



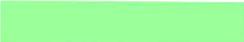
U.S. Citizenship  
and Immigration  
Services

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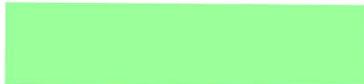
Office: VERMONT SERVICE CENTER

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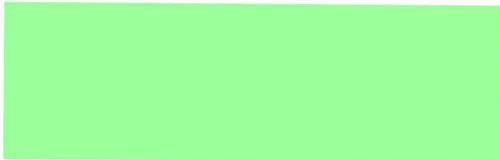
Petitioner:

Beneficiary:



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

ON BEHALF OF PETITIONER:

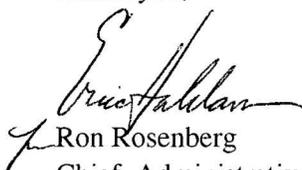


INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements.** See also 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

  
Ron Rosenberg

Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Vermont Service Center, initially approved the nonimmigrant visa petition. The director subsequently issued a notice of intent to revoke the approval of the petition, and, after reviewing the petitioner's rebuttal evidence, issued a notice of revocation. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner filed this nonimmigrant petition seeking to classify 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 Texas corporation established in July 2008, states that it operates a store, providing beer, wine, grocery, lottery, lotto, soft drinks, cigarettes, and tobacco products. The petitioner claims to be a joint venture with [REDACTED] located in [REDACTED] Nepal. The petitioner seeks to employ the beneficiary as general manager for a period of one year.<sup>1</sup>

The director initially approved the petition for a one-year period commencing on December 1, 2012. Subsequent to the approval of the petition, the director determined that the approval was not clearly correct in that the petitioner failed to establish: (1) that the beneficiary worked in a qualifying position abroad for the required one year in the past three years prior to filing; (2) that a qualifying relationship exists between the foreign and domestic entities; and (3) that the beneficiary will be working primarily as a manager in the United States. On March 11, 2013, after reviewing the petitioner's rebuttal evidence, the director revoked the approval of the petition based on these three alternative grounds.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO. On appeal, counsel for the petitioner asserts that "the petitioner provided sufficient evidence to show a qualifying relationship between the foreign entity and the petitioner[,] the beneficiary's work in the foreign entity was sufficiently managerial and executive[, and] the beneficiary's proposed duties in the U.S. were sufficiently managerial and executive." Counsel submits a brief and additional evidence in support of the appeal.

## I. THE LAW

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United

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<sup>1</sup> The petitioner indicated on the Form I-129, Petition for a Nonimmigrant Worker, that the beneficiary is coming to the United States in order to open or be employed in a new office. A "new office" is defined as an organization that has been doing business in the United States through a parent, branch, affiliate or subsidiary for less than one year. 8 C.F.R. § 214.2(l)(1)(ii)(F). The petitioner in this matter was established in July 2008 and reported gross income of \$1.26 million in 2010 and \$1.39 million in 2011. Therefore, while the petitioner claims that the foreign entity recently acquired a majority of its shares, it does not qualify as a new office and the evidentiary requirements at 8 C.F.R. § 214.2(l)(3)(v) do not apply.

States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

Under 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. Referring to the eligibility criteria at 8 C.F.R. § 214.2(l)(3)(i), (ii), (iii), and (iv), the director reviewed the rebuttal evidence and concluded that the petitioner had not established: that it had a qualifying relationship with a foreign entity; that the beneficiary has been working in a managerial capacity with the foreign entity for at least one year within the past three years; or that it will employ the beneficiary in a qualifying managerial or executive capacity. Upon review, the director revoked the approval on the basis of 8 C.F.R. § 214.2(l)(9)(iii)(A)(5): "Approval of the petition involved gross error."

The term "gross error" is not defined by the regulations or statute. Furthermore, although the term has a juristic ring to it, "gross error" is not a commonly used legal term and has no basis in jurisprudence. See *Black's Law Dictionary* 562, 710 (7th Ed. 1999)(defining the types of legal "error" and legal terms using

"gross" without citing "gross error"). The word "gross" is commonly defined first as "unmitigated in any way: UTTER," as in "gross negligence." *Webster's II New College Dictionary* 491 (2001).

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

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, and for the reasons discussed below, the approval of the present petition was properly revoked as the director clearly approved the petition in gross error, contrary to the eligibility requirements provided for in the regulations.

