

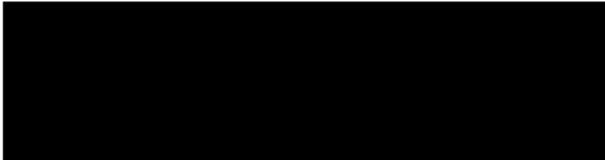
Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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

PUBLIC COPY



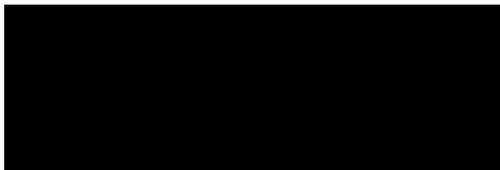
87

FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: **MAR 22 2011**

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:

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 law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

A handwritten signature in black ink, appearing to read "Perry Rhew".

Perry Rhew
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 Delaware corporation, states that it is engaged in the production, distribution, export and retail sale of alcoholic beverages. It claims to be an indirect, majority-owned subsidiary of [REDACTED]. The petitioner sought to employ the beneficiary in the position of Chief Financial Officer (Financial Controller) of its new office in the United States for a period of one year.

The director initially approved the petition and granted the beneficiary L-1A classification from June 11, 2008 until June 10, 2009, and subsequently granted the petitioner's request to extend the beneficiary's status for two additional years.¹ On October 30, 2009, upon further examination and following a site review of the U.S. entity and an interview with the beneficiary, the director issued a notice of intent to revoke the approval, pursuant to 8 C.F.R. § 214.2(l)(9)(iii)(A). 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 December 2, 2009.

The director revoked the approval of the petition on February 18, 2010, based on three independent and alternative grounds. Specifically, the director determined that the petitioner failed to establish: (1) that the U.S. and foreign entities have a qualifying relationship; (2) that the U.S. company is doing business as defined in the regulations; and (3) that the beneficiary will be employed in the United States in a qualifying managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the director failed to consider relevant evidence, discounted evidence that was submitted in support of the petition and in response to the notice of intent to revoke, misstated the law, and imposed requirements for approval of the petition that go beyond the statutory and regulatory requirements. Counsel further contends that the petition approval was improperly revoked as the director failed to identify any material error, substantial change in circumstances, or new material information that adversely impacts the petitioner's or beneficiary's eligibility. Counsel submits a lengthy brief in support of the appeal.

I. The Law

¹ The approval of the extension petition ([REDACTED]) was also revoked on February 18, 2010, and the revocation decision has been appealed to the AAO.

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.

The regulation at 8 C.F.R. § 214.2(l)(3)(v) also provides that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or be employed in a new office in the United States, the petitioner shall submit evidence that:

- (A) Sufficient physical premises to house the new office have been secured;
- (B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involves executive or managerial authority over the new operation; and
- (C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in

paragraphs (I)(1)(ii)(B) or (C) of this section, supported by information regarding:

- (1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;
- (2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and
- (3) The organizational structure of the foreign entity.

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).

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, 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. Discussion

The director revoked the approval of the petition based on three grounds, concluding that the petitioner failed to establish: (1) that it has a qualifying relationship with the beneficiary's foreign employer; (2) that the U.S. company is doing business as defined in the regulations; and (3) that the beneficiary will be employed in the United States in a qualifying managerial or executive capacity. The AAO will address these issues separately below.

A. Qualifying Organization

The regulation at 8 C.F.R. § 214.2(l)(1)(ii)(G) defines the term "qualifying organization" as 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; and
- (3) Otherwise meets the requirements of section 101(a)(15)(L) of the Act.

Therefore, in order for a petitioner to establish that it is a "qualifying organization," for the purposes of this classification, it must establish two elements: (1) that it has a "qualifying relationship" with the beneficiary's foreign employer, and (2) that it is "doing business" as defined in the regulations. The director determined that the petitioner did not satisfy either requirement.

1. Qualifying Relationship

The first issue to be addressed is whether the petitioner established that it has a qualifying relationship with the beneficiary's previous foreign 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 petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on May 30, 2008. On the L Classification Supplement to Form I-129, the petitioner identified the beneficiary's last foreign employer as [REDACTED]. The petitioner further described the corporate relationship as follows:

[The petitioner] is 100% owned by [REDACTED] is 100% owned by [REDACTED] which in turn is 100% owned by [REDACTED]

In a letter dated May 22, 2008, the petitioner stated that the U.S. company "is a wholly owned subsidiary of [REDACTED] which is in turn, wholly owned by [REDACTED]"

The petitioner also submitted a corporate organizational chart depicting [REDACTED] and its approximately 45 subsidiaries, which depicts the above-described ownership of the U.S. company.

As evidence of the U.S. company's ownership, the petitioner submitted: (1) a copy of the petitioner's stock certificate #1; (2) the company's certificate of incorporation indicating that it is authorized to issue 1,000 shares of common stock with a par value of \$.01 per share; (3) the company's by-laws; and (4) a Written Consent of Sole Director in Lieu of Meeting dated May 22, 2008, which indicates that 100 shares of the petitioner's stock were issued to [REDACTED] in exchange for consideration of \$100,000.

The petitioner's stock certificate indicates that 100 shares were issued to [REDACTED]. The stock certificate was not signed and did not bear the exact date of issuance.

As noted above, the director initially approved the petition on June 11, 2008. On October 30, 2009, the director issued a notice of intent to revoke based on a finding that there are unresolved discrepancies and deficiencies in the record with regard to the ownership of the petitioning company.

The director acknowledged that the petitioner had previously submitted a stock certificate indicating that [REDACTED] owns 100% of the U.S. company's stock, but noted that the certificate was neither signed nor dated, and thus was of little probative value. The director instructed the petitioner to explain why the company's stock certificate was not properly executed and to provide copies of the U.S. company's stock register showing all stock certificates issued to the present date, including information regarding the total shares of stock sold, the names of shareholders, and the purchase prices for all transactions.

The director also requested evidence showing that the parent company had, in fact, paid for the ownership of the U.S. company, and stated that such evidence may include original wire transfers from the parent company, copies of canceled checks, or deposit receipts detailing the monetary amounts for the stock purchase.

Finally, the director observed that the petitioner's 2008 IRS Form 1120, U.S. Corporation Income Tax Return, submitted in support of the beneficiary's petition for an extension of status, does not identify the claimed parent company, [REDACTED] as the petitioner's owner, but rather indicates that the company is wholly-owned by [REDACTED] and majority-owned by [REDACTED]. The director requested an explanation for this apparent discrepancy regarding ownership and evidence to support the petitioner's assertions.

In a letter dated December 1, 2009, the petitioner acknowledged that it submitted a stock certificate that was neither signed nor dated in support of the initial new office petition filed in May 2008. The petitioner explained that the oversight "was due to the rushed process of incorporation and petition for [the beneficiary]." The petitioner indicated that it submitted the certificate after it was prepared, but before it was finalized, and emphasized that the certificate was in fact signed by the petitioner's director, [REDACTED] on May 22, 2008, prior to the filing of the initial L-1A petition.

The petitioner submitted a copy of its executed stock certificate #1 indicated that 100 shares of the company's stock were issued to [REDACTED] on May 22, 2008. The petitioner also submitted a copy of its stock ledger indicating that [REDACTED] is the owner of stock certificate #1 and that it provided consideration in the amount of \$100,000. The date of the transaction is not provided.

