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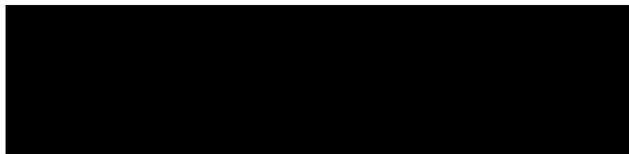
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File: SRC 05 800 18738 Office: TEXAS SERVICE CENTER Date: OCT 03 2007

IN RE: Petitioner:
Beneficiary:



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 F. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, initially approved the nonimmigrant visa petition. Upon further review, the director determined that the beneficiary was not eligible for the benefit sought. Accordingly, the director properly served the petitioner with notice of her intent to revoke the approval, and the approval was subsequently ordered revoked. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Texas limited liability company and is allegedly a freight forwarding business. The petitioner originally sought to employ the beneficiary as its operations manager 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 director subsequently revoked the petition on April 24, 2006 concluding that the petitioner had not overcome a finding by the United States Consulate in Nuevo Laredo, Texas, that the beneficiary will not be employed in a primarily managerial or executive capacity. Also, the director made her decision to revoke the petition after concluding that the petitioner had not timely responded to the Notice of Intent to Revoke sent to counsel to the petitioner on or about March 8, 2006.

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, the petitioner asserts that it did file a timely response to the Notice of Intent to Revoke on April 8, 2006, and argues that the director erred in failing to consider its response before revoking the petition. In support of this contention, the petitioner provides evidence that a package with a reference to [REDACTED] was delivered to the Texas Service Center on April 8, 2006. Counsel also submits a brief and a copy of the April 8, 2006 response to the Notice of Intent to Revoke. Counsel asserts that the consular officer's determinations were in error and that the beneficiary will be employed in the United States in a primarily managerial capacity.

To establish eligibility under section 101(a)(15)(L) of the Act, the petitioner must meet certain criteria. Specifically, within three years preceding the beneficiary's application for admission into the United States, a firm, corporation, or other legal entity, or an affiliate or subsidiary thereof, must have employed the beneficiary for one continuous year. Furthermore, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

- (iii) Evidence that the alien has at least one continuous year of full time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

As a threshold matter, the proper consideration of the petitioner's response to the Notice of Intent to Revoke must be addressed. As asserted by counsel, the petitioner responded to the Notice of Intent to Revoke on April 8, 2006. In support of this contention, counsel provides receipts and tracking documents evidencing receipt of a package referring to [REDACTED] by the Texas Service Center on Saturday, April 8, 2006, or 31 days after the date of the Notice of Intent to Revoke of March 8, 2006.¹

The AAO agrees with the petitioner that it is more likely than not, given this evidence, that the Texas Service Center received the timely response to the Notice of Intent to Revoke and erroneously failed to consider the response as timely. Although the petitioner was properly given 30 days to respond to the Notice of Intent to Revoke pursuant to 8 C.F.R. § 214.2(l)(9)(iii)(B), the Notice of Intent to Revoke was served upon counsel by mail. In accordance with 8 C.F.R. § 103.5a(b), three days must be added to the prescribed period. Therefore, the petitioner actually had 33 days to respond, and a response was not due at the Texas Service Center until Monday, April 10, 2006.

However, as the petitioner resubmitted the April 8, 2006 response on appeal, the AAO will properly consider this evidence in its adjudication of the appeal rather than withdraw and remand the matter to the director. Even through the director committed a procedural error by failing to properly consider the April 8, 2006 response in revoking the petition, it is not clear what remedy would be appropriate beyond the appeal process itself. The petitioner has in fact supplemented the record on appeal, and therefore it would serve no useful purpose to remand the case simply to supplement the record with evidence that should have been considered in the first instance.

Therefore, the primary issue in this matter is whether, after full consideration of the response to the Notice of Intent to Revoke originally submitted on April 8, 2006, the director's revocation of the petition was proper. Upon review, the AAO has determined that the revocation was proper and the appeal will be dismissed.

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

¹The effective receipt date was Monday, April 10, 2006, as Citizenship and Immigration Services (CIS) offices are not open and able to receive mail on a Saturday. Regardless, even if the due date of the response fell on Saturday, the regulations provide that the actual due date would be on the next day which is not a Saturday, Sunday, or legal holiday. See 8 C.F.R. § 1.1(h).