## II. THE ISSUES ON APPEAL

### A. Qualifying Relationship

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

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

- (G) *Qualifying organization* means a United States or foreign firm, corporation, or other legal entity which:
  - (1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section;

- (2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee[.]

\* \* \*

- (I) *Parent* means a firm, corporation, or other legal entity which has subsidiaries.
- (J) *Branch* means an operating division or office of the same organization housed in a different location.
- (K) *Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.
- (L) *Affiliate* means
- (1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or
  - (2) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

#### 1. Facts

On the L Classification Supplement to Form I-129, the petitioner identified the beneficiary's last foreign employer as [REDACTED] and stated that the companies have a joint venture relationship based on the following description of the stock ownership and control of each company: "51% [REDACTED]"

In support of the petition, the petitioner submitted: (1) its Certificate of Formation, indicating that the company is authorized to issue 1000 shares at \$1.00 par value; (2) an original, handwritten share certificate number 001 issuing 510 shares of the petitioning company to the foreign entity (the certificate itself is undated, but the front portion is dated July 1, 2012); (3) a "partnership agreement," dated July 1, 2012, between the petitioner and the foreign entity; (4) the petitioner's by-laws; (5) minutes of a company officers'

meeting, dated June 22, 2012; (6) a business plan dated July 2012; and (7) IRS Forms 1120S, U.S. Income Tax Return for an S Corporation, for 2010 and 2011, both showing that [REDACTED] owned 100% of the U.S. company.

The "partnership agreement" between the petitioner and the foreign entity states that the foreign entity owns 51% of the petitioner's shares and will make arrangements to transfer funds to the petitioner. It also states that the foreign entity will own the petitioner's profits and be charged losses. The agreement further states that the foreign entity has full rights to appoint or transfer a general manager to the U.S. company.

The minutes of the meeting held on June 22, 2012, state that the foreign entity acquired 51% of the U.S. petitioner's shares and is investing \$78,540.00. It further states that [REDACTED] owned 100% of the shares and after the company sold 51% of its shares to the foreign entity, [REDACTED] owns the remaining 49% of the petitioner's shares. The petitioner's business plan provides the same information in its discussion of the company's ownership.

With respect to the submitted share certificate number 001, it is evident that the number "510" was handwritten over a typed number on the upper-right corner of the certificate in the space where the issuer is to indicate the number of shares the certificate represents. Although the petitioner indicates that all issued shares were previously held by [REDACTED] the portion of the certificate on which the transfer of shares should be recorded is not completed.

The petitioner also submitted a letter from the [REDACTED] (India) stating that the foreign entity had a balance of \$40,732.56 as of May 8, 2012.

On the basis of this limited information, the director initially approved the petition on October 2, 2012 for a one-year period commencing on December 1, 2012.

On November 8, 2012, the director issued a notice of intent to revoke the approval of the petition based, in part, on a finding that the petitioner failed to establish that it has a qualifying relationship with the foreign entity. The director noted that the foreign entity's bank balance was not sufficient to make the required investment in the U.S. company. The director specifically requested evidence demonstrating that the foreign entity has in fact paid for the ownership of the U.S. entity. The director also noted that the sole share certificate submitted in support of the qualifying relationship appeared to be altered by hand.

In response to the Notice of Intent to Revoke, the petitioner submitted a letter addressing the director's concerns regarding the qualifying relationship:

[W]e respectfully disagree with your opinion in this regard, because, the provided stock certificate was not altered, instead, it was slightly corrected by the management to match with the real figures shown in the letters. Importantly, we would like to inform you that the petitioner issued the above mentioned shares to the [foreign entity], subject to the approval of

the L1A petition and therefore placed those shares in the escrow and will keep the shares in escrow until the petition is approved. It will not be necessary to pay by the [foreign entity] for the sold or distributed shares until the instant petition is not approved [*sic*]. Upon L1A approval, the foreign entity . . . will invest more than \$78,000 in the [U.S. company] upon approval of the petition. The shares were sold in a condition that if the petition is not approved, the shares are not paid, the shares are escrowed and sold of Distribution credited will be cancelled as a whole [*sic*]. As such, it was not necessary to invest the whole amount by the [foreign entity] before the petition is approved.

The petitioner submitted a new original, handwritten share certificate number 002 issuing 510 shares of the U.S. company to the foreign entity (again, the certificate itself is undated, but the reverse side is dated July 1, 2012). The petitioner also submitted a copy of its stock ledger indicating that the foreign entity was issued share certificates number 001 and 002, each issuing 510 shares of the U.S. company for \$78,540.00. The stock ledger notes that share certificate number 002 was issued as a correction. The stock ledger also indicates that the U.S. company held 490 of its shares at par value. [REDACTED] was not listed on the stock ledger as a stockholder.

