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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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File: [REDACTED] Office: TEXAS SERVICE CENTER Date: JUL 12 2005

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)

IN BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant petition was initially approved by the Director, Texas Service Center. Upon further review of the record, the director issued a notice of intent to revoke the approval and ultimately revoked the approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn and the matter remanded to the director for further consideration.

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary as its President as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a corporation organized in the State of Florida that operates a gas and automobile service station. The petitioner claims that it is a subsidiary of [REDACTED] located in Brazil. The director approved the nonimmigrant petition on September 9, 2002.

Based on further review of the record, the director issued a notice of intent to revoke the approval on March 31, 2004. The director determined that, due to the fact that the petitioner operates under a franchise agreement, the petitioner failed to show that it has control over its operations such that it is a qualifying organization. The petitioner was given 30 days in which to submit evidence in rebuttal of the stated ground for revocation and in support of the petition.

Counsel for the petitioner submitted correspondence dated April 6, 2004, in which he noted that the director issued two separate notices of intent to revoke approval of the instant petition.¹ Counsel provided a copy of correspondence dated March 24, 2004 as a response to the notices. Counsel submitted a copy of the petitioner's franchise agreement, further description of the beneficiary's duties, and documentation to show that the petitioner is an affiliate of the foreign entity due to common ownership by the same individual.

The director revoked the approval of the petition on June 1, 2004. The director determined that the petitioner's franchise agreement limits its control over its operations. The director stated that "[t]his clearly demonstrates the petitioner although able to establish ownership, clearly is not able to establish control over the enterprise. The petitioner has failed to establish the foreign company and the U.S. petitioner meet the definition of qualifying organizations."

On appeal, counsel submits a statement on Form I-290B addressing the ground for revocation as follows:

There is full discretion over the corporate matters in the hands of the Petitioner. [REDACTED] representative only appeared 4 time[s] last year, talking mainly about promotion of the station. This is not any "effective control" over any business. There are many L-1 beneficiaries as executives over franchise operations which form the U.S. business

¹ Counsel references two Notices of Intent to Revoke that Citizenship and Immigration Services (CIS) issued on March 18, 2004 and March 31, 2004. While counsel claims that both Notices of Intent to Revoke were issued in connection with the present petition, the notice dated March 18, 2004 pertained to a separate petition (SRC-03-225-50224) involving the same petitioner and beneficiary. The petition in connection with the March 18, 2004 notice was revoked in May 2004, and the petitioner has not appealed the revocation decision.

undertaken. If a franchise surrenders or fails it is the day to day work of the executives and managers that cause[s] it, not the few hours that the franchisor spends on it every 13 weeks.

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.

Under CIS regulations, the approval of an L-1A petition may be revoked on notice under six specific circumstances. 8 C.F.R. § 214.2(l)(9)(iii)(A). To properly revoke the approval of a petition, the director must issue a notice of intent to revoke that contains a detailed statement of the grounds for the revocation and the time period allowed for rebuttal. 8 C.F.R. § 214.2(l)(9)(iii)(B).

In the present matter, the director provided a detailed statement of the grounds for the revocation but did not cite to the specific provision of the regulations as a basis for the revocation. The director reviewed the rebuttal evidence and concluded that, though the petitioner indicated that it has a qualifying relationship with the foreign entity, the franchise agreement under which it operates restricts its authority over its business activity to the point that it does not have control of its company. Upon review, the director revoked the approval on the basis of 8 C.F.R. § 214.2(l)(9)(iii)(A)(5): "Approval of the petition involved gross error."

The term "gross error" is not defined by the regulations or statute. Furthermore, although the term has a juristic ring to it, "gross error" is not a commonly used legal term and has no basis in jurisprudence. *See Black's Law Dictionary* 562, 710 (7th Ed. 1999)(defining the types of legal "error" and legal terms using "gross" without citing "gross error"). The word "gross" is commonly defined first as "unmitigated in any way: UTTER," as in "gross negligence." *Webster's II New College Dictionary* 491 (2001).