With respect to the petitioner's 2008 corporate tax return, the petitioner indicated that the information provided therein does not prevent a finding that the U.S. company is directly owned by [REDACTED] as consistently stated by the petitioner. The petitioner explained that "the ownership structure on the tax returns was provided based upon tax elections made by the [REDACTED] to treat certain organizations, including [REDACTED] as "disregarded entities." The petitioner submitted a letter dated November 10, 2009 from its accounting firm further explaining the tax election by [REDACTED] and the information provided on the petitioner's tax return. The accountant explains that [REDACTED] is an indirect owner of 81.83% of the U.S. company based on his 98% ownership of [REDACTED]. The petitioner also provided an IRS Form 8832, Entity Classification Election, for [REDACTED], in which it elected to be "disregarded as a separate entity" and named [REDACTED] as its owner.

In response to the director's request for evidence that [REDACTED] paid for the stock the petitioner issued to it, the petitioner submitted a Written Consent of Sole Director in Lieu of Meeting dated December 1, 2009, which indicates that the petitioner agreed on May 22, 2008 to sell 100 shares of stock to [REDACTED] on May 22, 2008 for aggregate consideration of \$100,000. Counsel summarizes and explains the significance of the resolution as follows:

This resolution confirms that \$156,242.16 in obligations incurred by [REDACTED] [REDACTED] on behalf of [the petitioner] is deemed consideration paid in exchange for the issuance of 100 shares of [the petitioner's] stock in May 2008. . . . Such a resolution conforms with Section 152 of the General Corporations Law of Delaware, which provides that the "consideration . . . for subscriptions to, or the purchase of, the capital stock to be issued by a corporation shall be paid in such form and in such manner as the board of directors shall

determine." Specifically, the resolution explicitly acknowledges that [REDACTED] incurring financial obligations on behalf of [the petitioner] will be considered adequate consideration for the shares of stock.

The petitioner submitted copies of two invoices issued to [REDACTED] by the U.S. firm of [REDACTED] in June 2008 for work "relating to the establishment of a U.S. subsidiary to conduct distribution functions," during the months of April and May 2008.

After reviewing the evidence submitted in response to the notice of intent to revoke, the director revoked the approval of the petition, concluding that the petitioner had failed to adequately document its claimed qualifying relationship with the beneficiary's foreign employer.

The director declined to assign any evidentiary weight to the newly submitted signed and dated stock certificate, advising the petitioner that evidence that the petitioner creates after USCIS points out the deficiencies and inconsistencies in the petition will not be considered independent and objective evidence. The director also found the petitioner's stock ledger to be incomplete, as it did not include the date of issuance of the petitioner's stock. Further, the director determined that "a written consent in lieu of meeting executed by the director on a date after the instant petition was filed adds little to proving who owns the actual stock of the U.S. entity as of the date of filing." The director cited to *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r. 1998), to stand for the proposition that a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements.

The director further concluded that "no evidence was submitted to highlight the transfer of funds necessary for the start-up of the U.S. entity."

On appeal, counsel for the petitioner asserts that the director's conclusion that there is no qualifying relationship between the entities is belied by the evidence of record. Counsel contends that the petitioner provided explanations with respect to the perceived inconsistencies in ownership as reported in the company's 2008 IRS Form 1120, and with respect to the petitioner's failure to submit an executed stock certificate at the time of filing its new office petition.

With respect to the foreign entity's obligation to pay for the issued stock, counsel reiterates that the petitioner provided evidence that it ultimately accepted \$156,242.16 in financial obligations incurred by [REDACTED] on behalf of the U.S. company as consideration paid in exchange for 100 shares of stock issued in May 2008. Counsel further asserts that the petitioner provided the consolidated financial statements for the petitioner's ultimate parent company, [REDACTED] and the petitioning company are all included. Counsel contends that it did in fact submit "evidence to highlight the transfer of funds necessary for the start-up of the U.S. entity," by providing evidence that the foreign entity incurred significant expenses on behalf of the U.S. entity at the time of its formation, as allowable under Delaware corporations law. Counsel emphasizes that "it is not the Service's role to impose requirements above and beyond those established by the jurisdiction in which a petitioning entity is incorporated."

Counsel asserts that the "petitioner has not presented a new set of facts" in hopes of having the petition granted, but rather "has presented a consistent set of facts which have not changed from the original petition, the extension request or the response to the NOIR."

Upon review of the totality of the evidence submitted, the AAO finds sufficient evidence to establish a qualifying relationship between the U.S. company and the beneficiary's prior employer.

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 (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). 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 general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc., supra.* Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control.

The petitioner has consistently claimed that it is a direct, wholly-owned subsidiary of [REDACTED] and an indirect wholly or majority-owned subsidiary of [REDACTED]. There is no evidence in the record of proceeding that suggests that the company has any other owner. More importantly, there is sufficient evidence in the record to establish by a preponderance of the evidence that the petitioner is in fact a subsidiary of the beneficiary's foreign employer.

A few errors or minor discrepancies are not reason to question the credibility of an alien or an employer seeking immigration benefits. *See, e.g., Spencer Enterprises Inc. v. U.S.*, 345 F.3d 683, 694 (9th Cir., 2003). While it is true that the petitioner submitted an unexecuted stock certificate at the time that it filed the instant petition, the stock certificate was accompanied by a corporate resolution dated May 22, 2008 which indicated that the company resolved on that date to issue 100 shares of stock to SPI Spirits (Cyprus) Limited, the company named on the stock certificate. The submission of the signed and dated stock certificate at a later date does not amount to an attempt to create new evidence to correct a material deficiency.

With respect to the director's determination that the petitioner submitted "no evidence" to establish that the foreign entity paid for its interest in the U.S. company, the petitioner did in fact submit evidence to show that

██████████ was invoiced for substantial legal costs associated with the incorporation of the U.S. company and that the U.S. company has accepted such actions as consideration for the stock issued. The lack of evidence of a direct investment of \$100,000 may be directly relevant to the issue of whether the foreign entity had a *bona fide* intent to establish the U.S. entity as an operating company responsible for the import and distribution of ██████████ products in the United States. However, for purposes of establishing the foreign entity's ownership of the petitioner's stock, the AAO finds the evidence of record sufficient to establish that the petitioner's parent company provided the consideration required in exchange for the stock that was issued.

The petitioner has also provided financial documents for ██████████, which further support a finding that the petitioner is an ██████████, including a "*Balance des comptes genereaux*" prepared for the petitioner by ██████████ and the group's consolidated financial statements.

Based on the foregoing, the AAO finds that the petitioner established that the U.S. company is a subsidiary of the beneficiary's foreign employer. The director's determination to the contrary will be withdrawn.

2. *Doing Business*

The second issue to be addressed is whether the petitioner established that the U.S. company is doing business as defined at 8 C.F.R. § 214.2(l)(2)(H). "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. *Id.* Therefore, while the petitioner has established that the foreign entity is the petitioner's parent company based on its ownership of the petitioner's issued stock, the petitioner cannot be considered a "qualifying organization" unless it can establish that it is doing business as a subsidiary of the foreign entity. 8 C.F.R. § 214.2(l)(2)(G).

