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U.S. Citizenship
and Immigration
Services

D7



FILE: EAC 04 097 52344 Office: VERMONT SERVICE CENTER Date: **JUL 11 2006**

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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.

bert P. Wiemann, Chi
Administrative Appeals Office

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DISCUSSION: The Director, Vermont Service Center, initially approved the nonimmigrant visa petition. Upon subsequent review, the director issued a notice of intent to revoke and, after receiving a partial rebuttal from the petitioner, revoked approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be summarily dismissed.

The petitioner filed this nonimmigrant petition seeking to extend the employment of 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 New York corporation that claims to operate an import and export business. The petitioner claims that it is a subsidiary of Anhui Hua Bei Fur Clothing Co. Ltd, located in China. The beneficiary was previously granted a one-year period of stay in L-1A status in order to open a new office in the United States, and the petitioner now seeks to extend her stay.¹

The Form I-129 petition was filed on February 17, 2004 and approved on March 16, 2004. On June 16, 2004, the director issued a notice of intent to revoke the approval. The director noted that Citizenship and Immigration Services (CIS) had revoked approval of both “new office” petitions filed by the petitioner on behalf of the beneficiary, thereby making the petitioner and beneficiary ineligible for the previously granted extension. The director further observed that a review of the evidence submitted in support of the petition reflected only proposed staffing and business activities, rather than evidence that the new office had grown to a point where it could support a managerial or executive petition as of the date of filing. The director instructed the petitioner to submit specific evidence in rebuttal of the issues raised in the notice of intent to revoke, or any other evidence that would overcome the proposed grounds for revocation, including evidence that the petitioner currently had a valid “new office” petition that would allow a request for an extension. The petitioner submitted rebuttal evidence on July 8, 2004, but failed to submit the majority of the requested documentation, or otherwise explain why the requested evidence was unavailable.

The director revoked the approval of the petition on September 30, 2004, concluding that the petitioner had not established: (1) that the beneficiary would be employed in a primarily managerial or executive capacity; or (2) that the U.S. company had been doing business in the United States for the previous year. The director also observed the petitioner’s failure to submit evidence specifically requested in the notice of intent to revoke, the petitioner’s apparent lack of a commercial lease agreement demonstrating that the company had sufficient physical premises to operate the business, and lack of evidence that the foreign entity had actually funded the petitioning organization.

¹ The petitioner previously filed two Form I-129 Petitions requesting L-1A classification on behalf of the beneficiary. The first petition (EAC 03 019 54109) was approved for a one-year period commencing on December 20, 2002, but the request for a change and extension of the beneficiary’s status was denied. The director subsequently issued a notice of intent to revoke approval and ultimately revoked approval of this petition on December 11, 2003. The petitioner filed a second “new office” L-1A petition (EAC 03 078 53043) again requesting that the beneficiary be granted a change of status from B-2 to L-1A. This petition and request for a change and extension of status were approved, with validity dates of February 18, 2003 to February 17, 2004. The director issued a notice of intent to revoke approval and subsequently revoked approval of this petition on May 14, 2004.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the director "reached its denial decision based upon incomplete information." Counsel claims that the petitioning company has a U.S. subsidiary, JQ Project International, which is under the managerial control of the petitioner and the beneficiary, who currently supervises seven full-time employees of the subsidiary company. In support of the appeal, the petitioner submits: (1) IRS Forms 1120, U.S. Corporation Income Tax Return, for the petitioner and its claimed subsidiary for the 2003 year; (2) job descriptions for the beneficiary and the other employees of JQ Project International; (3) Forms 941, Quarterly Federal Tax Returns, for the second and third quarters of 2004 for JQ Project International; (4) an office lease for JQ Project International, which is valid from April 1, 2004; and (5) copies of invoices and contracts evidencing recent business activities of JQ Project International Inc. Counsel asserts that the petitioner "operates at a level that supports a managerial or executive petition," and contends "it is unrealistic to say that the president . . . of a company of 8 full-time employees is not functioning primarily in managerial or executive nature."