As the term "gross error" was created by regulation, it is most instructive to examine the comments that accompanied the publication of the rule in the Federal Register. The term "gross error" was first used in the regulations relating to the revocation of a nonimmigrant L-1 petition. In the 1986 proposed rule, an L-1 revocation would be permitted if the approval had been "improvidently granted." 51 Fed. Reg. 18591, 18598 (May 21, 1986)(Proposed Rule). After receiving comments that expressed concern that the phrase "improvidently granted" might be given a broader interpretation than intended, the agency changed the final rule to use the phrase "gross error." 52 Fed. Reg. 5738, 5749 (Feb. 26, 1987)(Final Rule). As an example of gross error in the L-1 context, the drafter of the regulation stated:

This provision was intended to correct situations where there was gross error in approval of the petition. For example, after a petition has been approved, it may later be determined that a qualifying relationship did not exist between the United States and the foreign entity which employed the beneficiary abroad.

Id. In the context of the L-1 nonimmigrant classification, the phrase "qualifying relationship" is a fundamental requirement for visa eligibility and is defined by the regulation. *See* 8 C.F.R. § 214.2(l)(1)(ii)(G). However, this element of eligibility is not a simple determination or one where there is always a obvious answer. To determine whether a qualifying relationship exists between United States and foreign entities, CIS must examine the elements of "ownership and control," whether by *de jure* or *de facto* control, by reviewing corporate stock certificates, a stock certificate registry or ledger, corporate bylaws, the minutes of relevant annual shareholder meetings, proxy agreements, and any other relevant documentation. *See Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). As authorized by Congress, CIS is charged with the authority to make this determination based on the implementing regulations. *See generally* section 214 of the Act, 8 U.S.C. § 1184.

Accordingly, upon review of the regulatory history and the common usage of the term, the AAO interprets the term "gross error" to be an unmitigated or absolute error, such as an approval that was granted contrary to the requirements stated in the statute or regulations. Regardless of whether there can be debate as to the legal determination of eligibility, any approval that CIS determines to have been approved contrary to law must be considered an unmitigated error, and therefore a "gross error." This view of "gross error" is consistent with the example provided in the Federal Register. *See* 52 Fed. Reg. at 5749.

Upon review, the petitioner has rebutted and overcome the director's ground for revocation. Upon review of the petitioner's franchise agreement, it is evident that the petitioner maintains ultimate control over its operations. While the agreement does impose requirements regarding how the petitioner conducts business with its gas and service station, control remains with the petitioner, as evidenced by the following paragraph in the agreement:

LESSEE'S INDEPENDENCE. Lessee is an independent businessperson, and nothing in this Lease may be construed as reserving to Lessor any right to exercise any control, or to direct any respect the conduct or management of, Lessee's business or operations conducted pursuant to this Lease; but the entire control and direction of such business and operations are and will remain in Lessee, subject only to Lessee's performance of the obligations of this Lease.

Further, the petitioner is free to engage in other business ventures not covered by the agreement.

Accordingly, the petitioner has established that the franchise agreement does not undermine a finding that it is a qualifying organization. Further, the petitioner has submitted sufficient evidence to show that it and the foreign entity are owned and controlled by the same individual, rendering them affiliates. *See* 8 C.F.R. § 214.2(l)(1)(ii)(L)(1). Thus, the petitioner has rebutted the director's ground for revocation, and the director's decision to revoke approval of the petition will be withdrawn.

However, upon review of the evidence of record, the petitioner failed to establish that the beneficiary would be employed by the petitioner in a primarily managerial or executive capacity, as required by 8 C.F.R. § 214.2(l)(3)(ii).

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.
- (v) 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.

In a letter submitted with the initial petition on June 25, 2002, the petitioner described the beneficiary's prospective duties in the United States as follows:

[The beneficiary] is being transferred to the United States to fill the position of President and Director of [the petitioner]. [The beneficiary] will exercise general discretion authority over the Financial, Administrative and Commercial departments of the subsidiary and the detailed description of her duties at this initial stage of the Corporation is delineated as follows:

- hire and fire of employees, train individuals to fill out positions involving supervision (10% of her time);
- decide on the company's budget allocation of funds coming from the foreign parent company and
- determine and establish the company's goals, marketing plans and strategies (20% of her time);
- direct and coordinate the day-to-day activities of the subordinate managers and supervisors, as well as
- indirect management of staff (50% of her time);
- creation and implementation of internal norms and procedures for the daily operation and
- indirect supervision of accounts payable and receivable (20% of her time).

