



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

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

*MATTER OF A-ICTUSA, INC*

DATE: OCT. 23, 2015

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a business engaged in trading in consumer goods and technology, seeks to classify the Beneficiary as an intracompany transferee. *See* Immigration and Nationality Act (the Act) § 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L). The Director, Vermont Service Center, denied the nonimmigrant visa petition. The matter is now before us on appeal. The appeal will be dismissed.

The Petitioner, a New York corporation, claims to be an affiliate of the Beneficiary's foreign employer in Bangladesh. It seeks to employ the Beneficiary as its "Manager" in order to open a new office in the United States. The Petitioner did not list the requested dates of employment on the Form I-129, Petition for a Nonimmigrant Worker.

The Director denied the petition, concluding that the Petitioner did not establish that it will support an executive or managerial position within one year of approval of the petition or that it has secured sufficient physical premises to house the new operation.

The Petitioner subsequently filed an appeal. The Director declined to treat the appeal as a motion and forwarded the appeal to us for review. On appeal, the Petitioner asserts that the evidence of record establishes that the Petitioner will grow to a sufficient size to support a managerial or executive position within one year and that the Petitioner has secured sufficient physical premises to house the new operations.

#### 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.

*Matter of A-ICTUSA, INC.*

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.

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.

## II. THE ISSUES ON APPEAL

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

The first issue to be addressed is whether the Petitioner established that the new office will support the Beneficiary in an executive or managerial position within one year of approval of the petition.

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. The “new office” regulations allow a newly established petitioner one year to develop to a point that it can support the employment of a beneficiary 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(l)(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.*

#### 1. Facts

On the L Classification Supplement to Form I-129, the Petitioner provided the following description of the Beneficiary’s duties:

We are starting an e-commerce business selling products from Bangladesh. These products will be marketed and sold world wide. The beneficiary will be taking care of customers in the United States. Products will be shipped to the New York office from where they will be distributed to customers. Also we will offer website development, design and software development to customers in the United States.

The Petitioner also provided a copy of the Memorandum of Association for the foreign entity, as well as a copy of the United States entity’s Certificate of Incorporation indicating that the corporation was authorized to issue 200 shares of stock with no par value. The Petitioner also submitted two letters from former employers of the Beneficiary in Bangladesh which summarized his prior positions.

In a request for evidence (RFE) issued on November 3, 2014, the Director requested, among other items, evidence to demonstrate how the company will grow to be of sufficient size to support a managerial or executive position and that the Beneficiary’s proposed position will be in a managerial or executive capacity. Specifically, the Director requested information regarding the proposed nature of the office and the size of the U.S. investment, as well as an overview of the organizational structure of the foreign entity.

(b)(6)

*Matter of A-ICTUSA, INC.*

In response to the RFE, the Petitioner provided, among other documents, the following evidence to show the U.S. entity will support the claimed executive position within one year of the petition's approval:

- Undated letter from the Managing Director of the foreign entity;
- List of employees of the foreign entity;
- Board Resolution of the foreign entity dated November 24, 2013;

The undated letter from [REDACTED] Managing Director of the foreign entity, stated that the United States organization was formed to "carry on the service of web design and development, online marketing," and distribution of products through e-commerce. The letter stated that the Beneficiary will be responsible for business development and marketing, "but in the case of hiring and firing; final decision will be taken by both of us." The letter stated that \$15,000 has been invested for web design and development.

The Board Resolution of the foreign entity stated that the Beneficiary would serve as Director of the United States entity. The resolution stated that the company would invest \$3,000 monthly for "business expansion purpose." Finally, resolution indicated that the Beneficiary is authorized with the following scope of authority:

- A. Will be responsible for all decisions on business development, marketing but in the case of hiring and firing; final decision will be taken by both of the shareholders whereby necessary.
- B. Written or oral instructions for future business plan & process by the authorized person.

The Director denied the decision on January 13, 2013. The Director found that the Petitioner had not established that it would grow to a sufficient size and scope by the end of the first year of operations to support a qualifying managerial or executive position.

