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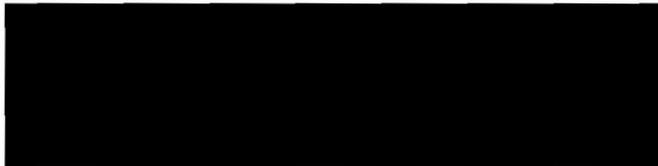
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FILE: EAC 06 249 53398 Office: VERMONT SERVICE CENTER Date: OCT 21 2008

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

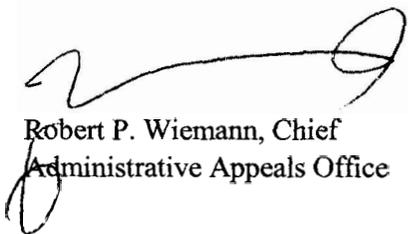
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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.


Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, initially approved the nonimmigrant visa petition. Upon subsequent review, the director issued a notice of intent to revoke approval and ultimately revoked approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary 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, a Georgia limited liability company, states that it is engaged in the construction, renovation and development of commercial and residential property. The petitioner claims to be a subsidiary of ET “Inna” 83, located in Sofia, Bulgaria. The beneficiary was initially granted one year in L-1A classification in order to open a new office in the United States, and the petitioner seeks to extend his status for one additional year.

The original “new office” petition was approved on September 7, 2005, granting the beneficiary one year to open the new office and commence doing business in a regular, systematic, and continuous manner. The petitioner filed the current nonimmigrant petition on September 6, 2006, and it was approved on September 21, 2006 for a one-year period commencing on the date of approval. On December 17, 2007, the director issued a notice of intent to revoke the approval. The director advised the petitioner that, pursuant to a site visit conducted in the United States and an overseas investigation, questions were raised as to whether the U.S. and foreign companies are doing business, and as to whether the beneficiary is employed in the United States in a primarily managerial or executive capacity. The director instructed the petitioner to submit additional evidence or arguments in rebuttal of the issues raised in the notice of intent to revoke. The petitioner submitted rebuttal evidence on January 18, 2008.

The director revoked the approval of the petition on May 1, 2008, concluding that the petitioner failed to establish that the beneficiary will be employed in a managerial or executive capacity.

The petitioner subsequently filed an appeal. On appeal, counsel for the petitioner cites an unpublished decision to stand for the proposition that a beneficiary may qualify as a function manager if he utilizes outside independent contractors, so long as his primary duties are to plan, organize, direct and control the organization’s major functions. Counsel states that although the beneficiary in this matter is the sole employee of the petitioning company, he utilizes independent contractors to provide services to the company’s clients. Counsel emphasizes that as long as the beneficiary’s primary duties are managerial, he is not prohibited from sometimes using his expertise “to resolve complicated problems” for the petitioner’s clients.

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 U.S. Citizenship and Immigration Services (USCIS) 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 statement of the grounds for the revocation but did not cite to the specific provision of the regulations as a basis for the revocation. Referring to the statutory definitions of “managerial capacity” and “executive capacity” at section 101(a)(44)(A) of the Act, the director reviewed the rebuttal evidence and concluded that the petitioner had not established that the beneficiary will be employed in a primarily managerial or executive capacity under the extended petition. 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 New College Dictionary* 502 (3rd ed. 2008).

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.

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 USCIS 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 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.

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.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

The sole issue addressed in the notice of revocation is whether the petitioner established that the beneficiary would be employed in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means 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;
- (ii) 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
- (iii) 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), provides:

The term "executive capacity" means 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 petitioner filed the new office extension petition on September 6, 2006. The petitioner indicated on Form I-129 that it has three employees. In a letter dated September 5, 2006, the petitioner noted that it was not able to execute its initial business plan due to "internal organizational issues." The petitioner stated that the beneficiary's duties as chief executive officer and general manager will include the following:

The position of CEO-General Manager will require the incumbent to plan, develop and establish business policies, concepts and objectives of the company. As the CEO-General Manager of the U.S. entity, [the beneficiary] shall be responsible for developing the company's operations in the United States, including hiring the necessary employees, negotiating contracts, assessing and creating new business opportunities and developing and interacting with potential clients. As CEO-General Manager of the company, beneficiary has overall responsibility for all aspects of business operations. His job responsibilities will also include the following:

- Develop, build and oversee strategic partnerships and relationships with other businesses.
- Involved in the strategic components of customer focus, strategic positioning, market timing and also direct and coordinate formulation of financial programs to provide funding for new or continuing continued [sic] operations to maximize returns on investment and to increase productivity;
- Plan, develop and establish policies and objectives of business organization
- Support new client acquisition effort by engaging with prospective clients and articulating the company value proposition

Additionally, the beneficiary will also be responsible for the accounting and legal compliance function for [the petitioner].