The petitioner submitted a letter from the foreign entity, dated December 3, 2012, stating that it currently has \$86,643.71 in an account at the [REDACTED]. The letter further states that the foreign entity "could not transfer money to [the U.S. company] at this point since the Nepalese regulations do not permit such transfer before securing a visa." The foreign entity states that it will transfer \$78,540.00 USD to the petitioner once the visa is approved.

The petitioner also submitted the meeting minutes of the foreign entity, dated May 17, 2012, stating that it decided to invest \$78,540.00 in the petitioning company and, as a result, will have 51% of its shares.

The petitioner submitted a letter from Citibank, dated November 27, 2012, to [REDACTED] stating that his account received a wire transfer for \$22,455.00 on August 11, 2008 and another for \$32,485.00 on August 12, 2008 from [REDACTED] through [REDACTED]. The petitioner also submitted a letter from Wells Fargo stating that the U.S. company's bank account has a balance of \$4,878.79 as of December 1, 2012.

The director revoked the approval of the petition on March 11, 2013, concluding, in part, that the petitioner failed to establish that it has a qualifying relationship with the foreign entity. In revoking the approval, the director found that the one stock certificate is not sufficient evidence of the petitioner's ownership because the petitioner failed to submit evidence of who owns the remaining 49% of the company's shares. The director further found that the meeting minutes are internally generated documents that were not officially registered to show that the partnership agreement is valid.

On appeal, counsel for the petitioner addresses the director's findings as follows:

[T]he Petitioner did submit a copy of the stock ledger . . . . That did indicate that the foreign entity had acquired 51% equity in the Petitioner. However, according to the Petitioner, because it is a small and closely held corporation, even though a new stock certificate was issued to the minority shareholder [REDACTED] necessary changes were not made to the stock register because by first owning 100%, and then having his 51% transferred to the foreign entity, [REDACTED] anyways would automatically own 49%. Therefore the necessary changes to the stock register was [sic] made only on March 29, 2013. . . . The explanation of the Petitioner is reasonable given that it is a closely held corporation and given that the Service Center had in its RFE had asked [sic] for evidence of the qualifying relationship, and qualifying relationship is shown if an entity owns 51% of the other entity. . . . Not by evidence of the minority shareholder's share.

The petitioner submits minutes of a meeting held on March 29, 2013, which states that on July 1, 2012, it issued the foreign entity 51% of its shares on certificate number 002. It then states, "corrected stock certificate issued date December 3, 2012." However, the date reflected on the stock ledger and on the front of certificate number 002 is July 1, 2012. The minutes also state that certificate number 003 was issued to [REDACTED] for 49% of its shares.

The petitioner provides a new copy of the U.S. company's stock ledger adding certificate number 003 issuing 490 shares of the U.S. company to [REDACTED] on July 1, 2012. The ledger notes that certificate number 003 was "issued post date 3-29-13." The petitioner also submits a copy of share certificate number 003 issuing 490 shares of the U.S. company to [REDACTED]. Again, the certificate itself is undated, but the reverse side is dated July 1, 2012.

## 2. Analysis

Upon review, and for the reasons discussed herein, the petitioner has not established that it has a qualifying relationship with the foreign entity.

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

As 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, USCIS is unable to determine the elements of ownership and control.

The regulations specifically allow the director to request additional evidence in appropriate cases. *See 8 C.F.R. § 214.2(l)(3)(viii).* As ownership is a critical element of this visa classification, the director may reasonably inquire beyond the issuance of paper stock certificates into the means by which stock ownership was acquired. Evidence of this nature should include documentation of monies, property, or other consideration furnished to the entity in exchange for stock ownership. Additional supporting evidence would include stock purchase agreements, subscription agreements, corporate by-laws, minutes of relevant shareholder meetings, or other legal documents governing the acquisition of the ownership interest.

In the instant matter, the petitioner failed to submit evidence of the petitioning company's initial ownership structure. Throughout the record, the petitioner claims that its shares were owned by [REDACTED] however, the petitioner did not present any primary evidence of such ownership. The petitioner's share certificates begin with number 001 issued to the foreign entity and later number 003 issued to [REDACTED] for 49% of the company. There is no indication that shares were transferred from [REDACTED] to the foreign entity and insufficient evidence that he even owned them in the first place. Further, certificate number 001 appears to be altered and the petitioner has failed to explain why it issued a second certificate to the foreign entity for 51% of its shares and backdated it to July 1, 2012.