On appeal, the Petitioner contends that the Director erred in the denial. The Petitioner provides a brief and additional evidence in support of the petition.

Specifically, the Petitioner provides an affidavit of the Beneficiary and a business plan. The Petitioner states that the business plan provided on appeal covers future sales projections, hiring personnel and other information, as well as the roles of both the Beneficiary and his partner. The Beneficiary states that the only details missing from the business plan are expenses in taxes and insurance. Regarding personnel, the Beneficiary states that he expects to "begin hiring employees at about one year after obtaining the L visa." The Beneficiary states that employees are expected to be hired to assist with marketing and shipping products and indicates that, at this point, he anticipates his duties would be strictly managerial. The Petitioner also submitted printouts from its new website, bdshoppay.com.

The business plan covers areas such as products and services, marketing plan, sales plan, operations plan, and organization plan. The Petitioner's plan includes a personnel plan stating that the Petitioner will hire "one people in first year" for the sales department, and two additional people thereafter. The Petitioner further explains that there are 50 people who work for the foreign entity performing search engine optimization, software development, web development, online marketing, customer care, face to face sales and marketing, and human resources. In the section titled "Sales Plan," the Petitioner states that the Beneficiary would be the "primary method of gaining new customers." The sales person to be hired would be responsible for door to door sales for initial sales purposes.

The business plan also includes financial projections. The financial projections show a first year budget of \$133,600. The plan states that the Petitioner "will be funded by an initial investment of \$99,000" over the course of the first year, but does not state from where it anticipates receiving the funding.

## 2. Analysis

Upon review of the petition and the evidence, and for the reasons discussed herein, the Petitioner has not established that the Beneficiary will be employed by the United States entity in a primarily managerial or executive capacity within one year of the petition's approval.

Although we note the Petitioner's claim throughout the record that the Beneficiary will be employed in a position that is primarily executive, we will nevertheless evaluate the proposed position for compliance with the definitions of both managerial and executive capacity.

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 petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* Beyond the required description of the job duties, U.S. Citizenship and Immigration Services (USCIS) reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's proposed organizational structure, the duties of the beneficiary's proposed subordinate employees, the petitioner's timeline for hiring additional staff, the presence of other employees to relieve the beneficiary from performing operational duties at the end of the first year of operations, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business. 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. *See generally* 8 C.F.R. § 214.2(l)(3)(v).

In the instant matter, the Petitioner has not provided any comprehensive description of the Beneficiary's duties. On the Form I-129, the Petitioner notes only that the Beneficiary will "be taking care of customers in the United States." This brief notation is further explained in the

business plan submitted on appeal, where it is claimed that the Beneficiary will be the “primary method of gaining new customers,” and will be assisted by a door to door sales person by the end of the first year of operations. An employee who “primarily” performs the tasks necessary to produce a product or to provide services is not considered to be “primarily” employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one “primarily” perform the enumerated managerial or executive duties); *see also Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm’r 1988).

The only other brief description the Petitioner provided of the Beneficiary’s duties in the letter submitted by the foreign entity and in the foreign entity’s Board Resolution relate mostly to his scope of authority, noting that he will be responsible for business development and marketing, and that hiring and firing decisions will be made jointly by both partners. While several of the duties broadly described by the Petitioner would generally fall under the definitions of managerial or executive capacity, the lack of specificity raises questions as to the Beneficiary’s actual responsibilities. Overall, 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. 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.

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 Petitioner shows that by the end of the first year the Beneficiary will manage one sales employee. The Petitioner, however, has not shown that this position will be a professional-level position. In addition, the Petitioner has not provided a description for the potential employee’s position other than that provided in the business plan, where it claims that the person employed in this position will perform door to door sales. Accordingly, the Petitioner has not otherwise shown that the Beneficiary will supervise a subordinate professional level employee or subordinate managerial employee. The Petitioner briefly notes in response to the RFE and again on appeal that the employees of the foreign entity would be available for software development or technology services. The Petitioner, however, did not provide any detailed information regarding what employees would be supervised, their position descriptions, the nature of their tasks, and who would be overseeing their work. The organizational structure, therefore, supports the conclusion that the

Beneficiary would be acting as a first line supervisor. Additionally, the Beneficiary's shared authority regarding hiring and firing decisions calls into question the scope of his authority as a personnel manager generally.

