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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

DATE: FEB 21 2013 Office: VERMONT SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
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)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, initially approved the nonimmigrant visa petition. The director subsequently issued a notice of intent to revoke and ultimately revoked the 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 extend the beneficiary's employment as a 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 Florida corporation, states that it operates a dental services business. It claims to be a subsidiary of , located in Venezuela. The beneficiary was previously granted L-1A classification from September 20, 2006 until January 31, 2008 in order to open a new office in the United States. She was subsequently granted a second period of L-1A classification valid from March 17, 2008 until November 15, 2008. The approval of this petition was revoked on notice on August 29, 2009 after the U.S. Consulate in Caracas returned the petition to the service center for additional review. On September 24, 2008, the petitioner filed the current petition to request an extension of the beneficiary's L-1A status through November 15, 2010.

The director initially approved the petition and granted the beneficiary the requested two-year extension of stay. On September 21, 2010, the director issued a notice of intent to revoke ("NOIR"), noting the revocation of the previously approved L-1A petition. The director, after reviewing the petitioner's rebuttal evidence, revoked the approval of the petition based on two independent and alternative grounds, concluding that the petitioner failed to establish (1) a qualifying relationship with the foreign employer, and (2) that it has been "doing business" as defined in the regulations.

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 asserts that the director erred as a matter of fact and law in making his determination and contends that the petitioner was doing business at the time the petition was filed on September 24, 2008 and maintaining an affiliate relationship with the beneficiary's foreign employer, Counsel submits a brief and additional evidence in support of the appeal.

I. The Law

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.

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.

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 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 New College Dictionary* 502 (3rd ed. 2008).

Based on 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, and for the reasons discussed below, the AAO finds that the petition approval was properly revoked as the director clearly approved the petition in gross error, contrary to the eligibility requirements provided for in the regulations.

II. The Issues on Appeal

A. Qualifying Relationship

The first issue to be discussed in the present matter is whether the petitioner has established that a qualifying relationship exists with the beneficiary's overseas employer. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." *See generally* section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l).

The pertinent regulations at 8 C.F.R. § 214.2(l)(1)(ii) define the term "qualifying organization" and related terms as follows:

> (G) *Qualifying organization* means a United States or foreign firm, corporation, or other legal entity which:
>
> (1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section;
>
> (2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee[.]
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> (I) *Parent* means a firm, corporation, or other legal entity which has subsidiaries.
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> * * *
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> (K) *Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.
>
> (L) *Affiliate* means
>
> *(1)* One of two subsidiaries both of which are owned and controlled by the same parent or individual, or

(2) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on September 25, 2008. The petitioner indicated on the L Classification Supplement to Form I-129 that it is a wholly owned subsidiary of the beneficiary's foreign employer. The petition was initially approved on August 10, 2009.

On September 21, 2010, the director issued a notice of intent to revoke (NOIR). The director requested, *inter alia*, additional evidence demonstrating that the foreign entity owns 100 percent of the United States entity as indicated on the Form I-129.

Counsel for the petitioner responded on October 21, 2010. Counsel explained that the relationship had changed since the date of filing, but that the two organizations were still qualifying for L-1A purposes as follows:

> When the Beneficiary first filed an I-129 (L-1A) petition for [the beneficiary] on September 20, 2006 (Receipt , [the petitioner] was 100% owned by the Venezuelan company . . . . As of the filing of the September 24, 2008 L1A petition (receipt # , the Petitioner's ownership had changed and it was owned by five individuals. owned 350 shares; owned 200 shares; owned 150 shares; owned 150 shares; and owned 150 shares.
>
> was 65% owned by who also owned 100% of the foreign entity Therefore, an affiliate relationship existed between the two companies by the same three individuals, thus evidencing the qualifying relationship under 8 C.F.R., §214.2(l)(1)(ii)(K) at the time of filing.

As evidence of the qualifying relationship, the petitioner submitted copies of its articles of incorporation and stock certificates. The stock certificates, numbered two through five, were dated November 14, 2006. They show that ownership shares were issued to the following individuals: (1) - 150; (2) - 150; (3) - 200; and (4) - 350. The petitioner also submits certificate number one, dated Jun 22, 2005, issued to , C.A. for one thousand shares. This certificate has been marked as "cancelled."

The petitioner's evidence shows that it amended its articles of incorporation on November 16, 2006 to show that the following individuals are shareholders: (1) - 150; (2) - 150; (3) - 200; (4) - 350; and (5) - 150.

The petitioner submitted the Articles of Incorporation for the foreign entity dated June 3, 2003, and showing the following ownership structure: (1) 40,320 shares; (2) - 86,827 shares; (3) and - 73,803 shares.

The petitioner's 2008 IRS Form 1120, U.S. Corporation Income Tax Return, shows that is claimed to own 35% of the voting stock of the corporation. No other individual was listed as having owned 20% or more directly or 50% or more indirectly the voting stock of the corporation.

