

LIGHTPATH TECHNOLOGIES INC

Form S-1/A

December 06, 2016

**As filed with the Securities and Exchange Commission on December 6, 2016**

**Registration No. 333-213860**

**UNITED STATES**

**SECURITIES AND EXCHANGE COMMISSION**

**WASHINGTON, D.C. 20549**

**FORM S-1/A**

**(Pre-Effective Amendment No. 4)**

**REGISTRATION STATEMENT**

***UNDER***

***THE SECURITIES ACT OF 1933***

**LIGHTPATH TECHNOLOGIES, INC.**

**(Exact name of registrant as specified in its charter)**

**Delaware**

**86-0708398**

**(State or other jurisdiction of (IRS Employer**

**incorporation or organization) Identification Number)**

**2603 Challenger Tech Court, Suite 100**

**Orlando, Florida 32826**

**(407) 382-4003**

**(Address, including zip code, and telephone number, including area code of registrant's principal executive offices)**

**J. JAMES GAYNOR, PRESIDENT & CHIEF EXECUTIVE OFFICER**

**LightPath Technologies, Inc.**

**2603 Challenger Tech Court, Suite 100, Orlando Florida 32826**

**Telephone: (407) 382-4003**

**(Name, address, including zip code, and telephone number, including area code, of agent for service)**

*With a copy to:*

**Jeffrey E. Decker, Esq.**

**Baker & Hostetler LLP**

**200 South Orange Avenue**

**Suite 2300**

**Orlando, Florida 32801**

**(407) 649-4017**

**Oded Har-Even, Esq.**

**Robert V. Condon III, Esq.**

**Zysman, Aharoni, Gayer and Sullivan & Worcester LLP**

**1633 Broadway**

**New York, New York 10019**

**(212) 660-5000**

**Approximate date of commencement of proposed sale to the public:** From time to time after the effectiveness of this registration statement.

If any of the securities being registered on this Form are to be offered on a delayed or continuous basis pursuant to Rule 415 under the Securities Act of 1933, check the following box:

If this Form is filed to register additional securities for an offering pursuant to Rule 462(b) under the Securities Act, please check the following box and list the Securities Act registration statement number of the earlier effective registration statement for the same offering.

If this form is a post-effective amendment filed pursuant to Rule 462(c) under the Securities Act, check the following box and list the Securities Act registration statement number of the earlier effective registration statement for the same offering.

If this Form is a post-effective amendment filed pursuant to Rule 462(d) under the Securities Act, check the following box and list the Securities Act registration statement number of the earlier effective registration statement for the same offering.

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Indicate by check mark whether the registrant is a large accelerated filer, an accelerated filer, a non-accelerated filer, or a smaller reporting company. See the definitions of “large accelerated filer,” “accelerated filer” and “smaller reporting company” in Rule 12b-2 of the Exchange Act. (Check one):

Large accelerated filer

Accelerated filer

Non-accelerated filer

(Do not check if a smaller reporting company) Smaller reporting company

**THE REGISTRANT HEREBY AMENDS THIS REGISTRATION STATEMENT ON SUCH DATE OR DATES AS MAY BE NECESSARY TO DELAY ITS EFFECTIVE DATE UNTIL THE REGISTRANT SHALL FILE A FURTHER AMENDMENT, WHICH SPECIFICALLY STATES THAT THIS REGISTRATION STATEMENT SHALL THEREAFTER BECOME EFFECTIVE IN ACCORDANCE WITH SECTION 8(a) OF THE SECURITIES ACT OF 1933, AS AMENDED, OR UNTIL THE REGISTRATION STATEMENT SHALL BECOME EFFECTIVE ON SUCH DATE AS THE SECURITIES AND EXCHANGE COMMISSION, ACTING PURSUANT TO SAID SECTION 8(a), MAY DETERMINE.**