Although required by the regulations, the petitioner did not provide: (1) evidence that the U.S. entity had been doing business for the previous year; (2) a statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees; or (3) evidence of the financial status of the United States operation. *See* 8 C.F.R. §§ 214.2(I)(14)(ii)(B), (D) and (E). The petitioner also submitted an expired lease agreement for premises located at an address that did not correspond to the address indicated on the Form I-129. Nevertheless, despite these evidentiary deficiencies, the director approved the petition on September 21, 2006.

On December 17, 2007, the director issued a notice of intent to revoke the approval of the petition. The director advised the petitioner of the following:

It has now come to the attention of USCIS that a site visit did not reveal any evidence of a company, employees, office building, financial records, or income, and revealed the fact that [the beneficiary] is actually doing the remodeling work himself with subcontractor help. Therefore, the beneficiary does not meet the definition of Manager or Executive as per section 101(a)(44) of the INA.

In a rebuttal letter dated January 17, 2008, counsel for the petitioner submitted a job description for the beneficiary which essentially re-stated the duties that were included in the petitioner's letter dated September 5, 2006. Counsel cited to an unpublished decision to stand for the proposition that a person may be a function

manager even if he is the sole employee of a company, provided that he utilizes outside independent contractors, or where the business is complex.

Counsel asserted that although the beneficiary is the sole employee of the U.S. company, he utilizes independent contractors to provide services to clients. Counsel stated that the petitioner utilizes the services of four individuals, identified only as "contractors," to complete the company's assignments. The petitioner provided copies of IRS Forms 1099-MISC, showing payments to the four contractors in the amounts of \$2,450, \$6,250, \$8,988, and \$10,300 in 2006.

The petitioner also submitted a copy of the petitioner's 2006 IRS Form 1120, U.S. Corporation Income Tax Return, in response to the notice of intent to revoke. The Form 1120 shows that the company had gross receipts of \$57,359, and deductions of \$57,488 for outside services/independent contractors, which included \$29,500 paid to the beneficiary. The petitioner's tax return reflected no assets, no rent payments, and no other deductions, costs or expenses associated with doing business other than \$200 in bank fees. The company's business activity is described at Schedule K as "construction, remodeling."

With respect to the director's finding that the beneficiary is actually performing remodeling work himself with the help of subcontractors, counsel stated:

Please notice according to USCIS Adjudicators Field Manual 32.6(d). The Manager can regularly apply his or her technical or professional expertise to solve a complicated issue. Therefore, as long as the duties of [the beneficiary] are primarily of a managerial nature, [the beneficiary] can sometimes use his expertise to resolve complicated problems for his clients.

After reviewing the petitioner's response, the director revoked the approval of the petition on May 1, 2008, concluding that the petitioner failed to establish that the beneficiary will be employed in a primarily managerial or executive capacity. The director determined that, based on the evidence submitted, the beneficiary will be primarily engaged in the non-managerial, operational tasks associated with a remodeling business, with occasional first-line supervisory duties over nonprofessional employees.

On appeal, counsel for the petitioner submits a brief that is identical in content to counsel's letter dated January 17, 2008, with respect to the beneficiary's duties and qualifications for the benefit sought. Counsel also re-submits copies of the petitioner's 2006 Forms 1099 and a copy of the petitioner's organizational chart, which indicates that the beneficiary supervises four contractors.

Upon review, the petitioner has not established that the beneficiary will be employed by the U.S. entity in a primarily managerial or executive capacity under the extended petition.

When examining the executive or managerial capacity of the beneficiary, USCIS 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.*

Here, the petitioner and counsel have repeatedly submitted the same general, nonspecific description of the beneficiary's responsibilities without attempting to clarify exactly what tasks he performs on a day-to-day basis as chief executive officer, general manager, and sole full-time employee of the petitioning company, which is primarily engaged in providing remodeling services. For example, the petitioner indicates that the beneficiary will be responsible for "developing the company's operations in the United States," have "overall responsibility for all aspects of business operations," and will "plan, develop and establish business policies, concepts and objectives of the company." These statements merely identify general managerial functions and offer little insight into what the beneficiary will do a daily basis. 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).