Alternatively, 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.*

Here, the Petitioner has not established that the Beneficiary will be employed in the U.S. in a primarily executive capacity. The Petitioner's business plan does not establish that the Beneficiary will supervise a subordinate level of managerial employees by the end of the first year of operations. Moreover, the record contains insufficient evidence to demonstrate that the Beneficiary will primarily focus on the broad goals and policies of the organization, given that the Petitioner currently has only one employee and the proposed timeline for hiring subordinate staff that would otherwise perform the day-to-day operations of the enterprise does not seem feasible, given that it anticipates hiring only one employee by the end of its first year of operations to perform sales duties. Based on these deficiencies, we find that the Petitioner has not established that it will be able to support the Beneficiary in a primarily executive capacity by the end of the first year of operations.

Furthermore, our analysis of the Beneficiary's employment capacity and the Petitioner's ability to employ him in a qualifying capacity by the end of the first year of operations is severely restricted because the record does not include a credible business plan. As contemplated by the regulations, a comprehensive business plan should contain, at a minimum, a description of the business, its products and/or services, and its objectives. *See Matter of Ho*, 22 I&N Dec. 206, 213 (Assoc. Comm'r 1998). Although the precedent relates to the regulatory requirements for the alien entrepreneur immigrant visa classification, *Matter of Ho* is instructive as to the contents of an acceptable business plan:

The plan should contain a market analysis, including the names of competing businesses and their relative strengths and weaknesses, a comparison of the competition's products and pricing structures, and a description of the target market/prospective customers of the new commercial enterprise. The plan should list the required permits and licenses obtained. If applicable, it should describe the manufacturing or production process, the materials required, and the supply sources.

The plan should detail any contracts executed for the supply of materials and/or the distribution of products. It should discuss the marketing strategy of the business, including pricing, advertising, and servicing. The plan should set forth the business's organizational structure and its personnel's experience. It should explain the business's staffing requirements and contain a timetable for hiring, as well as job descriptions for all positions. It should contain sales, cost, and income projections and detail the bases therefore. Most importantly, the business plan must be credible.

*Id.*

In response to the RFE, the letter from the foreign entity stated that "\$15,000 has been invested for web design and development." The Petitioner did not provide any evidence to show that any money had been invested in the United States entity. The Petitioner also claimed that the foreign entity would be investing \$3,000 a month in the United States operations. Finally, the business plan submitted on appeal states that an initial investment of \$99,000 will be made in the United States operations, but did not state where it anticipated the investment would come from or show that any investment had been made to date.

A review of the totality of the evidence submitted provides very little information regarding the actual number of employees to be hired, the timeline for hiring employees, the financial position of the U.S. company, the Petitioner's anticipated start-up costs and financial objectives for the first year of operations, and the physical premises secured by the U.S. company. The Petitioner's submission of a vague job description for the Beneficiary, and a general business plan, falls significantly short of meeting its burden to establish that the company will be able to support a qualifying managerial or executive position within a twelve-month period. The regulations require the Petitioner to present a credible picture of where the company will stand in one year, and to provide sufficient evidence in support of its claim that the company will grow to a point where it can support a managerial or executive position within that time. 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)).

Overall, the vague job description provided for the Beneficiary, considered in light of the Petitioner's minimal business and hiring plans for the first year of operations, prohibits a determination that the Petitioner could realistically support the employment of the Beneficiary in a primarily managerial or executive position within one year. For this reason, the appeal must be dismissed.

#### B. Physical Premises to House the New Office

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

(b)(6)

*Matter of A-ICTUSA, INC.*

## 1. Facts

On the Form I-129, the Petitioner identified its mailing address [REDACTED] NY [REDACTED]. The Petitioner identified this same address as both the Beneficiary's intended worksite and his home address.

