

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



D7

File: EAC 98 102 52851 Office: VERMONT SERVICE CENTER Date: JUN 13 2005

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

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

IN BEHALF OF PETITIONER:
[Redacted]

INSTRUCTIONS:

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


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was initially approved by the Director, Vermont Service Center. 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 his intent to revoke the approval and subsequently ordered that the approval be revoked. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner seeks to extend the employment of its executive officer in the United States 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 U.S. petitioner, a general partnership organized in the Commonwealth of Massachusetts, is engaged in the computer business and also has investment interests in numerous hotels. The petitioner claims to be the subsidiary of [REDACTED] located in Lagos, Nigeria, and seeks to extend the beneficiary's stay for an additional three years.

On September 10, 1998, the director properly issued a notice of intent to revoke the approval of the petition, noting that the record did not establish that the. The petitioner failed to respond to this notice, and the director subsequently revoked the approval.

On appeal, counsel for the petitioner argues that the director did not adequately consider the evidence presented. Counsel contends that contrary to the director's conclusions, the beneficiary was in fact employed in a primarily managerial or executive capacity and that the U.S. company had in fact been doing business. In support of these claims, counsel submits a brief and additional evidence.

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

In the present matter, the director provided a detailed statement of the grounds for the revocation. When the petitioner failed to respond, the director revoked the petitioner, concluding that the petitioner had not established that United States companies had been doing business, or that the beneficiary had been or would be employed in a primarily managerial or executive capacity. Upon review, the director revoked the approval on the basis of 8 C.F.R. § 214.2(l)(9)(iii)(A)(5): "Approval of the petition involved gross error."

The term "gross error" is not defined by the regulations or statute. Furthermore, although the term has a juristic ring to it, "gross error" is not a commonly used legal term and has no basis in jurisprudence. *See*

Black's Law Dictionary 562, 710 (7th Ed. 1999)(defining the types of legal "error" and legal terms using "gross" without citing "gross error"). The word "gross" is commonly defined first as "unmitigated in any way: UTTER," as in "gross negligence." *Webster's II New College Dictionary* 491 (2001).

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

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

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

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

Upon review, the approval of 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 (I)(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 (I)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (I)(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 management or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

The first issue in this matter is whether the petitioner has been doing business. The regulation at 8 C.F.R. § 214.2(l)(1)(ii)(H) defines the term "doing business" as "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."

In this matter, the petitioner claims that it is engaged in the computer business. The evidence in the record further indicates that the petitioner has invested in a number of U.S hotels since its inception. In support of the petition, the petitioner submitted copies of operating agreements for two hotels, namely, the Sandeep Hotel, and the Hiren

Hotel. Both agreements indicate that the petitioner owns a 40% interest in each of these hotels. No additional documentation was submitted which supported the claim that the petitioner was doing business as required by the regulations.

In the notice of intent to revoke, issued on September 10, 1998, the director specifically requested that the petitioner submit additional documentation establishing that the petitioner was actually an employer engaged in the regular, systematic, and continuous provision of goods and/or services. The petitioner failed to respond to the notice of intent to revoke, and consequently, the director revoked the approval on March 17, 1999.

On appeal, counsel for the petitioner discusses the nature of the petitioner's business, and contends that the director's decision unfairly disregarded the ample evidence submitted in support of the petition. Specifically, counsel states that the petitioner submitted "extensive documentary evidence of its export of computer technology, information, and services to its overseas counterpart, and of its provision of technology and hospitality services to U.S. companies." In addition, counsel alleges that the petitioner also submitted evidence of the "[petitioner's] acquisition of a controlling interest in six hotels in Massachusetts and New Hampshire," and claims that that evidence is relevant because it "constitutes engagement in the provision of goods and services, insofar as [the petitioner] involves itself in the service industry." Finally, counsel submits for the first time on appeal copies of various invoices generated by the petitioner, and copies of the petitioner's 1995, 1996, and 1997 tax returns.

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).

On review of the evidence submitted, the AAO concurs with the director's revocation of the approval in this matter. The petitioner failed to respond to the notice of intent to revoke the petition, and specifically failed to address the director's specific request for additional evidence supporting the claim that the petitioner was doing business as required by the regulations. The petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the approval was revoked. The petitioner failed to submit the requested evidence and now submits it on appeal. However, the AAO will not consider this evidence for any purpose. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director.