**EXPLANATORY NOTE**

This Amendment No. 4 (this “Amendment”) to the Registration Statement on Form S-1 (File No. 333-213860) (the “Registration Statement”) of LightPath Technologies, Inc. is being filed solely to amend Item 16 of Part II of the Registration Statement to include Exhibit 1.1, the Form of Underwriting Agreement by and between LightPath Technologies, Inc. and Roth Capital Partners, LLC. Accordingly, this Amendment consists only of the facing page, this explanatory note, Part II of the Registration Statement, the signature page to the Registration Statement, the exhibit index, and Exhibit 1.1. The preliminary prospectus contained in the Registration Statement is unchanged and has been omitted.

**PART II****INFORMATION NOT REQUIRED IN PROSPECTUS****Item 14. Other Expenses of Issuance and Distribution**

The following table sets forth an itemization of the various expenses, all of which we will pay, in connection with the issuance and distribution of the securities being registered. All of the amounts shown are estimated except the SEC registration fee, FINRA filing fee and NCM listing fee.

SEC registration fee	\$1,426
FINRA filing fee	2,943
NCM listing fee	80,000
Accounting fees and expenses	4,000
Legal fees and expenses	100,000
Transfer agent fees and expenses	500
Printing and miscellaneous expenses	15,000
Total	\$203,869

**Item 15. Indemnification of Directors and Officers**

Section 145 of the DGCL provides for the indemnification of officers and directors of corporations in terms sufficiently broad to indemnify our officers and directors under certain circumstances from liabilities (including reimbursement of expenses incurred) arising under the Securities Act. Section 102(b)(7) of the DGCL permits a corporation to provide in its certificate of incorporation that a director of the corporation shall not be personally liable to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director, except for liability (i) for any breach of the director's duty of loyalty to the corporation or its stockholders, (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law, (iii) in respect of certain unlawful dividend payments or stock redemptions or repurchases, or (iv) for any transaction from which the director derived an improper personal benefit.

As permitted by the DGCL, our Certificate of Incorporation provides that the personal liability of each member of our Board or our stockholders for monetary damages for breach of fiduciary duty as a director is eliminated. The effect of this provision in the Certificate of Incorporation is to eliminate our rights and the rights of our stockholders (through stockholders' derivative suits on our behalf) to recover monetary damages against a director for breach of fiduciary duty as a director thereof (including breaches resulting from negligent or grossly negligent behavior) except in the

situations described in clauses (i)-(iv), inclusive, above. Specifically, Article TENTH of the Certificate of Incorporation provides as follows:

TENTH: No director of the corporation shall be personally liable to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director (i) for any breach of the director's duty of loyalty to the corporation or its stockholders, (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law, (iii) for any transaction from which the director derived an improper personal benefit, or (iv) under Section 174 of the GCL. This Article shall eliminate or limit the liability of a director for any act or omission occurring prior to the time this Article became effective.

In addition, Article 7 of our Bylaws provides, in summary, that we are required to indemnify to the fullest extent permitted by applicable law, any person made or threatened to be made a party or involved in a lawsuit action or proceeding by reason that such person is or was our officer, director, employee, or agent. Indemnification is against all liability and loss suffered and expenses reasonably incurred to the fullest extent permitted by applicable law. Unless required by law, no such indemnification is required by us of any person initiating such suit, action, or proceeding without Board authorization. Expenses are payable in advance if the indemnified party agrees to repay the amount if he or she is ultimately found to not be entitled to indemnification.

The Bylaws further provide that the indemnification rights provided for in the Bylaws shall not be deemed exclusive of any rights to the indemnified party under any bylaw, agreement, vote of stockholders or disinterested directors or otherwise.

Insofar as indemnification for liabilities arising under the Securities Act may be permitted to our directors, officers, and controlling persons pursuant to the foregoing provisions, or otherwise, we have been informed that in the opinion of the SEC such indemnification is against public policy as expressed in the Securities Act and is, therefore, unenforceable.