Additionally, the petitioner has not provided any evidence of the foreign entity's investment in the U.S. company. In fact, the petitioner and the foreign entity openly state that the foreign entity will not invest in the U.S. company until the instant petition is approved. Had the petitioner made this clear at the time of filing, the petition could not have been approved. As the U.S. company and foreign entity openly state that the foreign entity will not purchase its 51% of the shares of the U.S. company until the instant petition is approved, and that its 51% of the U.S. company's shares will remain with the U.S. company if the instant petition is denied, it is evident that the foreign entity does not in fact own 51% of the U.S. company's shares. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971).

For these reasons, it cannot be determined that the petitioner has a qualifying relationship with the foreign entity. Accordingly, the approval of the petition was properly revoked and the appeal will be dismissed.

B. Employment Abroad in a Managerial or Executive Capacity

The second issue addressed by the director is whether the petitioner has established that the beneficiary was employed by the foreign entity in a qualifying managerial or executive capacity, as required by 8 C.F.R. § 214.2(l)(3)(v)(B).

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.

On the Form I-129, Petition for a Nonimmigrant Worker, where asked to describe the beneficiary's duties abroad for the three years preceding the filing of the petition, the petitioner stated the following:

She is performing all duties of Director from May 2006 until now in the parent company. Now she will be transfer to US company to perform duties of General Manager as past that include to make policy decision [*sic*], quality controlling and coordinate store activities about sales, promotion, pricing, and distribution of products and services, review financial statement, sales, and activities report.

In support of the petition, the petitioner submitted a letter describing the beneficiary's duties abroad as follows:

[The beneficiary], as a full time working Director, stands on topmost position of the parent company and supervises and directs directly to other employee of the business. [The beneficiary] is performing her managerial responsibility and duties sincerely and professionally. Her duties are included but not limited to making policy decision, plan, set business objective and sales target and auditing, directing and supervising of employee, making decision on hire, fire and training and employee benefits, making decision on negotiating and dealing with customers and buyers, quality control of services and goods [*sic*].

[The beneficiary] is responsible professional manager who has quality of perfect decision making including complete product knowledge. [The beneficiary] has proved her managerial ability successfully completing different project [*sic*] during her tenure in the past.

\* \* \*

She has more than 6 years of executive level managerial experience without any interruption. She has been employed continuously for more than 6 years by the foreign company . . . .

The petitioner submitted an organizational chart for the foreign entity depicting the beneficiary as president and chief executive officer. According to the chart, the beneficiary supervises a chief of sales and marketing, Mr. [REDACTED] and a chief of administration and accounts, Mrs. [REDACTED]. Beneath the chief of sales and marketing, the chart lists "2 persons marketing assistant" and "2 persons sales assistant," and beneath the chief of administration and accounts, the chart lists "1 persons administrator assistant" and "1 persons account assistant."

On the basis of this limited information, the director initially approved the petition on October 2, 2012 for a period of one year commencing on December 1, 2012.

On November 8, 2012, the director issued a notice of intent to revoke the approval of the petition based, in part, on a finding that the petitioner failed to establish that the beneficiary worked in a qualifying position abroad for the required one year in the past three years preceding the filing of the petition. The director requested additional information regarding the beneficiary's job duties, evidence of managerial decisions she

made, and information regarding her subordinate employees, including their job duties, educational levels, and annual salaries. In addition, the director requested evidence that she was employed by the foreign entity for one full year in the three years preceding the filing of the petition, and evidence establishing the nature and scope of the foreign entity's ongoing business operations.

In response to the Notice of Intent to Revoke, the petitioner submitted a letter from the foreign entity describing the beneficiary's position abroad as follows:

Currently, [the beneficiary] has been performing the following duties at [the foreign entity]

