



U.S. Citizenship
and Immigration
Services

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY



07

JUN 07 2007

File: WAC 06 114 51543 Office: CALIFORNIA SERVICE CENTER Date:

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:

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

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its managing director 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 California corporation, operates two residential home care facilities for the elderly. The petitioner states that it is a subsidiary of [REDACTED], located in the Philippines. The beneficiary was initially granted a one year period in L-1A classification in order to open a new office in the United States, and the petitioner now seeks to extend her status for two additional years.

The director denied the petition concluding that the petitioner did not establish that the beneficiary would be employed in the United States in a primarily 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 disputes the director's findings, attempts to clarify the petitioner's staffing levels, and asserts that the beneficiary is in fact relieved from performing non-qualifying duties associated with the day-to-day business operations of the company. Counsel submits a brief and additional evidence in support of the appeal.

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)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

The sole issue addressed by the director is whether the petitioner established that the beneficiary will be employed by the United States entity 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 petitioner filed the nonimmigrant petition on March 3, 2006. The petitioner indicated that the beneficiary would be employed as managing director of the six-person company under the extended petition, and attached the following position description to Form I-129:

In this position [the beneficiary] is responsible for managing and directing the entire business operations of the U.S. company.

The following are her detailed job duties:

1. She has full discretionary authorities to be in charge of personnel action in hiring, firing, and promotion of high level positions, such as the department managers, supervisors or professionals;
2. She supervises the daily operations in the entire company;
3. She confers and coordinates the heads among departments (i.e. administrative, accounting, and marketing/public relations) in company's objectives and policies;
4. She supervises her subordinates [sic] personnel to implement properly the company's policies and procedures;
5. She also negotiates the company lease contracts and other business contracts with home care tenants and reports to the company's President; and
6. She is has been [sic] development a management operations system according to company's business policies and objectives.

The petitioner submitted an organizational chart for the U.S. company indicating that the beneficiary as "vice president/operations manager," reports to the company president and supervises an administrator, who in turn supervises two caregivers and one "reliever caregiver." The chart also depicts a treasurer who reports to the president. The petitioner indicated that the company operates two residential care facilities for the elderly located in Diamond Bar, California.

In support of the petition, the petitioner provided a copy of its California Form DE-6, Employee Wage and Withholding Report, for the fourth quarter of 2005, which listed a total of four employees, including the beneficiary and the three individuals identified as caregivers. The Form DE-6 indicates that the company employed four employees during October and November 2005, and only three employees in December 2005. Based upon the wages paid, it appears that the "reliever caregiver" left the company prior to December 2005.

On April 7, 2006, the director issued a request for additional evidence, in part, instructing the petitioner to submit additional evidence to establish that the beneficiary will be employed in the United States in a qualifying managerial or executive capacity. Specifically, the director requested: (1) a more detailed description of the beneficiary's duties in the United States, indicating exactly whom the beneficiary directs including their job title and position description; (2) an organizational chart for the U.S. company that clearly identifies the beneficiary's position and lists all employees under the beneficiary's supervision by name and job title; (3) if any of the petitioner's employees is a degree holder, a copy of the employee's diploma and an explanation as to how the education is related to the duties performed; (4) copies of the U.S. company's payroll summary, Forms W-2 and W-3, evidencing wages paid to employees for 2005; (5) copies of the U.S. company's IRS Forms 941, Employer's Quarterly Federal Tax Return, for all employees for the last four quarters; (6) a list of the specific goals and policies the beneficiary has established, and the specific discretionary decisions the beneficiary has exercised, over the last six months; and (7) a specific day-to-day description of the duties the beneficiary has performed over the last six months.

In a response dated May 30, 2006, the petitioner submitted the following description of the beneficiary's duties:

- Having full discretionary authorities in hiring, firing, and evaluating, promoting subordinate professionals, namely the administrator and the financial officer and other staff;
- Being responsible for managing and directing the entire business operations of the company;
- Designating and supervising subordinate projects and tasks to ensure that projects are on schedule and effectively implemented the company's objectives and policies;
- Developing mechanisms of coordination among operations, marketing and finance in the daily operations;
- Establishing company goals, policies and operations procedures and supervising subordinates to properly implement company's operations procedures, policies and objectives;
- Negotiating together with the administrator, approving and signing the admission agreement contracts with home care tenants; and
- Attending, reporting and participating in Board meetings with the President and Directors.

In addition, in response to the director's request for a day-to-day description of the beneficiary's duties, the petitioner stated:

- Confer, coordinate and oversee and give instructions on matters which administrator was in charge of about the operations of the facilities and implement company's policies and operations procedures.
- Devise marketing strategies to meet company's objectives and delegate assignments to subordinates and follow-up.
- Supervise and approved the work of finance manager including the budget and miscellaneous expenditures of the facilities
- Meet with and approve possible home care tenants.
- Visit the facilities and ensure that the operations and safety standards set by the company are met.