[The beneficiary] will have full discretion over the corporate matters and businesses of [the petitioner]; she will also have discretionary authority over the negotiations of contracts with foreign and local companies; research other prospective markets to be approached; she will have autonomous control over and will exercise wide latitude in decision making, establishing the most advantageous courses of action for the successful management of our international development activities.

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). 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.* The petitioner must specifically state whether the beneficiary is primarily employed in a managerial or executive capacity.

In the instant matter, the petitioner represents that the beneficiary's duties will include significant supervisory responsibility over subordinate employees, including managers and supervisors. However, the petitioner has failed to provide any documentation to show that it in fact employs individuals in addition to the beneficiary. Such documentation should include: (1) a line and block organizational chart for the petitioner that clearly shows the beneficiary's position and that of all employees within the petitioner's divisions; (2) a description of the duties of each of the beneficiary's subordinate employees, including an indication of any managerial or supervisory authority they exercise; (3) copies of the petitioner's IRS Forms 941, Employer's Quarterly Federal Tax Return, and State quarterly reports for the second and third quarters of 2002, including attachments that list all individuals employed by the petitioner; (4) copies of the petitioner's payroll summary, W-2's, and W-3's evidencing wages paid to employees; (5) an explanation of the educational background of each of the beneficiary's subordinates, including copies of diplomas, if applicable; (6) an accounting of the number of hours each of the petitioner's employees work each week; and (7) any further documentation that the director deems necessary.

Without the above-listed documentation, CIS cannot determine the level of supervisory authority held by the beneficiary, or whether the petitioner employs sufficient staff that will relieve the beneficiary from performing primarily non-managerial and non-executive duties. Further, without this evidence CIS cannot

assess the accuracy of the job description provided for the beneficiary. 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Although the beneficiary is not required to supervise personnel, if it is claimed that her 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, the AAO 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." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by a subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above.

The definitions of executive and managerial capacity 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 prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). In light of the fact that the petitioner has failed to show that it employs workers that are subordinate to the beneficiary, the job description for the beneficiary suggests that she devotes significant time to non-qualifying duties. For example, the petitioner stated that the beneficiary will indirectly supervise accounts payable and receivable. Yet, without subordinates, it appears that the beneficiary will perform the day-to-day clerical tasks of maintaining these accounts. The petitioner indicated that the beneficiary will commit 50 percent of her time to "indirect management of staff." Yet, without subordinate employees, it is unclear what tasks the beneficiary will perform during this period. The petitioner must submit sufficient evidence to show that non-qualifying duties do not constitute the majority of the beneficiary's time.

It is further noted that the petitioner has failed to provide a clear business plan that discusses "the scope of the entity, its organizational structure, and its financial goals." 8 C.F.R. § 214.2(l)(3)(v)(C)(I). Additionally, the petitioner has not submitted evidence that "[s]ufficient physical premises to house the new office have been secured." 8 C.F.R. § 214.2(l)(3)(v)(A). The petitioner submitted a lease for its claimed gas station dated

November 22, 1999, yet it was executed by the previous owner, not the petitioner. Thus, it does not serve as evidence that the petitioner had secured sufficient premises as of the date the petition was filed.

In this matter, the petitioner has overcome the specific ground for the director's revocation. However, additional grounds for ineligibility exists, and further evidence is required in order to establish that the petitioner met the requirements for L-1A classification as of the date of filing the petition. The director is instructed to issue a new notice of intent to revoke approval of the petition addressing the issues discussed above, and any other evidence she deems necessary.

ORDER: The decision of the director dated June 1, 2004 is withdrawn. The matter is remanded for further action and consideration consistent with the above discussion and entry of a new decision.