- Providing leadership and vision to the organization by assisting the Board and staff with the development of long range and annual plans, and with the evaluation and reporting of progress on plans. Also, overseeing preparation of an Annual Report summarizing progress on short and long range plans.
- Directly involved in Hire/Fire, train, motivate, and evaluate store employees. Recruitment and contracting of company and project staff; Employee development, training, policy development and documentation review. Ensuring employment and compliance to regulatory concerns and reporting.
- Overseeing organization of company transport, subsistence and accommodation; liaise with Sales Manager to oversee hire and transport of all delivery mechanism.
- Directly coordinating store activities about sales, promotion, pricing, and distribution of products and services. Overseeing content, production and distribution of all marketing and publicity materials (posters, program, flyers, mail outs, brochure, including audio & video programs) with director, designer and project manager. Also, directly involve procuring potential future promoters and supporters of the company.
- Making decision regarding investments and cash strategies. Overseeing preparation of annual budget, provide vision regarding overall financial health of the company and leadership in long – range fiscal planning to ensure the continuity and solvency of the company including refinancing and purchasing/sales.
- Ensuring client and vendor file integrity documentation and communication notations. Directly supervise development team in development of forms and tools to increase company efficiency and risk management.

The petitioner provided the foreign entity's salary sheet for fiscal year 2011-2012, listing the beneficiary as "chairman" and eight additional employees for that time period, including two full-time and six part-time workers. The petitioner also re-submitted the same organizational chart it had provided at the time of filing. The foreign entity identified the beneficiary as "general manager" in its letter and as "president and chief executive officer" in its organizational chart. The petitioner submitted photographs of the foreign entity which show a retail grocery business, and the foreign entity stated that the company "has also been doing export/import business in multiple countries." Finally, the petitioner submitted a letter from a "Registered

Auditor" in Nepal stating that the beneficiary has been working for the foreign entity since 2006 at an annual salary of 96,000 Nepalese Rupees, equivalent to US\$1,078.40, which is "below the threshold for payroll tax in Nepal."

The director revoked the approval of the petition on March 11, 2013, concluding, in part, that the petitioner failed to establish that the beneficiary worked in a qualifying position abroad for the required one year in the past three years prior to filing. In revoking the approval, the director found that the duties, as described, are vague and broad and do not show the daily activities that the beneficiary has been performing. The director further found that the letter provided by the foreign entity is insufficient to show that the beneficiary actually worked for the foreign entity; rather, she is part owner of the entity as noted on the foreign corporation documentation.

On appeal, counsel for the petitioner describes the beneficiary's position abroad as follows:

Further, in her affidavit, . . . the Petitioner explains that she worked for a lower salary, which is actually reasonable by Nepali standards, even though avoiding tax, because she makes almost six times that amount through her share of profits and therefore the share of profits rather than her salary is her incentive.

Further, the Beneficiary's duties included making policy decisions, planning, defining business objectives, and setting up sales targets. . . . This shows that even if the Beneficiary's duties abroad were not managerial, they were executive because she primarily established goals and policies of the foreign entity, had wide discretion and latitude in decision making, and directed the management of the entity. . . .

\* \* \*

The duties of the Beneficiary described shows that she supervised all essential functions of the foreign entity. Moreover, given that the foreign entity was a small organization consisting of 8 employees, it is reasonable that the Beneficiary would be involved with all the essential functions. Therefore, even though a description of the duties may appear broad, in light of the fact that the Beneficiary was involved with all essential functions of a retail store, the Petitioner's description of the duties were not vague but was what she exactly did and the Service Center should have considered the nature of the business and the reasonable needs of the organization.

The petitioner submits a letter in support of the appeal in which it states: "Regarding the reasoning that the beneficiary's duties in [the foreign entity] were not managerial or supervisory because they were broad and vague, we believe that what was described was sufficiently managerial and executive for a retail business and was similar to the offered position here."

The petitioner submits an affidavit from the beneficiary describing her duties at the foreign entity. The beneficiary provided a similar description as that listed above and added the following:

My work also involves deciding whether we should fire more people, whether the potential employee is of a pleasant disposition, whether he or she talks nicely to customers and make conversations with them to create goodwill. Whether a salesman is quick enough to handle many customers at the same time. My work also involves things like determining who will work from what time. Since morning and evening times are the ones when there is maximum rush, the most efficient of the salespersons will have to be employed then. However, because the store Open at 6:00 a.m. and Close at 8:00 pm women employees are also not put in that shift and if there is a male employee absent from an evening shift, it may require another male employee to work overtime.

\* \* \*

I also assist the salesmen and the managers in the store, when there is rush and may even lend a helping hand when there are a lot of customers in the store. I am always in the store and are [sic] always observing what the employees are doing.

Upon review, and for the reasons stated herein, the petitioner has not established that that the beneficiary worked in a qualifying position abroad for the required one year in the past three years prior to filing.