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-1 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. 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).

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 AAO will affirm the director's decision to revoke approval of the petition. The present petition was properly revoked as the director clearly approved the petition in gross error, contrary to the eligibility requirements provided for in the regulations. Further, the AAO finds that the director had sufficient reason to find that the beneficiary was no longer eligible for an extension of the previously approved I-129 "new office" petition that was subsequently revoked by CIS.

Regulations at 8 C.F.R. § 103.3(a)(1)(v) state, in pertinent part:

An officer to whom an appeal is taken shall summarily dismiss any appeal when the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal.

On appeal, counsel for the petitioner does not dispute the director's findings or suggest that the decision was based on an erroneous conclusion of fact or law. Rather, the director alleges that the director's decision was based on "incomplete information." However, the petitioner was already provided with an opportunity to supplement the record with evidence of the petitioner and beneficiary's eligibility and failed to submit the majority of the requested evidence. To the extent that the record before the director was "incomplete," it was due to this failure on the part of the petitioner. Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); see also *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's notice of intent to revoke. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal.

Furthermore, even if the AAO did consider the evidence submitted on appeal, it must be noted that the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). While the evidence submitted on appeal suggests that the petitioning company may currently have an active subsidiary that is doing business in the United States, the subsidiary company was incorporated approximately two weeks prior to the filing of this petition and does not appear to have been operational at that time.

Generally, the director's decision to revoke the approval of a petition will be affirmed, notwithstanding the submission of evidence on appeal, where a petitioner fails to offer a timely explanation or rebuttal to a properly issued notice of intention to revoke. *See Matter of Arias*, 19 I&N Dec. 568, 569 (BIA 1988). In this matter, the director's notice of intent to revoke was properly issued based on a number of evidentiary deficiencies in the record. Although the petitioner technically submitted a timely response to the notice of intent to revoke, it failed to rebut the majority of the deficiencies noted in great detail in the director's notice of intent to revoke, nor did it submit the majority of the evidence or explanation which was clearly and specifically requested by the director. For this additional reason, the director's decision to revoke the approval of the petition will not be disturbed.

The AAO concurs with the director's decision that the evidence submitted at the time of filing and in response to the notice of intent to revoke did not establish: (1) that the beneficiary would be employed in a managerial or executive capacity under the extended petition; or (2) that the U.S. company had been doing business in the United States for the previous year. The petitioner provided no evidence that the petitioner's new office had been staffed or had commenced doing business, and thus no evidence that the petitioner or beneficiary were eligible for an extension of the new office petition. The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in CIS regulations that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension.

Finally, although not specifically addressed by the director, the petitioner has not submitted sufficient evidence to establish the existence of a qualifying relationship between the U.S. and foreign entities, as required by 8 C.F.R. § 214.2(l)(3)(i). The petitioner claims to be a wholly-owned subsidiary of Anhui Bei Clothing Co. Ltd., located in China. The petitioner initially submitted its certificate of incorporation, a copy of its stock certificate number one issuing all of its 200 authorized shares to the foreign entity, and blank stock certificates numbered two through 20. The record also contains the petitioner's New York Form NYC 4S, General Corporation Tax Return, which lists the beneficiary as the company's only stockholder owning in excess of 5% of capital stock. Although requested by the director, the petitioner did not provide evidence that the foreign entity had in fact paid for its interest in the U.S. company. Given the inconsistencies and deficiencies in the record, the petitioner's stock certificate alone is not sufficient to establish the claimed parent-subsidiary relationship. 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). Consequently, it cannot be concluded that the petitioner has a qualifying relationship with the foreign entity. For this additional reason, the petition cannot be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

Inasmuch as the petitioner has failed to identify specifically an erroneous conclusion of law or a statement of fact in this proceeding, the appeal must be summarily dismissed.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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. Here, that burden has not been met.

ORDER: The appeal is summarily dismissed.