We provide indemnity insurance pursuant to which officers and directors are indemnified or insured against liability or loss under certain circumstances, which may include liability or related loss under the Securities Act and the Exchange Act.

#### **Item 16. Exhibits**

The exhibits to this registration statement are listed in the Exhibit Index to this registration statement, which Exhibit Index is hereby incorporated by reference.

#### **Item 17. Undertakings**

Insofar as indemnification for liabilities arising under the Securities Act of 1933 may be permitted to directors, officers and controlling persons of the registrant pursuant to the foregoing provisions, or otherwise, the registrant has been advised that in the opinion of the Securities and Exchange Commission such indemnification is against public policy as expressed in the Act and is, therefore, unenforceable. In the event that a claim for indemnification against such liabilities (other than the payment by the registrant of expenses incurred or paid by a director, officer or controlling person of the registrant in the successful defense of any action, suit or proceeding) is asserted by such director, officer or controlling person in connection with the securities being registered, the registrant will, unless in the opinion of its counsel the matter has been settled by controlling precedent, submit to a court of appropriate jurisdiction the question whether such indemnification by it is against public policy as expressed in the Act and will be governed by the final adjudication of such issue.

The undersigned registrant hereby undertakes that:

- (i) the information omitted from the form of prospectus filed as part of this registration statement in reliance upon Rule 430A and contained in a form of prospectus filed by the registrant pursuant to Rule 424(b)(1) or (4) or 497(h) under the Securities Act shall be deemed to be part of this registration statement as of the time it was declared effective; and
- (ii) each post-effective amendment that contains a form of prospectus shall be deemed to be a new registration statement relating to the securities offered therein, and the offering of such securities at that time shall be deemed to be the initial *bona fide* offering thereof.

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**SIGNATURES**

Pursuant to the requirements of the Securities Act of 1933, as amended, the registrant certifies that it has reasonable grounds to believe that it meets all of the requirements for filing on Form S-1 and has duly caused this registration statement to be signed on its behalf by the undersigned, thereunto duly authorized in the City of Orlando, State of Florida, on December 6, 2016.

LIGHTPATH TECHNOLOGIES, INC.

By: /s/ J. James Gaynor  
 Name: J. James Gaynor  
 Title: President and Chief Executive Officer

Pursuant to the requirements of the Securities Act of 1933, as amended, this registration statement has been signed by the following persons in the capacities and on the dates indicated.

<b>Signatures</b>	<b>Title</b>	<b>Date</b>
*	President and Chief Executive Officer (principal executive officer)	December 6, 2016
J. James Gaynor		
*	Chief Financial Officer (principal financial and principal accounting officer)	December 6, 2016
Dorothy M. Cipolla		
*	Chairman of the Board and Director	December 6, 2016
Robert Ripp		
*	Director	December 6, 2016
Sohail Khan		
*	Director	December 6, 2016
Steven Brueck		
*	Director	December 6, 2016
M. Scott Faris		

\*  
December 6, 2016  
Director  
Louis Leeburg

\*  
December 6, 2016  
Director  
Craig Dunham

\* By: /s/ J. James Gaynor  
J. James Gaynor, as Attorney-in-Fact

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**EXHIBIT INDEX**

The following is a list of exhibits filed as part of this registration statement.