If a petitioner indicates that a beneficiary is coming to the United States to open a "new office," it must show that it is prepared to commence doing business immediately upon approval so that it will support a manager or executive within the one-year timeframe. *See generally*, 8 C.F.R. § 214.2(l)(3)(v). At the time of filing the petition to open a "new office," a petitioner must affirmatively demonstrate that it has acquired sufficient physical premises to house the new office and that it will support the beneficiary in a managerial or executive position within one year of approval. Specifically, the petitioner must describe the nature of its business, its proposed organizational structure and financial goals, and submit evidence to show that it has the financial ability to remunerate the beneficiary and commence doing business in the United States. *Id.* If approved, the beneficiary is granted a one-year period of stay to open the "new office." 8 C.F.R. § 214.2(l)(7)(i)(A)(3). At the end of the one-year period, when the petitioner seeks an extension of the "new office" petition, the regulation 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" through the regular, systematic, and continuous provision of goods or services.

Upon review, it is evident that the petitioner was not prepared to do business upon approval of its initial new office petition, and in fact never commenced the proposed business activities which formed the basis of the

instant new office petition approval. For these reasons, the AAO concurs with the director's determination that the petition was approved in error and finds that the approval of the petition was properly revoked.

The petitioner submitted a copy of its business plan as of May 2008. According to this business plan, [REDACTED] had made an initial investment of \$100,000 in the U.S. company in order to establish it as "an alcoholic beverage importer and supplier of the [REDACTED]'s current and future owned brands." The business plan explains that the [REDACTED] products have traditionally been represented by third parties in the United States, most recently by [REDACTED], whose partnership with the [REDACTED] was being terminated in 2008 by mutual agreement of the parties. The business plan goes on to state that the group "is seeking entry into the U.S. market with the establishment of [the petitioner]."

The business plan further states:

It is the intent of [the petitioner] to acquire the Basic Permit required for importation and wholesale of distilled spirits for commercial reasons throughout the 50 states. Upon receipt of the Basic Permit, Applications for Certificate of Label Approval will be submitted. Given the fact that the importation and distribution of distilled spirits in the US is highly regulated, the volume of necessary permits and applications are expected to be high. However, most approvals are expected within the next six months.

To date [the petitioner] has held preliminary discussions with US regulators/legal advisors in several states regarding its business and expansion plans. The business model of [the petitioner] largely follows the same principle as those already in place by [REDACTED] in other countries. [The petitioner] will be tailored to the unique US three-tier distribution system for alcoholic beverages. As such [the petitioner's] products will be distributed via a carefully chosen group of distributors in Control and License States. These distributors will arrange the physical distribution and promotion, where permitted by law, of the agreed brands on an exclusive basis in the assigned territory.

According to the business plan, the roles and responsibilities of the newly established company were to include: establishing a local market strategy within the company's global framework; profit and loss responsibility for the local market; development of the local organization; appointment and management of local distributors, market research, production development, development and execution of local marketing and sales programs and management of local budgets. The business plan indicated that the foreign entity had provided the U.S. company with a \$100,000 investment. However, the petitioner did not provide evidence of this investment in the forms of a wire transfer, canceled checks, or copies of the petitioner's bank statements.

With respect to the physical premises of the petitioner's office, the evidence submitted in support of the initial petition indicated that the petitioner has a "membership agreement" with Preferred Offices, under which the petitioner has agreed to an "executive membership." This agreement provides the petitioner with a published Washington, DC telephone number, live telephone answering with voice mail access, a permanent business

address with mail receipt and forwarding services, and 16 hours per month of private office usage. The petitioner provided no other business address.

In the notice of intent to revoke issued on October 30, 2009, the director advised the petitioner that, upon further examination of the petition and following a site review of the U.S. entity and an interview with the beneficiary and the signatory of the petition, it had come to the attention of USCIS that the petitioner "is not actively doing business per statute."

The director noted that, upon being interviewed by a USCIS officer, both the beneficiary and [REDACTED] stated that the beneficiary's duties are to oversee the contract between [REDACTED]. The director emphasized that the petitioning entity is not a party to this contract and questioned how such responsibility established that the petitioner is "doing business."

The director further advised the petitioner that a site visit to the petitioner's claimed address revealed that the United States entity does not have a physical location, but rather had simply secured a mail drop and answering service. The director requested additional evidence that the petitioner had secured physical premises to house the office, as well as additional evidence of business activities including phone listings and phone records and business licenses.

In response to the Notice of Intent to Revoke, counsel for the petitioner emphasized that "the on-site investigation and the [USCIS] communication with the officers of the company revealed that [the petitioner] was acting precisely as described in the petitions and [the beneficiary] was performing in precisely the role detailed in the petitions." Counsel asserted that "confirmation of representations made in two approved petitions cannot be what Congress meant when it provided that petitions may be revoked for 'good and sufficient cause.'"

Counsel emphasized that the petitioner is "doing business" through the provision of "marketing consulting and financial management services" to the foreign entity and [REDACTED] with respect to their contract. Counsel asserted that "in light of the size of the contract, [the petitioner] has taken on the role of supervising [REDACTED] performance on behalf of the [REDACTED]." Counsel explained that the petitioner and its parent company entered into its "marketing consultancy agreement" due to "the need for local daily management of the Stolichnaya brand and the financial returns under the contract."

In a letter dated December 1, 2009, the petitioner further explained as follows:

As detailed extensively in the second L petition, from the establishment of [the petitioner] in May 2008 until November 2008, [the petitioner] was engaged in representing [REDACTED] in its effort to develop its own internal distribution network or find a suitable partner. Once it became clear that [REDACTED] would be better served by contracting distribution and marketing to a single partner, [the petitioner] worked with the [REDACTED] to identify the best fit for distribution of [REDACTED] in the U.S. Based upon the analysis and opinion of [the

beneficiary], [REDACTED] chose to contract with [REDACTED]). This contract was entered into on November 7, 2008 and is between our parent companies. . . and [REDACTED].

Although [REDACTED] is not a party to this contract, [the petitioner] provides services in marketing management in support of this contract. . . . [T]he evidence of record shows that [the petitioner] has been issuing invoices for services rendered to [REDACTED]. [REDACTED] has paid those invoices.

The petitioner submitted evidence that, effective January 1, 2009, it entered into an agreement to serve as "Marketing Research Consultant" in the U.S. market for [REDACTED]. Under the terms of the agreement, the petitioner "shall provide such services to [REDACTED] on the territory of the USA as may be requested by [REDACTED] from time to time during the term of this Agreement in accordance with the list of services stipulated in Addendum 1 to this Agreement." The petitioner agreed that "it is not entitled either to provide services as an Agent of [REDACTED] or soliciting and/or concluding any agreement on behalf of [REDACTED] on the territory of the USA." Under the terms of the agreement, the petitioner is required to submit a monthly report to [REDACTED] and is compensated at a rate of \$15,000 per month.

The record contains evidence that the petitioner started invoicing \$ [REDACTED] for "Marketing Research Consultancy" services as of January 31, 2009. The petitioner claims no other source of income. The petitioner's IRS Form 1120, U.S. Corporation Income Tax Return, for 2008 indicates that the petitioner had no income during that calendar year. The petitioner acknowledges that the beneficiary is the only employee of the U.S. company and mentions no plans for further hiring.