The fact that the beneficiary manages or directs a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 101(a)(15)(L) of the Act. By statute, eligibility for this classification requires that the duties of a position be "primarily" of an executive or managerial nature. Sections 101(A)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). While the information provided by the petitioner indicates that the beneficiary exercises discretion over the foreign entity's day-to-day operations as its owner and president, the petitioner has failed to show that the beneficiary's actual duties are primarily managerial or executive in nature. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Here, the petitioner has provided a very vague description of the beneficiary's position abroad that does not establish that she is primarily an executive or is primarily a manager with sufficient subordinate employees to relieve her from performing non-qualifying operational duties. For example, while the petitioner indicates that the foreign entity employs a chief of sales and marketing and a chief of administration and accounts, the beneficiary's affidavit states that she is responsible for monitoring the lower-level employees of the retail business and managing schedules to have sufficient coverage during the rush sale times. In fact, the beneficiary clearly stated that she is always in the store and always observing the employees, so much so, that she steps in to help with sales when there are many customers in the store.

Furthermore, although requested by the director, the petitioner did not provide information regarding the duties performed by the foreign entity's employees. This evidence is critical, as the foreign entity indicated that it operates an import-export business in several countries in addition to operating a retail store. The petitioner has not explained how the work of both aspects of the business is distributed among the foreign entity's three full-time and six part-time employees. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

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. However, it is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Family Inc. v. USCIS*, 469 F.3d 1313 (9th Cir. 2006); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

The reasonable needs of the petitioner may justify a beneficiary who allocates 51 percent of her duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of her time on non-qualifying duties. Here, the petitioner has not established that the beneficiary primarily manages and directs the corporation or other professional, managerial, or supervisory employees. Absent a detailed description of the beneficiary's actual duties and a consistent account of how the beneficiary allocates her time to specific duties, the AAO cannot conclude that the beneficiary has been employed by the foreign entity in a qualifying managerial or executive capacity. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Accordingly, the appeal will be dismissed.

### C. U.S. Employment in a Managerial or Executive Capacity

The last issue addressed by the director is whether the petitioner established that the beneficiary would be employed in a qualifying managerial or executive capacity at the U.S. company.

On the Form I-129, the petitioner stated that the petitioner is operating a retail convenience store with four current employees. Where asked to describe the beneficiary's proposed duties in the United States, the petitioner stated the following:

[The beneficiary] will secure the growth of the US joint venture company. She will directly & indirectly supervise the manager, marketing and sales Supervisor & Accountant & other employee of this joint venture company. The responsibility & duties to be performed by the General Manager are establish & implement store policies, goals, procedures regarding the

management & operation of the US subsidiary company, direct & coordinate store activities about sales, promotion, pricing, and distribution of products & services. She will [be] responsible for hire/fire, train, motivate, & evaluate store employees. She will also be responsible for to review [sic] financial statement, sales, & activities reports, & other performance data to measure productivity & goal achievement & to determine areas requiring cost reduction and program improvement. Duties of the General Manager also include prepare work schedules & assign duties & responsibilities, locate, select, & procure merchandise & negotiate profitable deals with wholesalers, distributors & manufacturers. She will also conferring with managers of parents [sic] company[.]

In support of the petition, the petitioner submitted a letter describing the beneficiary's proposed duties at the U.S. company exactly as above and added, "[s]he will also [be] conferring with manager of parents [sic] company; regarding production, design and quality in accordance to current American market taste and set price, analyze and evaluate market and set price accordingly, observe and market trend and for promotion and report directly to the Board of Directors in Nepal."

The petitioner submitted a business plan, dated July 2012, discussing its personnel plan and stating that it plans to hire five employees, but does not indicate a timeframe in which it plans to hire the five employees. The business plan shows a "wage and salary" chart listing one general manager, one marketing and sales supervisor, one store manager, three senior sales associates, three junior sales associates, and a contracted accountant. The business plan also shows an organizational chart depicting the beneficiary as general manager/president, supervising [redacted], the vice president. The vice president then supervises a store manager, [redacted] an unnamed marketing and sales supervisor, and an unnamed accountant. The store manager supervises three senior sales associates and three junior sales associates, none of whom were identified by name.