The director revoked the approval of the petition on February 24, 2011, finding that the petitioner failed to provide evidence of a qualifying relationship with the beneficiary's foreign employer. The director noted that "it is not possible to determine the true relationship and ownership and control as required by the regulations" due to the various ownership information submitted by the petitioner.

On appeal, counsel for the petitioner asserts that as of the date of filing, the same three individuals that own 100% of the foreign entity also own 65% of the United States petitioner, and thus a qualifying relationship exists.

Upon review, and for the reasons stated herein, the petitioner has not established that the petitioner had a qualifying relationship with the beneficiary's foreign employer at the time the petition was filed.

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (Comm'r 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (Comm'r 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm'r 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

As a preliminary matter, the petitioner has not adequately explained why it indicated on the Form I-129 filed in September 2008 that it was wholly owned by the foreign entity, when in fact the petitioner later conceded that the foreign entity ceased to have any ownership interest in the petitioner as of September 2006. 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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

Further, the petitioner has not fully documented the current claimed ownership of the United States entity. The petitioner's articles of incorporation state that the entity is authorized to issue 1,000 shares of stock. In response to NOIR, the petitioner submits stock certificates showing 850 shares of stock issued. The amended articles of incorporation, however, show an additional shareholder of 150 shares. The petitioner failed to submit a share certificate evidencing this additional share issuance. 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

Assuming *arguendo*, that all of the petitioner's shares have in fact been issued, the record reflects that the petitioning company is owned by five individuals, and no one individual owns a majority interest in the company. The beneficiary's foreign employer is directly owned three individuals. Despite the fact that the same three individuals have ownership interest in the petitioner and ownership interest in the beneficiary's foreign employer, USCIS has never accepted a combination of individual shareholders as a single entity, so that the group may claim majority ownership, unless the group members have been shown to be legally bound together as a unit within the company by voting agreements or proxies. Here, the petitioner has submitted no evidence that these three shareholders are bound together as a unit, and has not otherwise established that the companies are owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity. *See* 8 C.F.R. § 214.2(l)(1)(ii)(L)(2).

On appeal, counsel for the petitioner appears to also be claiming that a single individual, controls both entities despite the fact that he holds only a minority interest in each entity. This claim is also unpersuasive.

To establish eligibility in this case, it must be shown that the foreign employer and the petitioning entity share common ownership and control. Control may be "de jure" by reason of ownership of 51 percent of outstanding stocks of the other entity or it may be "de facto" by reason of control of voting shares through partial ownership and possession of proxy votes. *Matter of Hughes*, 18 I&N Dec. 289 (Comm'r 1982). If one individual owns a majority interest in a petitioner and a foreign entity, and controls those companies, then the companies will be deemed to be affiliates under the definition even if there are multiple owners.

In this case, the U.S. entity is owned by five individuals and the foreign entity is owned by three individuals. Absent documentary evidence such as voting proxies or agreements to vote in concert so as to establish a controlling interest, the petitioner has not established that the same legal entity or individuals control both entities. The petitioner has not established that it had an affiliate or other qualifying relationship with the beneficiary's foreign employer at the time the petition was filed.

Additionally, the director addressed whether the foreign employer continues to do business as a qualifying organization abroad. The AAO will withdraw the director's finding that the foreign entity is not doing business, but uphold the director's ultimate conclusion that the petitioner failed to establish that it has a qualifying relationship with the foreign entity. Accordingly, the appeal will be dismissed.

B. Doing Business

The second issue the director addressed is whether the petitioner was doing business at the time it filed the instant petition. "Doing business" means the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad. 8 C.F.R. § 214.2(l)(1)(ii)(H).

On the Form I-129, filed on September 24, 2008, the petitioner indicated that it had three employees and both a gross and net income of $205,949. The petitioner submitted a business plan from 2006. The company's mission, as stated in the business plan, is to provide dental health services through a "network of dentist and dental offices." The petitioner did not provide any evidence relating to its business operations with the initial petition. On the Form I-129, the petitioner stated that the beneficiary would serve as the "Auditor of Service." The petitioner described this position as being responsible for the installation of the dental clinic.

Based on the petitioner's summary of activities, construction began on an office location in August of 2007. Without providing specific dates, the petitioner indicates that it has selected a distributor for dental equipment, cabinets, and staff. The petitioner further stated that is expects to commence business as follows:

> According to the schedule of activities and after overcome all the inconveniences presented during construction finally the inauguration of the first dental clinic of [the petitioner] will be in September 2008, after completing the aforementioned remodeling and fulfilled all the requirements mandated by the rules of the city of Kissimmee and the United States.

The petitioner's IRS Form 1120, U.S. Corporation Income Tax Return, showed a loss of $184,361 for 2007. The petitioner did not report any receipts or income from goods or services sold. The petitioner submitted a five year lease for space at [redacted] commencing on July 1, 2006. The petitioner submitted evidence showing its engagement and oversight of the construction of the leased office space into a location suitable for a dentist's office.

