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



U.S. Citizenship
and Immigration
Services

DATE: **APR 18 2013** OFFICE: VERMONT SERVICE CENTER FILE: [REDACTED]

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:

[REDACTED]

INSTRUCTIONS:

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

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

Thank you


Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The director of the Vermont Service Center revoked the previously approved nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed and the petition will be revoked.

The petitioner, a Georgia corporation, states that it is an importer and distributor of textile products and metal beauty implements. The petitioner states that it is a subsidiary of [REDACTED], located in Pakistan. The petitioner seeks to classify the beneficiary as a nonimmigrant intracompany transferee (L-1A) pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). On behalf of the beneficiary, the petitioner was previously granted a one-year period of stay in L1A status and two extensions for two years each for the beneficiary.

The petitioner filed a Form I-129 (Petition for a Nonimmigrant Worker) with the United States Citizenship and Immigration Services (CIS) to continue to employ the beneficiary in L-1A classification. The director approved the petition and granted a visa valid from December 7, 2010 to December 6, 2012. During this period, the beneficiary traveled abroad. Before returning to the United States, the beneficiary was required to attend an interview at the U.S. Consulate in Islamabad on February 15, 2011. During the interview, the beneficiary gave the interviewing officer reason to doubt the validity of the basis for the petition. On March 13, 2012, the director notified the petitioner of his intent to revoke approval of the L1A petition. Accompanying the Notice of Intent to Revoke (NOIR), the director included a copy of the letter from the U.S. Consulate in Islamabad, which called into question several aspects of the beneficiary's eligibility, including whether the petitioner had misrepresented the executive nature of the beneficiary's position.

In the consular officer's letter, the officer noted that evidence accompanying the petition stated the petitioner employs six staff members. However, documents submitted after the beneficiary's interview indicated that the petitioner's only full-time employee is the beneficiary himself. The officer further noted that the records show that between 2007 and 2011, the petitioner only employed between 1 and 4 part-time warehouse workers at any time.

The NOIR instructed the petitioner that it could submit additional evidence to address the issues raised in the NOIR. In response, counsel for the petitioner submitted a detailed letter addressing the issues raised and pointing to additional evidence submitted, including 2008 and 2009 tax returns, bank statements, 2009 W2s, 2010 quarterly wage reports, a payroll spreadsheet, a lease renewal, invoices, and emails regarding shipments.

Counsel further stated that the instant petition should be given deference due to the petitioner's previously approved petitions, citing the policy memo issued on April 23, 2004 by William Yates entitled "The Significance of a Prior CIS Approval of a Nonimmigrant Petition in the Context of a Subsequent Determination Regarding Eligibility for Extension Petition Validity."

The director subsequently revoked the petition. The director concluded that the petitioner had no full-time employees other than the beneficiary based on tax documents and wage reports showing wages for other employees far below what would be paid for full-time minimum-wage employment. The director reasoned that the petitioner's lack of other employees meant that it was unreasonable to claim that the beneficiary would spend his time primarily performing executive level functions within the organization. Without any other employees, there would be no one to perform the common tasks necessary for the business to operate.

The petitioner now submits a timely appeal accompanied by a brief. The brief identifies previously submitted documents that address the director's reasons for the revocation. In addition, counsel emphasizes the illogic of revoking a petition that was recently reaffirmed. He also again raises the Yates memo for the premise that extensions should be given deference unless certain errors or changes exist.

On review, the petitioner's position that the beneficiary will be employed in a managerial or executive capacity is not persuasive. On that basis alone, the appeal will be dismissed.

II. Law

The regulations provide the following instructions regarding the revocation of petitions:

8 C.F.R. § 214.2(l)(14)(i):

The director shall send to the petitioner a notice of intent to revoke the petition at any time if he or she finds that:

- (1) One or more entities are no longer qualifying organizations;
- (2) The alien is no longer eligible under section 101(a)(15)(L) of the Act;
- (3) A qualifying organization(s) violated requirements of section 101(a)(15)(L) and these regulations;
- (4) The statement of facts contained in the petition was not true and correct; or
- (5) Approval of the petition involved gross error; or
- (6) None of the qualifying organizations in a blanket petition have used the blanket petition procedure for three consecutive years.