The only evidence submitted in support of the petitioner's existence during the previous three years was the petitioner's General Partnership agreement, allegedly executed in 1997 but not specifically dated, and copies of the operating agreements for two hotels showing that the petitioner held a 40% interest in each. This evidence is insufficient to show that the petitioner has met the definition of doing business. The term "doing business" is defined in the regulations as "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). 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 establish the new office. Furthermore, at the time the petitioner seeks an extension of the new

office petition, the regulations at 8 C.F.R. § 214.2(l)(14)(ii)(B) requires the petitioner to demonstrate that it has been doing business for the previous year. 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. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

The second issue in this matter is whether the beneficiary has been and will continue to be employed in a managerial or executive capacity

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as an assignment within an organization in which the employee primarily:

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day to day operations of the activity or function for which the employee has authority. A first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as an assignment within an organization in which the employee primarily:

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In the initial petition, the petitioner described the beneficiary's job duties in a letter dated February 2, 1998 as follows:

As one of the executives of [the petitioner], he has day to day responsibilities to manage the business. He sets company policies and formulates investment strategies. He is responsible for developing new investments, finding additional opportunities, and formulating operational policies. [The beneficiary] has control over and exercises discretionary decision-making in, establishing the most favorable courses of action for the successful management of the business' international activities. For the past three years, he has been an integral executive in the United States company and provides significant contributions in the formulation of strategic policies, which have resulted in the success of [the petitioner's] business endeavors.

No further evidence was provided with regard to the beneficiary's specific job duties or subordinate employees.

In the notice of intent to revoke, issued on September 10, 1998, the director requested that the petitioner submit specific documentation establishing that the beneficiary's position was in fact managerial or executive. He requested a specific description of the beneficiary's position, including the amount of hours he devoted to each of his tasks. Furthermore, the director requested details with regard to all of the employees of the petitioner, including tax records to verify their employment. The petitioner failed to respond to the notice of intent to revoke, and consequently, the director revoked the approval on March 17, 1999.

On appeal, counsel for the petitioner provides a detailed discussion of the beneficiary's qualifications, and contends that the director disregarded the significant evidence submitted in support of this issue. Specifically, counsel states that "despite substantial documentary evidence of [the beneficiary's] broad policy-making authority and oversight responsibility, the Center Director asserts that he does not operate at a senior level in [the petitioner's] hierarchy." Counsel continues to provide a detailed statement with regard to the beneficiary's position and the duties he is required to perform in the course of that position.

On review of the evidence submitted, the AAO again affirms the director's revocation of the approval in this matter. The petitioner failed to respond to the notice of intent to revoke the petition, and specifically failed to address the director's specific request for additional evidence supporting the claim that the beneficiary has been and would continue to be employed in a primarily managerial or executive capacity. The petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the approval was revoked. The petitioner failed to submit the requested evidence and now submits it on appeal. However, the AAO will not consider this evidence for any purpose. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director.

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(1)(3)(ii). The only evidence with regard to the beneficiary's position is the petitioner's February 2, 1998 letter which provided a brief overview of the beneficiary's position. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties.

The petitioner has failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. 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. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

The AAO notes that on appeal, counsel for the petitioner asserts that an immigrant petition was simultaneously pending at the time of the revocation. Counsel's reference to this petition suggests that the "significant evidence" referred to as on appeal as previously submitted and disregarded by the director was in fact submitted in support of the other pending petition. Consequently, it appears that counsel failed to respond to the director's specific requests in the since it believed that the requested evidence was already included in the record. It is worth emphasizing that that each petition filing is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, Citizenship and Immigration Services (CIS) is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). If a director requests additional evidence that the petitioner may have submitted in conjunction with a separate nonimmigrant petition filing, the petitioner is, nevertheless, obligated to submit the requested evidence, as the record of the nonimmigrant proceeding is not combined with the record of the immigrant proceeding.

In this matter, the initial evidence submitted with the petition was insufficient to establish that the petition had been validly approved. The petitioner had the opportunity to overcome the deficiencies in the record, yet failed to submit the requested evidence and did not address the director's concerns until appeal. 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).

Beyond the findings in the previous decision, the remaining issue in this proceeding is whether the petitioner has established that a qualifying relationship exists between the petitioning entity and a foreign entity pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(G). Specifically, the petitioner claims that it is a wholly-owned subsidiary of the foreign entity. However, the petitioner submitted Form 1065, U.S. Partnership Return of Income Tax for 1996 and 1997, which indicates that the petitioner is owned in equal proportions by the beneficiary and two other individuals. 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). Furthermore, the ownership of the foreign entity is not documented in the record, nor has the petitioner persuasively demonstrated that the foreign entity will continue doing business during the alien's stay in the United States. Accordingly, the petitioner has not

established that it maintains a qualifying relationship with a foreign entity. For this additional reason, the petition may not 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).

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. Accordingly, the director's decision revoking the approval will be affirmed.

ORDER: The director's decision of March 17, 1999 is affirmed. The appeal is dismissed.