The director issued a requested for evidence (RFE) on March 25, 2009, requesting *inter alia*, evidence that the United States organization (1) is doing business as defined by the regulations, and (2) that is has been, and is presently, engaged in the regular, systematic, and continuous provision of goods or services.

The petitioner responded on April 21, 2009. The petitioner provided evidence relating to their business operations including staffing levels, utility bills, and receipts for supplies.

The director approved the petition on August 10, 2009. On September 21, 2010, the director issued a notice of intent to revoke (NOIR), advising the petitioner that the U.S. Consulate in Caracas interviewed the beneficiary in connection with her L-1A visa application, reviewed the evidence submitted with the prior L-1 petition and determined that the petitioner was not "doing business" more than a year after the founding of the company. The director requested evidence including a description of the beneficiary's duties at the time of filing, a list of the United States employees at the time of filing and financial and tax statements for 2008.

The petitioner responded on October 21, 2010 with the requested information. The petitioner included an affidavit from the beneficiary. The affidavit explains the petitioner's activities from the end of 2006 through 2008. Specifically, the beneficiary stated that on "November 12, 2008, [the petitioner's] dental clinic opened to the public."

The director revoked the approval of the petition on February 24, 2011, concluding that the petitioner failed to establish that the petitioner was doing business as of the date of filing. The director noted the petitioner's IRS Form 941, Employer's Quarterly Federal Tax Return, indicated "0" employees for the quarter in which the petition was filed. The director further emphasized the lack of receipts indicating that the petitioner was operational as a dental clinic as of the filing the instant request for an extension of the beneficiary's L-1A status.

On appeal, counsel for the petitioner asserts that the petitioner was doing business at the time of filing based on its oversight of the construction of its dental clinic. Specifically, counsel states the following with respect to the petitioner's activities as of the date of filing:

> [A]t the time that the present L-1A petition was filed, [the petitioner] was doing business. The petitioner had constructed over $250,000 in business with its contractors and had constructed its own dental clinic; had $531,800 in assets; had two employees including the beneficiary.

The petitioner includes the beneficiary's affidavit submitted in response to the NOIR. In the affidavit, the beneficiary states that the clinic had not yet opened due to delays by the contractors "clearly out of [her] control." The beneficiary asserts that the petitioner was "operational since [it] was trying to finish construction of our clinic and open its doors to the public as quickly as possible."

Upon review, and for the reasons stated herein, the petitioner has not established that it was doing business as defined in the regulations at the time the petition was filed.

In response to the NOIR, and on appeal, the petitioner clearly states that its dental clinic did not open until November 12, 2008, nearly two months after the filing date of the petition. Although the petitioner submits evidence of construction of the clinic and the commencement of hiring staff, the petitioner failed to provide evidence that it was engaged in the provision of goods or services as of the date of filing this request for an extension of the beneficiary's status. As stated above, the petitioner must show that it is engaged in the regular, systematic, and continuous provision of goods and/or services. Without an open clinic, the petitioner cannot show that it has provided any services whatsoever, and certainly not in a regular, systematic, and continuous manner. 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'r 1978).

Counsel for the petitioner asserts that the organization was operational due to the construction of the clinic. The nature of the petitioner's business, as stated on the Form I-129, is to provide dental health services. On appeal, counsel appears to be claiming that the petitioner is operational due to its construction activities and not its provision of dental health services. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

Furthermore, counsel asserts that the delays in opening the clinic were beyond the control of the petitioner. The AAO notes that any unforeseen delays in commencing business operations do not exempt the petitioner from meeting the regulatory requirements applicable to this classification.

Here, it appears that the beneficiary was initially granted approximately 16 months in L-1A status in order to open the petitioner's dental practice, and then granted a second approval for an additional eight months. The approval of the second approval was revoked based on the petitioner's failure to commence business operations during the one-year "new office" period. The petitioner filed the instant petition to request an additional two years in L-1A status despite the fact that it had still not opened the intended dental office or commenced business operations.

The L-1A nonimmigrant visa is not an entrepreneurial visa classification that would allow an alien a prolonged stay in the United States in a non-managerial or non-executive capacity to start up a new business. The regulations allow for a one-year period for a U.S. petitioner to commence doing business and develop to the point that it will support a managerial or executive position. By allowing multiple petitions under the more lenient standard, USCIS would in effect allow foreign entities to create under-funded, under-staffed or even inactive companies in the United States, with the expectation that they could receive multiple extensions of their L-1 status without primarily engaging in managerial or executive duties. The only provision that allows for the extension of a "new office" visa petition requires the petitioner to demonstrate that it is staffed and has been "doing business" in a regular, systematic, and continuous manner for the previous year. 8 C.F.R. § 214.2(l)(14)(ii).

As the record reflects that the petitioner had not commenced operations as of the filing date of the instant petition, two years after the approval of the new office petition, the AAO concurs with the director's determination that the petitioner failed to establish that it was doing business or that it was operating in the scope, capacity, and function to support the transfer of an individual who is primarily a manager or executive. For this additional reason, the appeal will be dismissed.

III. Conclusion

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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.