<b>Exhibit Number</b>	<b>Description</b>	<b>Notes</b>
1.1	<u>Form of Underwriting Agreement by and between LightPath Technologies, Inc. and Roth Capital Partners, LLC</u>	*
3.1.1	Certificate of Incorporation of Registrant, filed June 15, 1992 with the Secretary of State of Delaware	1
3.1.2	Certificate of Amendment to Certificate of Incorporation of Registrant, filed October 2, 1995 with the Secretary of State of Delaware	1
3.1.3	Certificate of Designations of Class A common stock and Class E-1 common stock, Class E-2 common stock, and Class E-3 common stock of Registrant, filed November 9, 1995 with the Secretary of State of Delaware	1
3.1.4	Certificate of Designation of Series A Preferred Stock of Registrant, filed July 9, 1997 with the Secretary of State of Delaware	2
3.1.5	Certificate of Designation of Series B Stock of Registrant, filed October 2, 1997 with the Secretary of State of Delaware	3
3.1.6	Certificate of Amendment of Certificate of Incorporation of Registrant, filed November 12, 1997 with the Secretary of State of Delaware	3
3.1.7	Certificate of Designation of Series C Preferred Stock of Registrant, filed February 6, 1998 with the Secretary of State of Delaware	4
3.1.8	Certificate of Designation, Preferences and Rights of Series D Participating Preferred Stock of Registrant filed April 29, 1998 with the Secretary of State of Delaware	5
3.1.9	Certificate of Designation of Series F Preferred Stock of Registrant, filed November 2, 1999 with the Secretary of State of Delaware	6
3.1.10	Certificate of Amendment of Certificate of Incorporation of Registrant, filed February 28, 2003 with the Secretary of State of Delaware	7
3.1.11		19

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Certificate of Amendment of Certificate of Incorporation of Registration, filed March 1, 2016 with the Secretary of State of Delaware

3.2	Amended and Restated Bylaws of Registrant	15
4.1	Rights Agreement dated May 1, 1998, between Registrant and Continental Stock Transfer & Trust Company	5
4.2	First Amendment to Rights Agreement dated as of February 25, 2008, between LightPath Technologies, Inc. and Continental Stock Transfer & Trust Company	10
5.1	Opinion of Baker & Hostetler LLP as to the legality of the securities registered hereby	20
10.1	Amended and Restated Omnibus Incentive Plan dated October 15, 2002	8
10.2	Employee Letter Agreement dated June 12, 2008, between LightPath Technologies, Inc., and J. James Gaynor, its Chief Executive Officer & President	9
10.3	LightPath Technologies, Inc. Employee Stock Purchase Plan effective January 30, 2015	11
10.4	Form of Common Stock Purchase Warrant dated as of June 11, 2012, issued by LightPath Technologies, Inc. to certain investors	12
10.5	Amended and Restated Loan and Security Agreement dated as of December 23, 2014 between LightPath Technologies, Inc. and Avidbank Corporate Finance, a division of Avidbank	13

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10.6	Sixth Amendment to Lease dated as of July 2, 2014 between LightPath Technologies, Inc. and Challenger Discovery LLC	14
10.7	First Amendment to Amended and Restated Loan and Security Agreement dated as of December 23, 2015 between LightPath Technologies, Inc. and Avidbank Corporate Finance, a division of Avidbank	16
10.8	Stock Purchase Agreement dated August 3, 2016 by and among LightPath Technologies, Inc., ISP Optics Corporation, Mark Lifshotz and Joseph Menaker	17
21.1	Subsidiaries of the Registrant	18
23.1	Consent of BDO USA, LLP	21
23.2	Consent of Baker & Hostetler LLP (included in Exhibit 5.1)	20
23.3	Consent of Ltd ARMA K Revidents Auditors	21
24	Power of Attorney	18

*Notes:*

1. This exhibit was filed as an exhibit to our Registration Statement on Form SB-2 (File No: 33-80119) filed with the Securities and Exchange Commission on December 7, 1995 and is incorporated herein by reference thereto.

2. This exhibit was filed as an exhibit to our annual report on Form 10-KSB40 filed with the Securities and Exchange Commission on September 11, 1997 and is incorporated herein by reference thereto.

3. This exhibit was filed as an exhibit to our quarterly report on Form 10-Q filed with the Securities and Exchange Commission on November 14, 1997 and is incorporated herein by reference thereto.

4. This exhibit was filed as an exhibit to our Registration Statement on Form S-3 (File No. 333-47905) filed with the Securities and Exchange Commission on March 13, 1998 and is incorporated herein by reference thereto.

