offer high-level guidance regarding the development and implementation international student programming and make recommendations regarding sales and marketing of programs.
- 30% - Manage and oversee the sales of our student programs, as detailed in our initial submission. Primarily focused on the identification of new client sources.

The RFE response also included information on the Petitioner's other staff and their assigned duties. Specifically, the Petitioner claims to employ four individuals in the positions of Director, Financial Marketing Planning Specialist, and two Office Assistant positions. The Petitioner states that it does "not maintain formal organizational and/or staffing charts," but included a brief description of the salary and educational credentials for each position in the RFE response.

The Director denied the petition, concluding that the evidence of record did not establish that the Beneficiary will be employed in a primarily managerial or executive capacity in the United States. On appeal, the Petitioner disputes the director's adverse findings and contends that the Beneficiary will be employed in a managerial and executive capacity in the United States.

2. Analysis

Upon review, and for the reasons stated herein, the Petitioner has not established that the Beneficiary will be employed in a primarily managerial or executive capacity in the United States.

When examining the executive or managerial capacity of the Beneficiary, we will look first to the Petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The definitions of executive and managerial capacity each have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must show that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day operational functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). The fact that the beneficiary owns or manages a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of sections 101(a)(15)(L) of the Act. *See* 52 Fed. Reg. 5738, 5739-40 (Feb. 26, 1987) (noting that section 101(a)(15)(L) of the Act does not include any and every type of "manager" or "executive").

In the instant matter, the description of the Beneficiary's proposed position is insufficient to show that the Beneficiary will primarily perform qualifying duties at the U.S. company. In the initial submission, the Petitioner did not demonstrate what proportion of the beneficiary's duties would consist of executive or managerial duties and what proportion would consist of non-executive or non-managerial duties. Specifically, the Petitioner stated that the Beneficiary will "manage business finances," "seek to expand existing programs," "direct the establishment and maintenance of new programming initiatives." 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's description of the proposed duties does not provide any detail or explanation of the Beneficiary's claimed managerial or executive 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 (2nd Cir. 1990). 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. *Id.* at 1108.

In response to the RFE, the Petitioner provided a breakdown of the percentage of time the Beneficiary spends on each duty, but the duties were described in such a way that it is not clear what proportion of the Beneficiary's time would actually be spent on qualifying and non-qualifying duties. The Petitioner also does not explain how the general duties described translate into daily tasks and responsibilities performed by the Beneficiary, leaving us unable to determine how the Beneficiary actually spends his time. Absent a clear and credible breakdown of the time spent by the beneficiary performing her/his duties, we cannot determine what proportion of those duties would be managerial or executive, nor can we deduce whether the beneficiary is primarily performing the duties of a function manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999). Some of the duties assigned to the Beneficiary could be considered to fall into managerial or executive capacity, duties such as the "general oversight of the business," which the Petitioner asserts constitutes 40% of the Beneficiary's time. However, when this duty is examined in light of the documentation in the record, it appears that the "general oversight of the business" includes non-qualifying responsibilities concerned with the minutia of the business operations, including "running weekly webinar meetings with all company staff, during which the Director reviews the week's activities achievements" and "review plans for the coming week and beyond," meeting with clients, and facilitating/participating in the camp programs offered by the Petitioner. The other duties assigned to the Beneficiary, including spending 30% of his time managing and overseeing the sales of the student programs, wherein the Beneficiary is primarily focused on the identification of new client sources, indicate that the Beneficiary engages in non-executive duties focused on selling and producing the services of the organization. Based on this description, it is reasonable to conclude that the Beneficiary would spend his time involved in performing non-qualifying market research and sales activities. The Petitioner did not explain how these duties and broad business objectives fall within the statutory definitions of managerial or executive capacity. The Petitioner's statements reflect that the beneficiary would perform these duties himself, rather than assigning them to the company's employees.

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." *See* sections 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. §§ 1101(a)(44)(A)(i) and (ii). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that 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)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2). If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 214.2(l)(1)(ii)(B)(3).