8 C.F.R. § 214.2(l)(9)(iii)(A):

The notice of intent to revoke shall contain a detailed statement of the grounds for revocation and the time period allowed for the petitioner's rebuttal. Upon receipt of this notice, the petitioner may submit evidence in rebuttal within 30 days of the notice. The director shall consider all relevant evidence presented in deciding whether to revoke the petition in whole or in part.

In addition, the following statutes and regulations are relevant to the beneficiary's qualification for the sought benefit:

8 C.F.R. § 214.2(l)(3):

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.

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

The term "managerial capacity" means an assignment within an organization in which the employee primarily-

- (i) manages the organization, or a department, subdivision, function, or component of the organization;

- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (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):

The term "executive capacity" means an assignment within an organization in which the employee primarily-

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

III. Analysis

Under 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. Although not explicitly stated by the director, the AAO agrees with certain aspects of the director's reasoning

such that the petition approval must be revoked on the basis of 8 C.F.R. § 214.2(l)(9)(iii)(A)(5): "Approval of the petition involved gross error."

The term "gross error" is not defined by the regulations or statute. Furthermore, although the term has a juristic ring to it, "gross error" is not a commonly used legal term and has no basis in jurisprudence. See *Black's Law Dictionary* 562, 710 (7th Ed. 1999)(defining the types of legal "error" and legal terms using "gross" without citing "gross error"). The word "gross" is commonly defined first as "unmitigated in any way: UTTER," as in "gross negligence." *Webster's II New College Dictionary* 491 (2001).

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

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 is granted contrary to law must be considered an unmitigated error, and therefore a "gross error." This view of "gross error" is consistent with the example provided in the Federal Register. See 52 Fed. Reg. at 5749.

Upon review, the present petition was properly revoked as the director originally approved the petition in gross error, contrary to the eligibility requirements provided for in the regulations. In this case, the clear error was the director's finding that the petitioner established it would employ the beneficiary in a primarily managerial or executive capacity.

As an initial matter, the AAO notes the petitioner's recurring contention that the prior approval of the petition means that the petition extension should be given deference. The AAO acknowledges that USCIS previously approved a nonimmigrant petition filed on behalf of the beneficiary. In matters relating to an extension of nonimmigrant visa petition validity involving the same petitioner, beneficiary, and underlying facts, USCIS will generally give some deference to a prior determination of eligibility. However, the mere fact that USCIS, by mistake or oversight, approved a visa petition on one occasion does not create an automatic entitlement to the approval of a subsequent petition for renewal of that visa. *Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 148 (1st Cir 2007); see also *Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 597 (Comm. 1988). Each nonimmigrant petition filing is a separate proceeding with a separate record and a separate burden of proof. See 8 C.F.R. §

103.8(d). In making a determination of statutory eligibility, USCIS is limited to the information contained in that individual record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Ultimately, the prior approvals do not preclude USCIS from denying an extension of the original visa based on reassessment of petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004).

The definitions of executive and managerial capacity 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 prove 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).