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 bases of 8 C.F.R. § 214.2(l)(9)(iii)(A)(4) (the statement of facts contained in the petition was not true and correct) and 8 C.F.R. § 214.2(l)(9)(iii)(A)(5) (approval of the petition involved gross error), as further explained below.²

The primary substantive issue in this matter is whether approval of the petition involved gross error, and/or whether the facts in the petition are incorrect or untrue, in relation to whether the beneficiary will be employed primarily in a managerial capacity. See 8 C.F.R. § 214.2(l)(3)(ii).³

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;

²The 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.

³As counsel clearly limits the beneficiary to the managerial classification in the response to the Notice of Intent to Revoke, the AAO will not consider the executive classification. Regardless, the record does not establish that the beneficiary will be employed in a primarily executive capacity for the same reasons set forth herein.

- (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.

The petitioner described the beneficiary's job duties in a letter dated March 2, 2005 as follows:

[The foreign entity] would like to transfer [the beneficiary] to [the petitioner] to be the Manager of Operations at that location. As Manager of Operations, he will be completely responsible for company-wide Operations of the business in the U.S. He will serve as the Classification Manager of Freight and Freight Coordination and he will be responsible for implementing current organizational policies. [The organization is] relying on his years of experience with [the] business to continue to develop standards and policies for [the] business as well as enforce the current standards and policies in place.

On March 24, 2005, the director requested additional evidence. The director requested, *inter alia*, an organizational chart for the petitioner which includes detailed job descriptions for all employees.

In response, the petitioner submitted an organizational chart for the petitioner which shows the beneficiary supervising an inspector, an assistant, and three customer service employees. Each of the customer service employees is shown supervising one warehouse worker. The customer service employees are described as follows:

Each [customer service employee] is assigned a client. They have to check that all merchandise is in clearance. Any discrepancies are advise [sic] immediately to their [p]ertaining clients.

The petitioner also described the inspector, the assistant, and the warehouse workers as performing tasks necessary to produce a product or to provide a service, e.g., inspecting merchandise, "paperwork," and loading/unloading merchandise. It must be noted that the list of employees and job descriptions attached to the organizational chart is inconsistent with the chart. For example, the person described as the "assistant" in the organizational chart is identified as a "customer service" employee in the attached job descriptions.

Likewise, the individual identified in the chart as the inspector does not appear in the list of job descriptions. However, the individual identified as the inspector in the list of job descriptions is identified as a warehouse worker in the organizational chart. The petitioner offers no explanation for these inconsistencies.

Finally, the beneficiary's proposed position in the United States is described in the list of job descriptions as follows:

[The beneficiary's] duties are coordinating the exports and imports; devising methods of transporting merchandise; resolving legal issues involved with importing[/]exporting goods.

In addition all merchandise whether incoming or outgoing are accounted for. Supervises traffic clerks and ware-house [sic] personnel.

On June 7, 2005, the petition was approved by the Texas Service Center.

On March 8, 2006, the director served a Notice of Intent to Revoke by mail on counsel to the petitioner. As explained by the director, the United States Consulate in Nuevo Laredo, Mexico, concluded that the beneficiary would not be employed in a primarily managerial or executive capacity in the United States. Based on the interview of the beneficiary and its review of the evidence, the Consulate concluded, *inter alia*, that the beneficiary would be primarily employed as a first-line supervisor and recommended to CIS that the petition be revoked. The petitioner was granted 30 days to rebut this determination.

In response, counsel to the petitioner provided an updated organizational chart in which the "customer service" employees are now referred to as "traffic clerks," although they are still portrayed as supervising the warehouse workers. The traffic clerks are described as "responsible to obtain legal documentation for shipments, make arrangements with the shippers, and coordinates [sic] the merchandise to their respected destinations."

As explained above, the director ultimately revoked the petition on April 24, 2006 without considering counsel's response to the Notice of Intent to Revoke. The director determined that the petitioner had not overcome a finding by the United States Consulate in Nuevo Laredo, Texas, that the beneficiary will not be employed in a primarily managerial or executive capacity.

In view of the above and upon full consideration of the petitioner's response to the Notice of Intent to Revoke, the AAO concludes that the approval of the petition involved gross error and that the petition contained incorrect or untrue facts. The petitioner did not establish that the beneficiary will be employed in a primarily managerial capacity and submitted a misleading organizational chart for the United States operation.