The terms of the petitioner's agreement with [REDACTED] indicate that the petitioner's services will include: advertising and promoting [REDACTED] name, brands and business through advertising agencies and media; provision of assistance to the foreign entity in relation to merchandising and marketing strategies; services related to planning, arranging and or participating in promotional events such as trade fairs and exhibitions; provision of marketing support services such as preparing and filing documents for advertising; and collecting data and reporting on the marketing strategies, advertising and promotional events and products of competitors. We note that, at the time this agreement was signed, these types of services had already been contracted out to [REDACTED]. Nevertheless, the petitioner's agreement with the foreign entity makes no mention of [REDACTED] or the petitioning company's responsibility to "oversee" or "direct" the provision of such services by [REDACTED].

Nevertheless, the petitioner claimed that the role of the U.S. company at the end of the first year of operations is to oversee "several components of the contract with [REDACTED] that contain key financial provisions." The petitioner stated that the beneficiary "is designated by [REDACTED] to oversee [REDACTED] compliance with [contract] provisions and to ensure performance under the contract." The petitioner also provided a list of marketing services performed by [REDACTED] and indicated that the beneficiary "directs" the provision of such services. The list of services is identical to the list of services attributed to the petitioning company in its contract with [REDACTED].

The petitioner submitted copies of a number of e-mail exchanges between the beneficiary and members of the [REDACTED] team as evidence of the petitioner's "provision of marketing consulting and management services." Counsel asserted that the petitioner "is not a mere agent or office as it is providing the marketing and financial management services to [REDACTED] and is engaged in the daily direction of the work of [REDACTED] under its contract with [REDACTED] foreign offices." Counsel contended that, given that the petitioner is involved in "daily decision making regarding how to market Stolichnaya," its activities are "far different than a passive agent or office that performs no services."

Counsel also addressed the petitioner's lack of traditional physical premises, noting that the company does not require significant office, warehousing, distribution, manufacturing or assembly facilities. Counsel stated that the petitioner "has determined that the availability of office space at [REDACTED], [the beneficiary's] home offices and condominium services and [REDACTED] facilities are 'sufficient physical premises' for the provision of their services." Counsel argued that the director's insistence upon "traditional office spaces is not reflective of the current reality of business." Finally, counsel asserted that "the manner of office space is a business decision made by [the petitioner] and one that the CIS should respect and not disturb, especially in light of the fact that it was fully disclosed to the CIS in the petitions submitted by [the petitioner]."

The director determined that the petitioner failed to submit evidence that the petitioner has been doing business as defined in the regulations. The director emphasized that the company has no staff other than the beneficiary and was unable to provide evidence of sufficient physical premises or business activities other than copies of e-mail exchanges and invoices issued to the parent company requesting payment for marketing consulting services.

On appeal, counsel contends that the petitioner is actively doing business in the United States. Counsel asserts that the petitioner submitted "extensive evidence" to satisfy this requirement, including: invoices for the provision of marketing consulting services related to the distribution of [REDACTED] in the United States; evidence of marketing events and materials for the [REDACTED] in 2008 and 2009; sample emails showing the beneficiary's daily communication with [REDACTED] brand managers and marketing professionals; pay records reflecting the petitioner's payment of the beneficiary's salary; evidence of office space and facilities used by the petitioner; evidence of the petitioner's insurance policy; and financial documents and bank statements.

Counsel reiterates that the petitioner fully disclosed the nature of its "space arrangement" with Preferred Offices at the time the new office petition was filed. Counsel emphasizes that a review of the petitioner's agreement with Preferred Offices reveals that the petitioner has not obtained a mere "mail drop and answering service" but rather has access to private office space, conference rooms, secretarial services, administrative support, Internet, shipping and printing services, amounting to "the entire panoply of business services provided in an office." In addition, counsel contends that many of the petitioner's activities are performed at the sites of vendors, during business travel, at the beneficiary's home office, or at the offices of contractors, lawyers and other business partners. Finally, counsel asserts that the petitioner "made a business decision not

to invest more in traditional office facilities and has found the current arrangement more than sufficient for its purposes."

Counsel goes on to address the director's observations regarding the staffing of the company, asserting that, while the beneficiary is the company's sole direct employee, the director erroneously disregarded evidence that she oversees [REDACTED] staff who are assigned exclusively to the Stolichnaya account "under the contract between [REDACTED] and [the petitioner]." Counsel states that "the need for local, daily management of the Stolichnaya brand and the financial returns under the contract is the reason behind [the petitioner's] existence."

Counsel concludes by stating that the petitioner has sufficient funds to pay its sole employee and that the [REDACTED] employees who provide marketing and distribution services to the [REDACTED] "are employed by [REDACTED] and work pursuant to that company's contract with [REDACTED]"

Upon review, the AAO concurs with the director's determination that the petitioner failed to demonstrate that the U.S. company is doing business as required by the regulations.

The petitioner indicated to USCIS as of May 2008 that it had invested \$100,000 in the U.S. company with the intention of establishing the petitioner as an alcoholic beverage importer, distributor and marketer with local market profit and loss responsibility, responsibility for developing and executing marketing and sales programs, appointing and managing local distributors throughout the United States, establishing a local marketing strategy, and performing market research and product development activities for the U.S. market. Upon review of the evidence of record, it is apparent that the petitioner was not prepared to commence doing business upon approval of this new office petition. The petitioner did not have capital in the form of cash or other assets, did not secure a physical premises suitable for operating an import and distribution company, had no defined hiring plans, and did not have the licenses and permits needed to operate the type of business it claimed it would operate.

The petitioner readily acknowledges that [REDACTED] intended to assign [the petitioner] the responsibility of managing U.S. marketing and distribution of our products, which would require hiring an extensive work force, buying or leasing warehouse space, obtaining the necessary permits and licenses and taking other actions to build a successful distributor network." However, the record reflects that the petitioner did not proceed with implementing these plans, and in fact, devoted the first five to six months of its existence to researching the feasibility of implementing its own business plan. When a new office petition is approved, it is expected that the petitioner will immediately proceed with implementing the business plan that formed the basis of the approval, and not conduct months of feasibility analysis before ultimately abandoning the plan. The feasibility analysis should be completed before the petitioner presents the new office petition to USCIS for approval. Had the petitioner initially submitted a business plan indicating that the beneficiary would be the company's sole employee at the end of one year, operating the company primarily from a home office pursuant to a consulting agreement with the foreign entity, it is more likely than not that the new office petition would not have been approved.

The petitioner has documented no business activities in 2008, despite the fact that the beneficiary's L-1A classification petition was initially approved in June 2008. The only explanation the petitioner has provided for the delay in commencing any type of business activities is the petitioner's claim that additional time was needed to research the feasibility of carrying out the business plan submitted to USCIS when the initial petition was filed. For the reasons discussed above, this is not a reasonable excuse, in light of the petitioner's burden to establish at the time of filing the new office petition that it is prepared to immediately commence operations in the United States.

The petitioner's failure to implement its original business plan and its failure to commence any activities that could be deemed "doing business" during the first six months following approval of the new office petition provide sufficient grounds for the revocation of the petition approval. Accordingly, the approval of the petition involved gross error, and the petition approval was properly revoked pursuant to 8 C.F.R. § 214.2(l)(9)(iii)(5).

The director also addressed whether the petitioner was doing business at the end of the first year of operations, when it filed a request to extend the instant new office petition.

As of the date of filing, the petitioner had one employee and no full-time commercial premises from which to conduct business. However, counsel emphasizes that the company nevertheless is engaged in the provision of critical marketing and financial management services, and is charged with overseeing [REDACTED] staff "under the contract between [REDACTED] and [the petitioner]." Counsel also asserts that the petitioner exists due to "the need for local, daily management of the [REDACTED] and the financial returns" under this contract. However, contrary to counsel's assertions, the petitioner does not have a contract with [REDACTED], is not a party to the contract between [REDACTED] and is not named in that contract. If there is in fact a contract between the petitioner and [REDACTED] it has not been submitted for review by USCIS.