The financial information provided by the Petitioner contradicts the claims made concerning the employment of subordinate employees. Specifically, in the RFE response, the Petitioner states that the Director is paid \$86,000 per year, the Financial Marketing Planning Specialist is paid \$42,500 a year, and that the two Office Assistants are paid \$37,440 and \$17,500 per year, respectively. However, the company's 2013 tax returns (the most recent year submitted) show just \$55,910 total

in salaries and wages paid.² These figures do not reflect fulltime employment of these individuals for the entire year.

Further, although the Beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, the Petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* § 101(a)(44)(A)(ii) of the Act.

In evaluating whether the Beneficiary manages professional employees, we must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries."

Here, the Petitioner did not submit an organizational chart. Without this evidence, we cannot determine the actual organizational structure of the organization and the Beneficiary's place in it; nor can we determine whether or not the Beneficiary is in fact supervising managerial, supervisory or professional workers. Notwithstanding the deficiencies of the record, we have reviewed the information provided.

On appeal, the Petitioner asserts that "each individual supervised by the Beneficiary in the U.S. is a degreed professional employee. As such, the beneficiary will supervise professional staff and the regulatory requirement cited above is satisfied." However, in this inquiry we must focus on the level of education required by the position, rather than the degree held by the employee. The possession of a bachelor's degree does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. In the instant case, the actual job duties listed for the positions of Director, Financial Marketing Planning Specialist and Office Assistants are not sufficiently detailed such that they demonstrate that they require professional degrees.

Furthermore, the totality of the record does not support a conclusion that the Director, Financial Marketing Planning Specialist and Office Assistants are supervisors or managers. Although the Petitioner claims that the Director manages the other three employees, the record indicates that the Director chiefly performs the actual day-to-day tasks of providing and coordinating the foreign student activities, indicating that the Beneficiary is likely acting as a first-line supervisor.

Therefore, the Petitioner has not demonstrated that the Beneficiary's duties primarily focus on the management of the organization and the supervision of qualifying managerial, professional, or supervisory employees, rather than on producing a product or providing a service of the Petitioner.

² We note that the tax returns do indicate the employment of subcontractors whose wages were recorded separately. However, the Petitioner has not claimed that the subordinates are employed as contractors rather than regular employees, and the payroll records submitted do not categorize the named employees as contractors.

As noted above, the Petitioner has not provided evidence of an organizational structure sufficient to elevate the Beneficiary to a managerial position that is higher than a first-line supervisor of non-professional employees. Even if the Petitioner was able to establish that the Beneficiary was managing supervisory, professional or managerial employees, the fact remains that the Petitioner has not submitted evidence that these employees will relieve the Beneficiary from performing non-qualifying sales, operational, and administrative duties for the Petitioner. For the reasons discussed above, we find that the Beneficiary will not be employed as a personnel manager.

The petitioner has also not established, in the alternative, that the beneficiary is employed primarily as a "function manager." The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a position description that describes the duties to be performed in managing the essential function, i.e. identifies the function with specificity, articulates the essential nature of the function, and establishes the proportion of the beneficiary's daily duties attributed to managing the essential function. *See* 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. Here, the Petitioner did not indicate that the Beneficiary is a function manager. The petitioner did not describe an essential function to be managed by the Beneficiary or provide a breakdown of the Beneficiary's job duties to support such a claim.

Likewise, the Petitioner has not established that the Beneficiary will be employed in an executive capacity. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct[] the management" and "establish[] the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.*

On appeal the Petitioner also asserts that the Director did not consider that:

[T]he Beneficiary is the founder, sole owner, and only executive of [the Petitioner]. He directs the management of the company in its entirety and establishes all of the goals, policies, and programs of the organization. He also exercises wide-latitude in

discretionary decision making. Moreover, there is no higher level executive or other individual or group, such as a Board of Directors, to provide him with direction. [The Petitioner] is the beneficiary's company in every sense of the word."

We acknowledge that the Beneficiary is the highest-level employee of the Petitioner; however, as noted above, this alone is not sufficient to establish that he will be *primarily* employed in an executive or managerial capacity. The designation hinges on whether or not the Petitioner demonstrates that it has the requisite level of subordinate staff capable of carrying out the duties associated with the day to day operation of the business. In this case, incorporating our earlier discussion of the deficiencies of the job description provided and the lack of evidence regarding the Petitioner's organization structure, we find that the Petitioner has not established that the U.S. business has an organizational structure sufficient to elevate the Beneficiary to a position that is primarily executive in nature or that the Petitioner has sufficient subordinate staff to relieve the Beneficiary of non-qualifying duties. For the reasons discussed above, we find that the Beneficiary will not be employed as an executive.