5. This exhibit was filed as an exhibit to our Registration Statement on Form 8-A filed with the Securities and Exchange Commission on April 28, 1998 and is incorporated herein by reference thereto.

6. This exhibit was filed as an exhibit to our Registration Statement on Form S-3 (File No: 333-94303) filed with the Securities and Exchange Commission on January 10, 2000 and is incorporated herein by reference thereto.

7. This exhibit was filed as an exhibit to our Proxy Statement filed with the Securities and Exchange Commission on January 24, 2003 and is incorporated herein by reference thereto.

8. The Amended and Restated Omnibus Incentive Plan, dated October 15, 2002 was filed as an exhibit to our Proxy Statement filed with the Securities and Exchange Commission on September 12, 2002. Amendment No. 1, dated October 20, 2004 and Amendment No. 2, dated December 6, 2004, were filed as an exhibit to our Registration Statement on Form S-8 (File No. 333-121389) filed with the Securities and Exchange Commission on December 17, 2004. Amendment No. 3, dated November 1, 2007 and Amendment No. 4, dated January 1, 2009, were filed as an exhibit to our Proxy Statement filed with the Securities and Exchange Commission on December 10, 2012. Amendment No. 5 dated January 1, 2013 was filed as an exhibit to our Registration Statement on Form S-8 filed with the Securities and Exchange Commission on May 9, 2013. Amendment No. 6 dated January 29, 2015 was filed as an exhibit to our Proxy Statement filed with the Securities and Exchange Commission on December 19, 2014.

9. This exhibit was filed as an exhibit to our Current Report on Form 8-K filed with the Securities and Exchange Commission on June 12, 2008, and is incorporated herein by reference thereto.

10. This exhibit was filed as an exhibit to Amendment No. 1 to the Registration Statement on Form 8-A/A filed with the Securities and Exchange Commission on February 25, 2008, and is incorporated herein by reference thereto.

11. This exhibit was filed as an Appendix A to our Proxy Statement (File No, 333-27548) filed with the Securities and Exchange Commission on December 19, 2014, and is incorporated herein by reference thereto.

12. This exhibit was filed as an exhibit to our Current Report on Form 8-K filed with the Securities and Exchange Commission on June 11, 2012, and is incorporated herein by reference thereto.

13. This exhibit was filed as an exhibit to our Quarterly Report on Form 10-Q filed with the Securities and Exchange Commission on February 5, 2015, and is incorporated herein by reference thereto.

14. This exhibit was filed as an exhibit to our Current Report on Form 8-K filed with the Securities and Exchange Commission on July 8, 2014, and is incorporated herein by reference thereto.

15. This exhibit was filed as an exhibit to our Current Report on Form 8-K filed with the Securities and Exchange Commission on February 3, 2015 and is incorporated herein by reference thereto.

16. This exhibit was filed as an exhibit to our Quarterly Report on Form 10-Q filed with the Securities and Exchange Commission on February 4, 2016 and is incorporated herein by reference thereto.

17. This exhibit was filed as an exhibit to our Annual Report on Form 10-K filed with the Securities and Exchange Commission on September 15, 2016 and is incorporated herein by reference thereto.

18. This exhibit was filed as an exhibit to our Registration Statement on Form S-1 filed with the Securities and Exchange Commission on September 29, 2016 and is incorporated herein by reference thereto.

19. This exhibit was filed as an exhibit to our Quarterly Report on Form 10-Q filed with the Securities and Exchange Commission on November 14, 2016 and is incorporated herein by reference thereto.

20. This exhibit was filed as an exhibit to our Registration Statement on Form S-1 filed with the Securities and Exchange Commission on November 18, 2016 and is incorporated herein by reference thereto.

21. This exhibit was filed as an exhibit to our Registration Statement on Form S-1 filed with the Securities and Exchange Commission on November 29, 2016 and is incorporated herein by reference thereto.

\* Filed herewith.

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