Based on the evidence submitted, the petitioner's sole source of income is from fees paid by its parent company pursuant to its marketing consultant agreement with [REDACTED]. The agreement gives the petitioner no specific management authority over [REDACTED] and no specific financial management role over the parent company's North American business activities. In fact, the marketing services outlined in the addendum to the petitioner's agreement with its parent company are precisely those which the petitioner attributes to [REDACTED]. The nature and scope of the services performed by the U.S. company is further illustrated by the following disclaimer which accompanies electronic mail correspondence sent by the petitioner:

[The petitioner] is entitled to provide to [REDACTED] (hereinafter [REDACTED]) marketing research services of auxiliary character. Nothing in this correspondence is intended or written to be used by [the petitioner] to (i) negotiate, solicit, conclude any contracts and agreements and/or provide approvals and make material decisions on behalf of [REDACTED] (ii) solicit, negotiate, conclude, authorize any sales, display, storage or maintenance of products of [REDACTED] or (iii) represent itself or through its employees as agents or employees of [REDACTED]

While the evidence submitted indicates that the beneficiary regularly engages in discussions via e-mail with WGS employees regarding the advertising and marketing of Stolichnaya products, the AAO cannot deem these "auxiliary marketing services" performed by a single employee from a home office, to rise to the level of engaging in "the regular, systematic and continuous provision of goods and services." 8 C.F.R. § 214.2(l)(1)(ii)(H). The U.S. company, in its current configuration, and pursuant to the terms of its agreement with SPI Cyprus, appears to serve as a vehicle for the foreign entity to place the beneficiary as its liaison in the United States. The petitioner invoices the foreign entity at a rate sufficient only to remunerate the beneficiary and to pay the minimal expenses of the U.S. company. The AAO does not doubt that the beneficiary can perform most of her duties from a home office via e-mail. However, given the circumstances described in the petition and supporting evidence, the beneficiary, as the sole employee of the petitioner, serves as an agent of the foreign entity, and such relationships are specifically excluded from the definition of doing business. *Id.*

Therefore, the AAO concurs with the director's conclusion that the petitioner's activities at the end of the first year of operations do not satisfy the regulatory definition of "doing business."

II. Employment in a Managerial or Executive Capacity in the United States

The final issue addressed by the director is whether the petitioner established that the beneficiary will be employed in the United States in a primarily 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.

The one-year "new office" provision is an accommodation for newly established enterprises, provided for by USCIS regulation, that allows for a more lenient treatment of managers or executives that are entering the United States to open a new office. When a new business is first established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of low-level activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed in that first year. In an accommodation that is more lenient than the strict language of the statute, the "new office" regulations allow a newly established petitioner one year to develop to a point that it can support the employment of an alien in a primarily managerial or executive position

Accordingly, if a petitioner indicates that a beneficiary is coming to the United States to open a "new office," it must show that it is prepared to commence doing business immediately upon approval so that it will support a manager or executive within the one-year timeframe. *See generally*, 8 C.F.R. § 214.2(l)(3)(v). At the time of filing the petition to open a "new office," a petitioner must affirmatively demonstrate that it has acquired sufficient physical premises to house the new office and that it will support the beneficiary in a managerial or executive position within one year of approval. Specifically, the petitioner must describe the nature of its business, its proposed organizational structure and financial goals, and submit evidence to show that it has the financial ability to remunerate the beneficiary and commence doing business in the United States. *Id.*

As contemplated by the regulations, a comprehensive business plan should contain, at a minimum, a description of the business, its products and/or services, and its objectives. *See Matter of Ho*, 22 I&N Dec. 206, 213 (Assoc. Comm. 1998). Although the precedent relates to the regulatory requirements for the alien entrepreneur immigrant visa classification, *Matter of Ho* is instructive as to the contents of an acceptable business plan:

The plan should contain a market analysis, including the names of competing businesses and their relative strengths and weaknesses, a comparison of the competition's products and pricing structures, and a description of the target market/prospective customers of the new commercial enterprise. The plan should list the required permits and licenses obtained. If applicable, it should describe the manufacturing or production process, the materials required,

and the supply sources. The plan should detail any contracts executed for the supply of materials and/or the distribution of products. It should discuss the marketing strategy of the business, including pricing, advertising, and servicing. The plan should set forth the business's organizational structure and its personnel's experience. It should explain the business's staffing requirements and contain a timetable for hiring, as well as job descriptions for all positions. It should contain sales, cost, and income projections and detail the bases therefore. Most importantly, the business plan must be credible.

Id.

In its letter dated March 22, 2008, the petitioner indicated that the beneficiary would perform the following duties in the position of Chief Financial Officer (Financial Controller) for the U.S. company:

- Management of [the petitioner's] financial statements and documents;
- Guiding [the petitioner's] budget;
- Outlining [the petitioner's] investments;
- Liaising with regulatory representatives;
- Meeting with [the petitioner's] tax consultants and legal advisors;
- Ensuring that [the petitioner's] financial planning is in compliance with [redacted] budgetary outlines;
- Present [the petitioner's] performance to [redacted] directors;
- Evaluate operating and financial performance of U.S. operations;
- Assessing local target markets;
- Identify acquisition and merger opportunities in the U.S.;
- Explore introduction and marketing of new brands;
- Review activity reports and financial statements to determine progress and status in attaining objectives; and
- Revise objectives and plans in accordance with current conditions as necessary.

[The beneficiary] will be supervising the preparation of [the petitioner's] financial and tax documents and correspond with financial institutions. Furthermore, she will be controlling the cash activities of [the petitioner]. The financial operations of [the petitioner] will largely be left to [the beneficiary's] discretion and supervision.

Given [redacted] interest in the US market and its revenue expectations for North America, [the beneficiary] will be reporting upon the progress of [the petitioner] to [redacted] directors on a regular basis. She will be closely monitoring the Group's capitalization of [the petitioner] and evaluating the need for further investments into the company. While [redacted] products are already performing impressively in the U.S. market, it is the intent of the company to expand its brands in the U.S. and continue building upon its success. As such [the beneficiary] will be strategizing on [the petitioner's] future expansions and activities. In addition, she will be assessing [the petitioner's] ability to generate revenue, its potential areas of profitability, and possible business alliances.

As [the beneficiary] will continue to perform the duties for [redacted] in addition to her responsibilities to [the petitioner], she will have hiring discretion of the staff for [the U.S. company]. She will be overseeing the day to day operations of [the petitioner] and managing the work products of her staff. She will continue managing the employees of SPI Group.

As noted above, the petitioner stated that "the intended focus of [the U.S. company] will be on the importation, supply and marketing of Stolichnaya vodka." The petitioner submitted the above-referenced five-page business plan, which indicated that the company was incorporated with an initial investment of \$100,000 and intended to operate as an alcoholic beverage importer and supplier. The business plan indicates that the U.S. company would be responsible for establishing local market strategy, holding profit and loss responsibility for the U.S. market, developing the local organization, appointing and managing local distributors, market research, product development, development of marketing and sales programs, and management of local budgets. According to the business plan, the petitioner expected gross revenue in excess of \$253 million in 2008 and \$260 million in 2009. The business plan does not include the petitioner's anticipated start-up costs, budget, operating expenses, projected staffing levels, or a detailed hiring plan. It merely notes that recruitment of senior staff is "underway" and that the company will hire marketing and sales staff.