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(1)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.*

In the petitioner's letters accompanying its original submission and its response to the RFE, it listed the beneficiary's duties as follows:

- Lead the development, implementation, and alignment of sourcing strategies and supplier network capabilities for key commodities and spend categories to achieve broad business objectives[;]
- Identify, develop, and manage strategic business relationships and gain a comprehensive understanding of business requirements of the customers[;]
- As needed, staff and develop a high performing and motivated sourcing team [sic] responsible for interfacing with business and supplier partners[;]
- Maintain and provide a current understanding of industry best practices and technology trends[;]
- Measure and manage the overall performance of the global supplier network within the field of expertise[;]
- Identify metrics, tools, and processes to optimize sourcing, supplier activities, and efficiencies, and work with others to prioritize and drive implementation[;]
- Establish short-term and long-term business objectives[;]

- Develop project plans, deliverables, metrics and milestones[;]
- Implement process disciplines and management systems necessary to achieve desired results[;]
- Manage governance and control programs to ensure business continuity, protect company assets, and comply with corporate and regulatory policies[;]
- Ensure organizational financial goals are met, including budget and savings[;]
- Develop both internal and external partnerships critical to meeting objectives[;]
- Manage an operating budget and external expenditures[; and]
- Advise on supplier network capabilities and commodity/spend category trends and industry best practices.

As an initial matter, the beneficiary's proposed job duties are extremely vague. The job duties listed are generic and provide no insight into what the beneficiary will actually do on a daily basis. Tasks such as "[l]ead[ing] the development, implementation, and alignment of sourcing strategies . . . to achieve broad business objectives," "[e]stablish[ing] short-term and long-term business objectives," and "[d]evelop[ing] project plans, deliverables, metrics and milestones" are meaningless without more explanation. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of her daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

The statutory definition of "managerial capacity" allows for both "personnel managers" and a "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).

The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.*

While the beneficiary evidently exercises discretion over the day-to-day operations of the business, the petitioner's description of proposed duties and the evidence in the record suggest that the beneficiary's actual duties include a number of non-managerial and non-executive tasks.

In a letter accompanying its petition, the petitioner stated that it began its business by importing and distributing textile products to hotels, motels, and salons. It received its first shipment in October 2005 and since then has imported and sold goods worth over \$2.1 million. In 2009, the company expanded its operations to include importing and selling "metal beauty implements" to beauty industry professionals. The petitioner stated that for 2009, it reported a gross annual income of \$279,967 and had a staff of 6 employees.

Accompanying the petition, the petitioner submitted a partially illegible organizational chart. At the top of the chart is the President listed as [REDACTED]. Below the President is the Director, Sourcing, listed as the beneficiary. Under the parent company branch, the chart shows [REDACTED] as the CEO. Below him is the Executive Director, also listed as the beneficiary. There are two branches under the beneficiary. Under "Coordination" are three illegible names, two of whom are listed as inspection coordinators and one of whom is listed as the assistant coordinator of accounts. Under the inspections branch are six illegible names. Two of these individuals are senior inspectors and each senior inspector has two inspectors below him.

The petitioner submitted 2009 W2 forms that show the following information

<u>Employee</u>	<u>Total amount paid in 2009</u>
beneficiary	\$60,000.00
[REDACTED]	\$2,392.76
[REDACTED]	\$754.38
[REDACTED]	\$622.63
[REDACTED]	\$2,995.85

\$9,539.59

The petitioner submitted a spreadsheet entitled "Employee Check Record" showing payments made to its employees in the year 2010. The spreadsheet indicates the following amounts were paid to the following individuals:

<u>Employee</u>	<u>Total amount paid in 2010</u>
[REDACTED]	\$672.50
[REDACTED]	\$3,077.60
[REDACTED]	\$87.50
beneficiary	\$35,000.00
[REDACTED]	\$9,173.25
[REDACTED]	\$765.01

The AAO first notes that none of these employees other than the beneficiary appears on the petitioner's organizational chart. 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).

Next, the yearly salary of a full-time employee paid minimum wage in the United States is over \$15,000. Of the salaries listed above, only the beneficiary makes that amount or more. For both 2009 and 2010, the evidence shows that the petitioner had five employees other than the beneficiary. Of these five employees, only [REDACTED] made over 25% of the minimum wage. As noted by the director, the wage reports therefore indicate that the majority of the petitioner's staff worked only sporadically.