Furthermore, the petitioner indicates that the beneficiary is responsible for directly performing sales, marketing and accounting functions for the petitioning company. Specifically, the petitioner states that the beneficiary will "support new client acquisition by engaged with prospective clients and articulating the company value proposition," "manage ongoing client relationships," negotiate contracts, and "be responsible for the accounting and legal compliance function." The petitioner has not explained how such duties meet the criteria for managerial or executive capacity, nor has it indicated that any of the contractors utilized by the petitioner relieve the beneficiary from performing sales, marketing, accounting functions and associated administrative tasks. 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 Int'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

Finally, the petitioner has conceded that the beneficiary devotes at least some portion of his time to directly performing the remodeling services of the company, although such duties are not included in his job description. In making this concession, the petitioner has indirectly acknowledged that the description of the beneficiary's duties submitted with the initial petition was, at best, incomplete. The AAO notes that this admittedly incomplete position description formed the basis of the initial approval.

Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Here, the petitioner fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. The petitioner lists the beneficiary's duties as including both managerial and administrative or operational tasks, but fails to quantify the time the beneficiary spends on them. This failure of documentation is important because several of the beneficiary's daily tasks, such as performing the above-referenced sales, marketing, accounting and administrative tasks, performing remodeling for customers, and supervising non-professional contract employees, do not fall directly under traditional managerial duties as defined in the statute. For this reason, the AAO cannot determine whether the beneficiary is primarily performing 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).

Pursuant to section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, USCIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. In the present matter, however, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require USCIS to examine the organizational structure and **staffing levels of the petitioner**. *See* 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in USCIS regulations that allows for an extension of this one-year period. If the business does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension.

Furthermore, in reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that USCIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family Inc. v. U.S. Citizenship and Immigration Services* 469 F. 3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990)(per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)). It is appropriate for USCIS 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).

At the time of filing, the petitioner operated the company with one full-time employee, the beneficiary, and several contractors whose duties have not been described but who are reasonably assumed to be engaged in construction and remodeling work. The beneficiary himself is responsible for the overall direction of the company, but is also responsible for performing all day-to-day functions such as sales, marketing, purchasing, bookkeeping/accounting, and administrative tasks, as well as supervising the contractors and directly performing remodeling work with the assistance of the contractors. To the extent to which the petitioner has described the beneficiary's specific duties, they are primarily non-managerial in nature. The evidence of record does not establish that it has a reasonable need for the beneficiary to perform primarily managerial or executive duties at its current stage of development. The reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. *See* sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). The reasonable needs of the petitioner may justify a beneficiary who allocates 51 percent of his duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of his or her time on non-qualifying duties.

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, 8 U.S.C. § 1101(a)(44)(A)(ii). 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.

Here, counsel relies on an unpublished decision to stand for the proposition that the sole employee of a company may qualify as a function manager as long as the petitioner establishes that the beneficiary controls the organization's major functions through outside independent contractors. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

Furthermore, counsel does not otherwise articulate how the beneficiary in this matter would qualify as a function manager. Instead counsel relies on the fact that the beneficiary is the sole employee of the company, and the fact that the petitioner utilizes independent contractors to perform remodeling work, as if being a sole employee of a company that occasionally utilizes contractors is all that is required to establish that a beneficiary is a function manager. Counsel asserts that the beneficiary qualifies as a function manager, but does not attempt to identify the essential function to be managed by the beneficiary or the amount of time he would devote to managing the function. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

While performing non-qualifying tasks necessary to produce a product or service will not automatically disqualify the beneficiary as long as those tasks are not the majority of the beneficiary's duties, the petitioner still has the burden of establishing that the beneficiary is "primarily" performing managerial or executive duties. Section 101(a)(44) of the Act; *see also Brazil Quality Stones, Inc. v. Chertoff*, 531, F.3d 1063, 1069-70 (9th Cir. 2008). Whether the beneficiary is an "activity" or "function" manager turns in part on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial. As discussed above, the petitioner has not sustained this burden.

Based on the foregoing discussion, the AAO concurs with the director's conclusion that the instant petition was approved in gross error, and affirms the director's decision to revoke the approval of the petition. Accordingly, the appeal will be dismissed.

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 dismissed.