The petitioner offered no further information regarding the proposed staffing of the U.S. company, nor did it provide evidence of the claimed \$100,000 investment from the foreign entity. As discussed above, the parent company paid over \$100,000 in legal fees related to the establishment of the U.S. company, but there is no evidence that the foreign entity provided any capital for the start-up of the U.S. operations. Furthermore, the petitioner's business plan indicates that the permits required to begin operating the business would not be acquired for at least six months. Finally, as discussed above, the petitioner had not acquired physical premises that would be suitable for an import and distribution company, and did not even sign a standard office lease.

Overall, while the position description submitted for the beneficiary indicates that she would have the appropriate level of authority over the U.S. operations as a manager or executive, the supporting evidence did not demonstrate that the company was prepared to commence doing business immediately upon approval so that it will support a manager or executive within the one-year timeframe. *See generally*, 8 C.F.R. § 214.2(l)(3)(v). Specifically, the petitioner did not adequately describe the proposed nature of the office, the scope of the entity, its organizational structure, and its financial goals, nor did it submit evidence to corroborate the size of the United States investment. 8 C.F.R. § 214.2(l)(3)(v)(B)(1) and (2). Despite these evidentiary deficiencies, the petition was approved on June 11, 2008. Therefore, we find that the present 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. Again, 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.

The director's Notice of Intent to revoke issued on October 30, 2009 also addressed the beneficiary's role at the end of the first year of operations, and considered whether the company had grown to a point where it could support a managerial or executive position. The director noted that, pursuant to telephone interviews

with the beneficiary and the petitioner's director, the beneficiary's duties appear to be limited to overseeing the contract between [REDACTED], despite the fact that the petitioning entity is not a party to that contract. The director requested additional evidence to establish that the beneficiary was employed in a primarily managerial or executive capacity, including: (1) the percentage of time the beneficiary devotes to each of her job duties for the U.S. entity on a weekly basis; (2) an explanation regarding how much time the beneficiary spends traveling and performing other duties associated with the [REDACTED] contract; (3) a list of U.S. employees, including names, job titles, educational qualifications and complete position descriptions for all workers; (4) copies of IRS Forms W-2, W-3, 1096 and 1099 issued by the petitioning company in 2008, and payroll records for all employees since January 2009; and (5) complete copies of IRS Forms 941 for all four quarters of 2008 and the first quarter of 2009.

The director advised the petitioner that, as it does not appear that the beneficiary supervises any employees at the U.S. entity, "it is not clear exactly what she does besides contract work that would qualify her as a bona fide manager or executive." The director emphasized that, given the size and nature of the business, "it is more likely than not that the beneficiary and any subordinate employees all primarily perform the tasks necessary to the operation of the business."

In response, the petitioner submitted a letter dated December 1, 2009, in which it provided the following account of the beneficiary's duties:

[The beneficiary] holds the position of Director of Finance and Marketing. Her principal duties are to oversee the financial performance of [REDACTED] under the distribution and marketing contract and to direct [REDACTED] marketing efforts on behalf of Stolichnaya. . . . [The beneficiary's] duties are as follows:

- Management of [the petitioner's] financial statements and documents. [The beneficiary] oversees the production of financial data for [the petitioner]. She reviews reports on the marketing and sales of Stolichnaya in the U.S. For example, Article VIII of the [REDACTED] contract contains several provisions that govern the volume and price for purchases of Stolichnaya. The contract covers issues ranging from extraordinary expenses to treatment of tax issues. [The beneficiary] oversees the financial reports generated and calculations made to ensure compliance and accuracy under the contract – 15% of her working time is allocated to these functions.
- Guiding [the petitioner's budget]. This duty has receded in importance since the decision was made to have [REDACTED] handle the distribution and marketing. Nonetheless, [the beneficiary] is responsible for overseeing the budgetary expenses for [the petitioner] – 2% of her working time is allocated to these functions.
- Outlining [the petitioner's] Investments. [The beneficiary] reviews investment opportunities for [the petitioner] as well as for the [REDACTED] is diversified into a variety of sectors other than vodka such as agriculture, wine, hospitality, retail and

real estate. As investment opportunities arise, [the beneficiary] evaluates them financially and reports to corporate headquarters her opinions regarding whether [redacted] will invest. 5% of her working time is allocated to these functions.

- Liaising with regulatory representatives. [The beneficiary] ensures that [the petitioner] complies with the myriad rules and regulations related to the alcohol business. Principally, [the beneficiary] addresses tax issues, but also remains a point of contact for a variety of issues. 5% of her working time is allocated to these functions.
- Meeting with [the petitioner's] tax consultants and legal advisors. [The petitioner] works with several professional service firms. . . . [The beneficiary] meets with these professionals to achieve [the petitioner's] goals. 10% of her working time is allocated to these functions.
- Ensuring that [the petitioner's] financial planning is in compliance with [redacted] budgetary guidelines. [The beneficiary] is responsible for ensuring that [the petitioner's] budget is aligned with the budgetary standards set by our corporate parent. This includes monitoring spending for marketing services under the contract with [redacted]. As such [the beneficiary] functions as the financial watchdog for the Group for spending in the U.S. 10% of her working time is allocated to these functions.
- Presenting [the petitioner's] performance to the [redacted] directors. [The beneficiary] reports regularly to the corporate directors regarding the financial performance of the U.S. operations. She is [in] daily contact with SPI officers and directors regarding sales and expenses in the U.S. market. 8% of her working time is allocated to these functions.
- Evaluating operating and financial performance of U.S. operations. [The beneficiary] is responsible for overseeing performance in the U.S., where [redacted] expects that the greatest growth in [redacted] has set a target of doubling the volume of sales by 2014 – will be in the U.S. This growth requires careful monitoring of the operations and financial performance in the U.S. [The beneficiary] is responsible for ensuring that the U.S. performance is operating at the best possible level. 10% of her working time is allocated to these functions.
- Identify acquisition and merger opportunities in the U.S. As [the petitioner] is a diversified company, [the beneficiary] seeks out opportunities to expand [redacted] brand and corporate footprint. This duty is similar to one above, "outlining investments" and the time spent on both duties is 5% of her working time allocated to these functions.
- Explore introduction and marketing of new brands. Since 2008, [redacted] has introduced three new [redacted] [The beneficiary] has managed the U.S. rollout of each of these brands and the development of brand recognition. As the [attached emails] show, [the beneficiary] is in daily

communication with [REDACTED] about branding and marketing opportunities for new brands. As the emails show, the brand managers and marketing professionals seek the approval of [REDACTED] for marketing initiatives. The oversight and obtaining approval of marketing initiatives from [REDACTED]. In the Group's most important market is performed by [the beneficiary]. This effort occupies at least 20% of her time.

- Review activity reports and financial statements to determine progress and status in attaining objectives. This duty is roughly identical to the duty above regarding "evaluating operating and financial performance of U.S. operations." As discussed above, this effort takes up 10% of [the beneficiary's] time.
- Revise objectives and plans in accordance with current conditions as necessary. This is a daily effort. [The beneficiary] constantly evaluates current conditions and reports to [REDACTED] for the proper decisions. This effort is part of all of her duties.