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.* In this matter, the petitioner clearly asserts that the beneficiary will be employed in a primarily managerial capacity.

The petitioner's description of the beneficiary's job duties has failed to establish that the beneficiary will act in a "managerial" capacity. In support of its petition, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary will do on a day-to-day basis. For example, the petitioner states that the beneficiary will be responsible for company-wide operations, will implement, develop, and enforce policies and standards, and will devise methods of transporting merchandise. However, the petitioner does not explain what policies or standards will be implemented, developed, or enforced and does not define with any specificity what, exactly, the beneficiary will do in devising methods of transporting merchandise. Likewise, ascribing broad duties such as "responsible for company-wide operations" will not establish that a beneficiary will be primarily employed as a manager. The fact that the petitioner has given the beneficiary a managerial title and has prepared a vague job description which includes inflated job duties does not establish that the beneficiary will actually perform managerial duties. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature; otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Therefore, based on the insufficiency of the beneficiary's job description, the approval of the instant petition involved gross error.

The petitioner has also failed to establish that the beneficiary will supervise and control the work of other supervisory, managerial, or professional employees, or will manage an essential function of the organization. As explained in the organizational chart and job descriptions for the subordinate staff members, the beneficiary will supervise a staff of eight or nine workers. However, the petitioner has not established that any of these employees are primarily engaged in performing supervisory or managerial duties. While the organizational chart indicates that the "customer service" employees, who are also referred to as "traffic clerks," supervise the warehouse workers, the petitioner's description of the customer service/traffic clerk employees reveals that the organizational chart is misleading. The customer service/traffic clerk employees clearly do not have any supervisory or managerial functions and, similar to the other workers who will be subordinate to the beneficiary, are engaged in performing the tasks necessary to produce a product or to provide a service.

In view of the above, the beneficiary will be primarily a first-line supervisor of non-professional employees, the provider of actual services, or a combination of both. 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. 1988). A managerial employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. 101(a)(44)(A)(iv) of the Act; see also *Matter of Church Scientology International*, 19 I&N Dec. at 604. Moreover, as the petitioner did not establish the skill level or educational background required to perform the duties of the subordinate positions, the petitioner has not established that the beneficiary will

manage professional employees.⁴ Therefore, the petitioner has not established that the beneficiary will be employed primarily in a managerial capacity, and the approval the instant petition involved gross error and was based on untrue or incorrect facts regarding the organization of the petitioner.⁵

It must be noted that it is appropriate for CIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g., Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.* In this matter, the petitioner's description of its organization and employees is rife with inconsistencies. As explained above, the person described as the "assistant" in the organizational chart is identified as a "customer service" employee in the attached job

⁴In 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).

⁵While the petitioner has not argued that the beneficiary will manage an essential function of the organization, the record nevertheless would not support this position even if taken. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act. The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed in managing the essential function, i.e., identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. *See* 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. In this matter, the petitioner has not provided evidence that the beneficiary will manage an essential function. The petitioner's vague job description fails to document what proportion of the beneficiary's duties would be managerial functions, if any, and what proportion would be non-managerial. Also, as explained above, the record establishes that the beneficiary will primarily be a first-line supervisor of non-professional employees. Absent a clear and credible breakdown of the time spent by the beneficiary performing his duties, the AAO cannot determine what proportion of his duties would be managerial, nor can it deduce whether the beneficiary will primarily perform the duties of a function manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

descriptions. Likewise, the individual identified in the chart as the inspector is not described anywhere in the list of employees. However, the individual identified as the inspector in the employee list is identified as a warehouse worker in the organizational chart. The petitioner offers no explanation for these inconsistencies. 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). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591. In view of these serious inconsistencies, the director's approval of the petition also involved gross error for this reason.

Accordingly, the director's approval of the petition involved gross error and the petition will be revoked pursuant to 8 C.F.R. § 214.2(l)(9)(iii)(A)(5). Moreover, as explained above, the petition contained facts regarding its organization which were untrue or incorrect, and the petition will be revoked pursuant to 8 C.F.R. § 214.2(l)(9)(iii)(A)(4). The petitioner has failed to establish that the beneficiary will be primarily performing managerial duties in the United States.

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. The petitioner has not met this burden.

ORDER: The appeal is dismissed.