Further on appeal, the Petitioner rightly notes that the Director incorrectly stated that the record must establish that there are sufficient managerial or executive duties to occupy the *entirety* of the Beneficiary's time. The Petitioner also emphasizes that the Beneficiary will only be working in the United States for approximately four months a year and, for this reason, we must conclude that the Beneficiary has sufficient staff to handle the day to day operations of the business while he is working remotely abroad the other eight months a year. We do not find this assertion persuasive. Whether the Beneficiary works remotely or in the United States is not indicative of his level of involvement in the minutia of the daily business operations nor is it dispositive of the nature of his duties.

Based on the deficiencies discussed above, the Petitioner has not established that the Beneficiary will be employed in a primarily managerial or primarily executive capacity in the United States. For this reason, the appeal will be dismissed.

III. BEYOND THE DIRECTOR'S DECISION

Beyond the decision of the Director, we note that the Petitioner has not submitted evidence to establish that the Beneficiary 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. See 8 C.F.R. § 214.2(1)(3)(iii).

The petition was filed on July 7, 2014. The Petitioner must therefore establish that between July 7, 2011 and July 7, 2014, the Beneficiary had at least one continuous year of full-time employment abroad with a qualifying organization.

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The Petitioner states that the Beneficiary has been employed abroad as the General Chairman of the Board with [REDACTED] and as the General Manager and Chairman of the Board for [REDACTED], since 2000. The Petitioner also states that the Beneficiary has been serving as the President and CEO of the Petitioner since 2012 in B1/B2 status.

The Petitioner contends that as the Beneficiary owns 80% of [REDACTED] 45% of [REDACTED] and 100% of the Petitioner, the Beneficiary's employment abroad with [REDACTED] and [REDACTED] can be used to qualify for the requested status. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the Beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." *See generally* section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l). In this case, [REDACTED] and the Petitioner are not the same employer, nor are they related as a parent and subsidiary or affiliate, as defined in 8 C.F.R. § 214.2(l)(1)(ii). Therefore, the Beneficiary's employment with [REDACTED] cannot be used to establish that the Beneficiary 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.

Likewise, time spent in the United States pursuant to a B1/B2 visa, while it does not interrupt the one year of continuous employment, cannot be counted towards the one year of qualifying employment abroad that is required. According to USCIS records, the Beneficiary spent in excess of 158 days in the United States in B1/B2 status between July 7, 2011 and July 7, 2014.

Given the simultaneous employment by both the Petitioner and two foreign employers from an unspecified date in 2012 to present, the absence of information on the percentage of time the Beneficiary devoted to each entity, and the Beneficiary's significant travel to the United States, the record, as it is currently constructed, does not contain sufficient information to establish that the Beneficiary does in fact have the required one year of continuous employment abroad with a qualifying organization.

Also beyond the Director's decision, we find that the Petitioner has not established that it has been doing business in the United States. The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition must be filed by a qualifying organization. Per 8 C.F.R. § 214.2(l)(1)(ii)(G)(2) a qualifying organization means a United States or foreign firm, corporation, or other legal entity which:

- ...
- (2) Is or will be doing business as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate, or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee;
- ...

Doing business is further defined at 8 C.F.R. § 214.2(l)(1)(ii)(H), which states:

- (H) Doing business means the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office on the qualifying organization in the United States and abroad.

In this case, the record does not contain evidence that the Petitioner is doing business in the United States. Specifically, the record does not contain documentary evidence of payment received for its services, evidence that it has paid employees or consultants, or evidence of the actual continuous provision of services. We note that the Petitioner has submitted sample itineraries, pictures and certificates that it claims are from the programs offered to foreign students; however, there is no evidence that the petitioner received compensation for the provision of these services. The record also lacks information with regard to whom the services were provided.

For these additional reasons, the petition cannot be approved. We may deny an application or petition that fails to comply with the technical requirements of the law 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, 1037 (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).

IV. 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.

Cite as *Matter of H-A-USA, LLC*, ID# 14425 (AAO Nov. 13, 2015)