The petitioner acknowledged that the beneficiary is its sole direct employee, but indicated that the beneficiary "manages the work of the [REDACTED] professionals who are dedicated to the [REDACTED] account." The petitioner provided the beneficiary's payroll records and copies of the petitioner's IRS Forms 941 for the first three quarters of 2009, demonstrating the beneficiary's receipt of a monthly salary of over \$11,500.

The director revoked the approval of the petition, concluding that the petitioner failed to establish that the beneficiary was employed in a primarily managerial or executive capacity at the end of the first year of operations. The director observed that the petitioner's statements regarding the beneficiary's duties identify "general managerial functions" and fail to specify what the beneficiary will be doing to qualify as a manager or executive in the context of the petitioner's current staffing arrangement. The director further determined that, as there are no subordinate employees to provide the sales and services of the organization, "it would therefore seem likely that the beneficiary has been and will be primarily engaged in providing sales and services to your organization's clients, not directing the department or organization as asserted by you."

On appeal, counsel asserts that the director ignored the petitioner's "detailed explanations and extensive evidence," submitted to establish that the beneficiary performs primarily managerial or executive duties. Counsel further contends:

[The beneficiary] does not perform "contract work"; rather she oversees financial and marketing performance of [REDACTED] under the terms of its contract with the [REDACTED] group and manages the work of [REDACTED] employees who are assigned to work full-time on the contract. As a high-ranking manager with a lengthy history with the [REDACTED] [the beneficiary] oversees distribution and manages the marketing efforts of [REDACTED] in the company's most important and profitable market, the United States. And although she does not supervise any employees of [the petitioning company] – as has been disclosed and repeatedly explained in Petitioner's previous filings – she does exercise managerial control over [REDACTED] marketing professionals assigned to the [REDACTED]

Counsel refers to the e-mail exchanges between the beneficiary and the [REDACTED] team to corroborate his assertions that the beneficiary has decision-making authority over marketing matters and is charged with instructing the [REDACTED] team in pursuing marketing initiatives. Counsel further asserts that the e-mail evidence demonstrates that the beneficiary "has authority to demand personnel actions."

Counsel further contends that the director based his decision, in part, on the small size of the petitioning organization, but failed to consider the reasonable needs of the organization in light of its overall purpose and stage of development, as required by section 101(a)(44)(C) of the Act. Counsel explains that, while the petitioning company is small, "it is part of a large multinational organization and has tremendous responsibilities to the [REDACTED]" as the sole U.S. entity of a worldwide organization, and based on the revenue the group achieves in the U.S. market. Counsel asserts that "the financial performance and marketing activities of Stolichnaya in the U.S. are clearly an essential function not only for [the petitioner] but for the entire corporate group" and, as such, the beneficiary's position is "clearly managerial."

Counsel contends that, contrary to the director's conclusions, the beneficiary is not involved in the performance of the routine, daily operations of the [REDACTED] in the United States. Specifically, the petitioner asserts that the beneficiary "does not perform the marketing duties, but makes decisions about marketing initiatives designed and developed by [REDACTED] marketing professionals, including how to spend [REDACTED] marketing budget and how to position Stolichnaya in the market." Counsel emphasizes that the petitioning company's "one key role" is "to manage and oversee [REDACTED]'s performance under its contract with the [REDACTED]," and that the beneficiary is clearly charged with managing this essential function.

Upon review, and for the reasons discussed below, counsel's assertions are not persuasive. The petitioner has not established that the beneficiary was employed in the United States in a primarily managerial or executive capacity at the end of the first year of operations. Therefore, the director properly revoked the approval of the petition pursuant to 8 C.F.R. § 214.2(l)(9)(iii)(5), in that the initial approval of the petition constituted "gross error."

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.*

The definitions of executive and managerial capacity each have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must show that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). Here, the evidence of record does not support the petitioner's claims regarding the beneficiary's level of authority, nor has the petitioner demonstrated that the beneficiary's actual duties were primarily managerial or executive in nature one year after the approval of the new office petition. Furthermore, as discussed above, the evidence shows that the petitioner did not carry out its initial business plan or hire additional staff during the first year of operations.

With respect to the beneficiary's level of authority, the petitioner has provided a "market research consultancy agreement" between the petitioner and its parent company which defines the petitioner's responsibilities to the parent company. As stated above, the duties described in the agreement include advertising and promotion, market research, assisting [REDACTED] with merchandising and marketing strategies, performing services related to planning, arranging and/or participation in promotional events, provision of market support services, and collecting relevant data regarding the marketing strategies, advertising and promotional events of the petitioner's competitors. This agreement was signed *after* [REDACTED] signed an agreement with [REDACTED] for that company to provide advertising, marketing and promotion services of a similar nature, and therefore any claim that the petitioner "assigned" such services to [REDACTED] or that it was appointed to manage the [REDACTED] contract are not persuasive.

None of the marketing services described in the addendum to the petitioner's market research consultancy agreement with its parent company are clearly managerial in nature. Further, given that the beneficiary has been and will be the sole employee of the U.S. company, it is reasonable to believe that she is expected to perform these "auxiliary marketing services" under the terms of the agreement. As such, any description of the beneficiary's duties that does not include the services outlined in the petitioner's agreement with its parent company must be considered incomplete and of limited probative value.

Other evidence in the record undermines the petitioner's claims that the petitioner has "tremendous responsibilities to the [REDACTED]," and that the company is charged with managing "the financial performance and marketing activities of [REDACTED] in the United States." The petitioner's e-mail correspondence bears a disclaimer that identifies the petitioner as a provider of "marketing research services of auxiliary character." The petitioning company has no authority to negotiate or conclude contracts or agreements, or to approve or make material decisions on behalf of the petitioner's group, nor is it authorized to represent itself or through its employees as an agent or employee of [REDACTED]. As the beneficiary is represented to [REDACTED] as an employee of the petitioner, and not [REDACTED] it follows that her authority is similarly limited. Given the evidence to the contrary, the petitioner's claims that the petitioner and beneficiary are charged with management oversight of the parent company's contract with [REDACTED] are not persuasive.

Turning to the petitioner's description of the beneficiary's duties, the AAO concurs with the director's finding that the petitioner's description of the beneficiary's duties, while quite lengthy, fails to identify with any specificity the nature of her daily tasks, such that they could be classified as primarily managerial or executive. Many of the claimed duties relate to the financial and administrative management of the petitioning company. As discussed, the petitioning company, to the limited extent that it is "doing business" functions as a marketing consultant with one client, one employee, no permanent office, and monthly income of \$15,000. The petitioner has not established its need for a manager to devote substantial time to financial and administrative management functions. The petitioner states that the beneficiary devotes more than 50 percent of her time to managing the petitioner's "financial statements and documents," presenting the petitioner's performance to the parent company's director's, reviewing financial statements, and ensuring that the petitioner's financial planning is in compliance with the parent company's budgetary guidelines. Many of these duties are based on a claim that the petitioner, and, indirectly, the beneficiary, bears overall responsibility for the financial performance of the petitioner's Stolichnaya brand in the North American

market, a claim that is not supported by the evidence of record. Furthermore, although the petitioner has submitted ample evidence related to the beneficiary's involvement in marketing activities carried out by [REDACTED] the record contains no corroborating evidence of her claimed financial management duties as of the date of filing. Therefore, the petitioner's claim that the beneficiary devotes more than 50 percent of her time to such tasks is not persuasive.