The business plan includes brief job descriptions for the general manager, the store manager, and the marketing and sales supervisor. The beneficiary's proposed position, as general manager, is described as follows:

- Hire/Fire, train, motivate, and evaluate store employees
- Establish and implement store policies, goals, and procedures
- Recruit, train, and supervise the employees
- Prepare work schedules and assign duties and responsibilities
- Direct and coordinate store activities about sales, promotion, pricing, and distribution of products and services
- Review financial statements, sales and activity reports, and other performance data to measure productivity and goal achievement and to determine areas requiring cost reduction and program improvement
- Locate, select, and procure merchandise and negotiate profitable deals with wholesalers, distributors, and manufacturers

- Regularly report to the Board of Directors of the company

The petitioner provided Form C-3, Texas Employer's Quarterly Report, for the second quarter of 2012, showing that it had six employees at that time.

On the basis of this limited information, the director initially approved the petition on October 2, 2012 for a period of one year commencing on December 1, 2012.

On November 8, 2012, the director issued a notice of intent to revoke the approval of the petition based, in part, on a finding that the petitioner failed to establish that it will employ the beneficiary in a qualifying managerial or executive capacity.

In response to the Notice of Intent to Revoke, the petitioner submitted a letter describing the beneficiary's proposed duties as follows:

- Supervising the departments, subdivisions and components of the US operations and ensure that the business plan and policies are completely implemented for the full and functional operation of the joint venture business in the U.S.
- Developing planning and establishing goals, policies and objectives of [the petitioner].
- Hiring, firing, supervising, training and promoting the required personnel, i.e. supervisor, accountant, and other employees in [the petitioning company].
- Review financial statements and reports [*sic*] to determine the progress of the business and revising the objectives and budget plans for [the petitioner].
- Responsible for regular employee performance evaluations to comply with the established policies and the objectives of the Corporation.
- Directing and coordinating store/corporation's activities about sales, promotion, pricing, and distribution of products and services.
- Preparing work schedules and assigns duties and responsibilities of the corporation's employees.
- Locating, selecting and procuring merchandise and negotiating profitable deals with wholesalers, distributors, and manufacturers.
- Any and all other actions necessary to maintain a successful joint venture business in the U.S.

The petitioner stated that it was also providing "a complete position description with a business plan, including with a chart, for all of the [petitioner's] employees, showing breakdown of the number of hours devoted to each of these employees job duties on a weekly basis and their educational credentials." The petitioner submitted a copy of the same business plan previously submitted, including the same brief job descriptions for the general manager, store manager, and marketing and sales supervisor positions, but failed to include any information on the breakdown of the number of hours devoted to each of the employees' job duties.

The director revoked the approval of the petition concluding, in part, that the petitioner failed to establish that it will employ the beneficiary in a qualifying managerial or executive capacity. In revoking the approval, the director found that the duties, as described, are vague and broad and do not detail the nature of the beneficiary's daily activities. The director further found that the duties provided for the beneficiary's subordinates do not show that any of the positions are professional, supervisory or managerial in nature, other than in position title.

On appeal, the petitioner describes the beneficiary's proposed position at the U.S. company as follows:

Regarding the beneficiary's position here being not managerial or supervisory [*sic*], we will reiterate that our business is retail, mainly selling gas, lottery, alcoholic and non-alcoholic drinks, tobacco, packaged food items, candy, quick food items, cosmetics, paper and paper supplies, deli, etc. As explained in the previous response, we have six employees at the moment but expect eleven if the beneficiary moves here to work as our General Manager and President. In that event, she would be the highest officer in our company and would supervise and review the work of the store manager, marketing and sales supervisor, and accountant, which positions are themselves managerial, in addition to supervising the vice president. We may have employees working in different shifts, especially as our gas station is open 6:00 a.m. to 10:00 p.m. That means that the beneficiary must prepare work schedules and assign duties, as explained in our response. She would also need to make sure that the employees were maintaining their schedule, hire personnel, orient and train them for their job – in lottery retail, operating gas equipment, maintaining inventory; and terminate people if required. Overseeing the maintenance of inventory in the business, and making sure that wastage was minimal, especially with food items. Her work would also include ascertaining what items should be stocked, and which wholesaler, distributors, or manufacturer would offer the best deal. At what price should we sell an item. Overseeing how items were displayed and whether changes needed to be made. What target should be fixed for sales, whether the cost was justified, what price the competitors were selling items at. Whether new line of products were justified. Her job would also involve looking for opportunities to expand and develop potential branches in new locations. That would involve first supervising a market research on the potential demand, and the existence of other retailers in the area. The beneficiary's job would be full time with physical presence required at the business premises, controlling the sales operations there and at the same time managing the supplies, administration, negotiations, and future plans of the business.