This is reinforced by the petitioner's Quarterly Tax and Wage Reports for 2010. The first quarter report indicates that the petitioner paid 5 employees wages totaling \$21,050.29. The beneficiary was paid \$15,000 while the remaining four individuals were paid \$765.01, \$672.50, \$974.53, and \$3,638.25. For the second quarter of 2010, the petitioner paid 3 employees a total of \$20,761.32. The beneficiary received \$15,000 and the other two employees received \$2,030.82 and \$3,730.50.

With no full-time employees other than the beneficiary, it is unclear who performs the tasks necessary for the every-day operation of the business if not the beneficiary. The petitioner is engaged in the distribution of wholesale products and it is not clear who is responsible for purchasing orders; managing the import and delivery of wholesale products; managing customs requirements; inventory; and negotiating contracts with wholesalers. Again, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho, supra*.

As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, USCIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. To establish that the reasonable needs of the organization justify the beneficiary's job duties, the petitioner must specifically articulate why those needs are reasonable in light of its overall purpose and stage of development. In the present matter, the petitioner has not explained how the reasonable needs of the petitioning enterprise justify the beneficiary's performance of non-managerial or non-executive duties. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998).

Furthermore, the reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. *See* sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). The reasonable needs of the petitioner may justify a beneficiary who allocates 51 percent of his duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of his or her time on non-qualifying duties.

Based on the current record, the AAO is unable to determine whether the claimed managerial or executive duties constitute the majority of the beneficiary's duties, or whether the beneficiary primarily performs non-managerial administrative or operational duties. An employee who "primarily" performs the tasks necessary to produce a product or provide a service is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology International*, 19 I & N Dec. at 604.

The job description submitted by the petitioner provides little insight into the true nature of the tasks the beneficiary will perform or how his time will be divided among managerial or executive and non-managerial or non-executive duties.

Although the beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* § 101(a)(44)(A)(ii) of the Act. Given that the petitioner has no full-time employees other than the beneficiary, it is not logical to assume that he could spend more than fifty percent of his time managing employees. Furthermore, the petitioner has not alleged that any of its other employees are professionals or themselves managers.

Based upon the record, it cannot be concluded that the beneficiary will be employed by the petitioner in a primarily managerial or executive capacity. The petitioner's employee structure is not substantial enough to relieve him of the tasks necessary to produce a product or provide a service. Accordingly, the appeal will be dismissed.

In his decision, the director lists additional grounds for the revocation. In addition to the petitioner's failure to demonstrate the beneficiary will be employed in a primarily managerial or executive capacity, the director found insufficient evidence that the petitioner was doing business and that an employer-employee relationship existed between the petitioner and beneficiary. The director found the petitioner was not doing business based on its small number of employees. While a large staff may be indicative of doing business, it does not necessarily follow that a small staff means a company is not doing business. To rebut the director's assertion, the petitioner provided evidence that included its 2008 and 2009 tax returns, bank statements, 2009 W2s, 2010 quarterly federal tax return, a payroll spreadsheet, a lease renewal, invoices, and emails regarding shipments. Evidence in the record is sufficient to show that the petitioner has been doing business as that term is defined in 8 C.F.R. § 214.2(l)(2)(H). Similarly, the director's finding that an employer-employee relationship did not exist between the beneficiary and petitioner is misplaced. The director's rationale for coming to this conclusion was flawed as it is based on the observation that the beneficiary's brother and father did not collect salaries. It is not clear what bearing this would have on the employer-employee relationship between the beneficiary and the petitioner. In support of the employer-employee relationship, the petitioner submitted the beneficiary's W2s.

These additional grounds for revocation are withdrawn, but the appeal is nevertheless dismissed due to the gross error made in approval of the initial petition. The finding of gross error is based on the petitioner's failure to show the beneficiary will be employed in a primarily managerial or executive capacity.

As always, the burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not met that burden.

ORDER: The appeal is dismissed and the petition is revoked.