As discussed above, the petitioner has an agreement to provide auxiliary marketing services of a non-managerial nature to its parent company, and the agreement attributes no other function to the U.S. company. The petitioner indicates that the beneficiary manages such activities by overseeing [REDACTED] personnel. However, the evidence submitted at the time of filing fails to establish the beneficiary's authority over marketing and advertising matters carried out by [REDACTED]. The e-mails submitted indicate that the beneficiary provides her opinion on routine advertising and promotional materials, provides information requested by [REDACTED], and clearly consults with others within [REDACTED] in doing so. The services performed appear to be consistent with the terms of the petitioner's marketing consulting agreement with its parent company. The petitioner acknowledges that the [REDACTED] "brand managers and marketing professionals seek the approval of [REDACTED] [REDACTED] for marketing initiatives," while the beneficiary's role is "oversight and obtaining approval." The petitioner has not established that the beneficiary's marketing duties, which appear to require a substantial portion of the beneficiary's time in light of the petitioner's marketing consulting services agreement, are managerial in nature. 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).

Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business.

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." See section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that 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)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2). If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 214.2(l)(1)(ii)(B)(3).

As discussed above, the petitioner's claim that the beneficiary is employed in a primarily managerial capacity is largely predicated on its assertion that the beneficiary oversees managers and professionals who are employed by [REDACTED] and assigned to the [REDACTED] account. While the beneficiary frequently interacts with

such managers and professionals, the petitioner has not established that the beneficiary supervises and controls their work, such that she could be classified as a personnel manager. [REDACTED] has an agreement with [REDACTED], not with the petitioning company. The petitioning company does not have the authority to make material decisions on behalf of [REDACTED]. An employee will not be considered to be a supervisor simply because of a job title, because he or she is arbitrarily placed on an organizational chart in a position superior to another employee, or even because he or she supervises daily work activities and assignments. Rather, the employee must be shown to possess some significant degree of control or authority over the employment of subordinates. *See generally Browne v. Signal Mountain Nursery, L.P.*, 286 F.Supp.2d 904, 907 (E.D. Tenn. 2003) (*Cited in Hayes v. Laroy Thomas, Inc.*, 2007 WL 128287 at *16 (E.D. Tex. Jan. 11, 2007)). The petitioner has not established that the beneficiary possesses a significant degree of control or authority over any [REDACTED] staff. In fact, it does not appear that [REDACTED] possesses this level of authority over [REDACTED] staff, as the contract between the parties indicates that [REDACTED] shall be solely responsible for the management, direction, control, supervision. . . of its own employees." In support of its claim that the beneficiary manages [REDACTED] personnel, the petitioner submitted a copy of an e-mail message the beneficiary sent to a [REDACTED] manager requesting that [REDACTED] "reconsider functional and/or personal composition of [REDACTED] team." It is not evident that this was the beneficiary's personal recommendation or that [REDACTED] was under any obligation to honor the request. The petitioner has not established that the beneficiary qualifies as a "personnel manager."

Counsel claims on appeal that the petitioning company's "one key role" is "to manage and oversee [REDACTED] performance under its contract with the [REDACTED]" and that the beneficiary is clearly charged with managing this essential function. The petitioner has not established that the beneficiary is employed primarily as a "function manager." 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 detailed description of 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, as discussed above, the petitioner has not established that the beneficiary's duties are primarily managerial or that her level of authority over [REDACTED] performance rises to the level of a function manager. Rather, the evidence shows that the petitioner acts as a marketing services consultant to its parent company, rather than being charged with management responsibility over the financial and marketing performance of [REDACTED] under its agreement with the [REDACTED] overseas. The beneficiary appears to act as a liaison between the [REDACTED], but does not exercise discretion over the day-to-day operations of [REDACTED] performance under the contract. The petitioner's claim that the beneficiary directs financial and marketing functions for the [REDACTED] is simply not supported by the evidence for the reasons already discussed. Again, the petitioner has acknowledged that it intended at the time it filed the new office

petition to hire "an extensive workforce," and is instead operating a one-person marketing consulting business with one client.

In light of the above, the record before the director at the time the petition was approved did not support a finding that the beneficiary would be employed in a primarily managerial or executive capacity within one year or that the U.S. company would support a managerial or executive position. Further, the evidence submitted in response to the notice of intent to revoke does not support a conclusion that the beneficiary's duties at the end of the first year of operations were primarily managerial or executive in nature. Accordingly, we find that the petition approval was properly revoked and the appeal will be dismissed.

III. The Beneficiary's Foreign Employment

Beyond the decision of the director, the evidence of record does not establish that the beneficiary had at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition, as required by 8 C.F.R. § 214.2(l)(3)(iii).

As noted above, the petitioner filed the Form I-129 on May 30, 2008. Therefore, the petitioner must establish that the beneficiary had at least one continuous year of full-time employment with the foreign entity between May 30, 2005 and the date of filing. The petitioner stated on the L Classification Supplement to Form I-129 that the beneficiary was employed by [REDACTED] from May 2004 until the present, with no interruption in employment. In its letter dated May 22, 2008, the petitioner indicated that the beneficiary had been serving as Financial Controller for [REDACTED] since 2004.

However, the petitioner also submitted a copy of the beneficiary's employment agreement with [REDACTED] dated October 1, 2007. The agreement indicates that the beneficiary "successfully performed the task of a Financial Controller for the Company from May 2004 to October 2005," and indicates that the beneficiary would be "beginning the employment" in this position on October 1, 2007. The petitioner submitted copies of the beneficiary's pay statements issued by [REDACTED] for the months of March and April 2008 only.

Based on the information provided in the employment agreement, it appears that the beneficiary had a two-year interruption in her employment as financial controller for the petitioner's parent company, from October 2005 until October 2007. Thus, the evidence does not establish that the beneficiary had one year of continuous full-time employment with the foreign entity in the three-year period preceding the filing of the petition. Based on the evidence of record, it appears that the foreign entity employed the beneficiary for an aggregate period of one year between May 2005 and May 2008. However, the plain language of the regulation at 8 C.F.R. § 214.2(l)(3)(iii) requires that the beneficiary's one-year of qualifying employment abroad be continuous.

A review of the beneficiary's current Russian passport issued in November 2006, a complete copy of which was submitted at the time of filing, further supports a conclusion that the beneficiary was not employed by the foreign entity in Switzerland continuously since May 2004, as claimed by the petitioner. The beneficiary's passport contains a United Kingdom "Visa Work Permit Dependant" that was valid from February 12, 2007

until February 12, 2012. She also has a Swiss *schengener staaten* visa valid from April 2007 until August 2007 which allows entries of up to 45 days, and a one-year Swiss *etats schengen* visa (notated "*non professionnel*") issued on November 1, 2007, which allows entries of up to 90 days. The beneficiary does not appear to have a Swiss work permit or extended-stay visa that would have allowed her to be employed by ■I ■ during the stated period of qualifying employment abroad. 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).

Based on the foregoing discrepancies, the petitioner has not established that the beneficiary had at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition. For this additional reason, the petition cannot be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003). The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

IV. Conclusion

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 based on the two independent and alternative grounds stated. Further, based upon a review of the evidence of record, the AAO finds that the petitioner has not submitted evidence to satisfy the regulatory requirement at 8 C.F.R. § 214.2(l)(3)(iii).

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. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *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).

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.