In response to the Director's RFE on the issue of physical premises, the Petitioner stated that the beneficiary is "using his home address for business purposes." The Petitioner attached a lease with a statement that allows the premises to be used for business purposes and photos of the space to be used as an office.

The Director denied the petition, finding that the Petitioner did not provide evidence that the house was zoned for business use. On appeal, the Petitioner states that the applicable zoning regulations are not relevant, and that only whether the space is suitable for the intended business use is at issue. The Beneficiary provides the following description of the workspace:

I am using the house in which I currently live to conduct my business. Specifically, there is one room which I am using as my office. In fact, these premises are more than adequate to meet my needs at this time. I only need one room for the computer so I can work on the website, coordinate with my partner and employees who are helping me in Bangladesh and other duties. I also have use of the basement and a large closet which I use for storage....I use the basement for inventory...As we expand over time and hire additional employees and this space is no longer adequate, I will locate new premises of suitable size and functionality.

## 2. Analysis

We acknowledge that the regulations do not specify the type of premises that must be secured by a petitioner seeking to establish a new office, and observe that there may be cases in which a home office would satisfy the regulatory requirements. However, the Petitioner bears the burden of establishing that its physical premises should be considered "sufficient" as required by the regulations at 8 C.F.R. § 214.2(l)(3)(v)(A). To do so, it must clearly identify the nature of its business, the specific amount and type of space required to operate the business, its proposed staffing levels, and evidence that the space can accommodate the petitioner's growth during the first year of operations. USCIS may also consider evidence that the company has obtained a license to operate the business from a home office, if required, evidence that the landlord has authorized the use of residential space for commercial purposes, evidence that the company has established separate phone lines or made other accommodations for the use of the premises by the U.S. company, or any other evidence that would establish that a residential dwelling will meet the company's needs. Finally, photographs and floor plans of the leased premises may assist in determining that the premises secured are sufficient to accommodate the petitioner's business operations.

Here, the Petitioner submitted evidence to show landlord consent of use of the premises for a business purpose. The Petitioner, however, did not show how the space would be sufficient to house

additional staff as the company grows to a size to support a managerial or executive position. The Petitioner stated that as additional employees are hired, a new premise will be found. The physical premises, however, must be sufficient to support the additional staff at the time of filing. As previously stated, when a petitioner indicates that a beneficiary is coming to the United States to open a “new office,” it must show that it is ready to commence doing business immediately upon approval. 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 commence business, that it has the financial ability to commence doing business in the United States, and that it will support the beneficiary in a managerial or executive position within one year of approval. *See generally* 8 C.F.R. § 214.2(l)(3)(v). Here, the evidence of record is insufficient to establish that the Petitioner secured sufficient physical premises and was therefore able to commence business operations at the time of filing. Accordingly, the appeal will be dismissed for this additional reason.

### III. BEYOND THE DIRECTOR’S DECISION

Although not addressed by the Director, a remaining issue to be examined is whether the Petitioner has established that the Beneficiary’s services are for a temporary period. The regulation at 8 C.F.R. § 214.2(l)(3)(vii) states that if the beneficiary is an owner or major stockholder of the company, the petition must be accompanied by evidence that the beneficiary’s services are to be used for a temporary period and that the beneficiary will be transferred to an assignment abroad upon the completion of the temporary services in the United States. In this matter, the record shows that the beneficiary is a co-owner of the U.S. petitioner. On the Form I-129, the Petitioner left blank the space where the Beneficiary’s dates of intended U.S. employment were to be listed. In the absence of persuasive evidence, it cannot be concluded that the Beneficiary’s services are to be used temporarily or that he will be transferred to an assignment abroad upon completion of the position in the United States. Therefore, the petition may not be approved on this basis as well.

### IV. CONCLUSION

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). When we deny a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if he or she shows that we abused our discretion with respect to all of our enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1037.

*Matter of A-ICTUSA, INC.*

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N 127, 128 (BIA 2013). Here, that burden has not been met.

**ORDER:** The appeal is dismissed.

Cite as *Matter of A-ICTUSA, INC.*, ID# 14099 (AAO Oct. 23, 2015)