Upon review, and for the reasons stated herein, the petitioner has not established that it would employ the beneficiary in a qualifying managerial or executive capacity.

On review, the petitioner's brief description of the beneficiary's duties fails to establish that the beneficiary will be engaged in either a primarily managerial or primarily executive position. The descriptions provided throughout the record are more indicative of a retail store manager position and not of an executive at the U.S.

company. In response to the notice of intent to revoke, the petitioner did not provide any further description of the beneficiary's duties or a breakdown of the amount of time she will devote to each duty. 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).

Overall, the position description alone is insufficient to establish that the beneficiary's duties will be primarily in a managerial or an executive capacity. While the petitioner submitted a brief job description for two of the beneficiary's subordinates, the store manager and the marketing and sales supervisor, it failed to provide a job description for the beneficiary's direct subordinate, who, according to the organizational chart, would be the vice president. The position descriptions for the beneficiary's subordinates include tasks that are not indicative of managerial, supervisory, or otherwise professional positions. Thus, the petitioner has not established that the beneficiary's subordinates require a baccalaureate degree, such that they could be classified as professional. Nor has the petitioner shown that these employees actually supervise subordinate staff members or manage a clearly defined department or function of the petitioner, such that they could be classified as managers or supervisors. Thus, the petitioner has not shown that the beneficiary's subordinate employees are supervisory, managerial or professional, as required by section 101(a)(44)(A)(ii) of the Act.

Here, at the time of filing, the petitioner indicated that it had four employees and its organizational chart shows that the beneficiary is the general manager/president, [REDACTED] is the vice president, and [REDACTED] is the store manager. The remaining positions of marketing and sales supervisor, accountant, three senior sales associates, and three junior sales associates appear to be vacant. According to the petitioner's Texas quarterly wage report (Form C-3) for the second quarter of 2012, the petitioner had six employees, [REDACTED]. However, the petitioner failed to clarify the positions held by the listed individuals and their status as full-time or part-time employees. The Form C-3 indicates that three of the listed employees were likely part-time employees earning \$1050 or less in the three-month period. The petitioner operates as a gasoline station and convenience store, but failed to identify any employees who perform the routine functions of this type of business. It is reasonable to conclude, and has not been shown otherwise, that most or all of the employees given managerial job titles are actually operating cash registers, ordering inventory, stocking shelves, preparing food, and performing other required daily tasks, and the actual structure of the company cannot be determined. Due to the extremely vague position descriptions provided for the beneficiary and the lack of credible descriptions for the beneficiary's subordinates, it remains unclear how the subordinates will relieve the beneficiary from performing non-qualifying administrative and operational duties. The petitioner has not established that a gas station claiming to have three existing levels of management and no cashiers or clerks has a reasonable need for a general manager/president.

While the petitioner indicated that it expects its staff size to grow to 11 employees after the beneficiary assumes her position as general manager, the petitioner must establish eligibility at the time

of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978).

The definitions of executive and managerial capacity each have two parts. First, the petitioner must show that the beneficiary will perform the high-level responsibilities that are specified in the definitions. Second, the petitioner must show that the beneficiary will *primarily* perform these specified responsibilities and will 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). The fact that the beneficiary owns or manages a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of sections 101(a)(15)(L) of the Act. *See* 52 Fed. Reg. 5738, 5739-40 (Feb. 26, 1987) (noting that section 101(a)(15)(L) of the Act does not include any and every type of "manager" or "executive").

Based on the evidentiary deficiencies addressed above, the AAO will uphold the director's determination that the petitioner failed to establish that it would employ the beneficiary in a qualifying managerial or executive capacity. Accordingly, the appeal will be dismissed.

### III. CONCLUSION

In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

The "preponderance of the evidence" standard requires that the evidence demonstrate that the applicant's claim is "probably true," where the determination of "truth" is made based on the factual circumstances of each individual case. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010) (citing *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm'r 1989)). In evaluating the evidence, the truth is to be determined not by the quantity of evidence alone but by its quality. *Id.* Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "probably true" or "more likely than not," the applicant or petitioner has satisfied the standard of proof. *See U.S. v. Cardozo-Fonseca*, 480 U.S. 421 (1987) (discussing "more likely than not" as a greater than 50 percent probability of something occurring). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition. Here, the submitted evidence is not relevant, probative, and credible for the reasons discussed above.

The approval of the petition will remain revoked and the appeal will be dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

**ORDER:** The appeal is dismissed.