The petitioner noted that the beneficiary's discretionary decisions over the last six months had included hiring the administrator and financial manager, establishing the company's operations policies and procedures, approving and signing two lease agreements, adopting marketing strategies, approving the purchase of a company vehicle, and approving budgets and acquisition of equipment, medical supplies and other supplies for the petitioner's facilities. The petitioner further indicated that the beneficiary had established personnel and pay policies for employees, created job descriptions for individual employees, created admission policies and eviction procedures for the home care facilities, devised marketing strategies to attract tenants, and created house rules for the petitioner's facilities. The petitioner submitted a copy of its personnel policies, an employee agreement, a job description for "facility administrator," the petitioner's "house rules," admission policy, and eviction procedures.

In addition, the petitioner submitted a revised organizational chart, indicating that the beneficiary supervises the administrator and a finance officer (previously identified as "treasurer" on the initial organizational chart), and that the administrator in turn supervises two caregivers, one assigned to each home care facility. The petitioner stated that the president of the company establishes the company's objectives and supervises the beneficiary "in overseeing the company's operations and achieving company's objectives." The petitioner further indicated that the finance officer has a bachelor's degree in business administration and is responsible for purchasing, payroll, accounting, budget, payments and other financial aspects of the company, under the beneficiary's direction.

The petitioner noted that the administrator has a bachelor's degree in biology, is qualified as a physician assistant, has successfully completed a "Residential-Elderly Administrator Program" and has been certified by the California Department of Social Services. The petitioner stated that this employee is responsible for the proper training of home care staff, familiarity with the rules and regulations regarding residential elderly care, ensures compliance with state regulations, oversees the daily operations of the facilities and the caregiver staff, and maintains recognized standards of care and sanitation. Finally, the petitioner stated that it has one caregiver assigned to each residential facility to provide personal care and assistance to the residents.

The petitioner submitted copies of educational credentials for the finance officer and administrator, and stated that these employees, along with the company president, are minor stockholders of the company and have chosen not to receive any compensation until the company becomes profitable.

The director denied the petition on August 16, 2006, concluding that the petitioner had failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition. The director observed that the petitioner had only established that it employs the beneficiary and three part-time caregivers, and had not established the employment of workers in the administrative, accounting, and marketing/public relations departments claimed to be managed by the beneficiary. The director thus concluded that the beneficiary herself has to perform all duties related to these functions, rather than performing primarily managerial or executive duties. The director determined that the U.S. entity lacks the organizational complexity to support the beneficiary in an executive or managerial position. Finally, the director determined that the evidence submitted does not establish that the beneficiary supervises a subordinate staff of professional, managerial, or supervisory personnel who will relieve her from performing non-qualifying duties.

On appeal, counsel for the petitioner asserts that the petitioner did in fact have sufficient staff to perform the day-to-day operations of the petitioning company, noting that the petitioner has continually employed two caregivers to staff its facilities, while the other employees, including the president, finance manager/treasurer, and administrator, are shareholders of the company who have opted to work for the petitioner without pay in exchange for stock options. The petitioner notes that its facilities are currently not fully occupied and the current staff is sufficient to provide care for the six residents living at the two facilities. Counsel further asserts that the petitioner began to pay wages to the treasurer/finance manager as of June 2006.

In support of the appeal, the petitioner submits state and federal quarterly wage reports for the last quarter of 2005 and first two quarters of 2006; a statement from [REDACTED] dated August 28, 2006, confirming that he is the treasurer of the petitioning company, works 40 hours per week, and is responsible for purchasing, payroll and other financial aspects of the company; a statement from [REDACTED] dated August 25, 2006, confirming that she works 20 hours per week as the administrator of the petitioning company with responsibility for administering and overseeing the operation of the facilities; and business documents, identifying [REDACTED] and [REDACTED] as company representatives.

Upon review, counsel's assertions are not persuasive. 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 petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary does on a day-to-day basis. For example, the petitioner stated that the beneficiary is responsible for "managing and directing the entire business operation of the company"; "designating and supervising subordinate projects and tasks to ensure that projects are on schedule"; establishing company goals, policies and operations procedures," "effectively implemented company's objectives and procedures," and giving "instructions on matters regarding the company's business operations, policies and objectives"; "participating in Board meetings"; and "developing mechanisms of coordination among operations, marketing and finance in the daily operations." These vaguely-defined responsibilities appear to overlap with those functions attributed to the president of the company, and raise questions regarding the need for a company with, at most, six employees, to employ two persons to establish policies

and objectives and oversee the management and direction of the entire business. 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 petitioner's description of the beneficiary's ongoing duties is not specific enough to establish the tasks she will perform under the extended petition, such that they could be classified as managerial or executive in nature.

Although the beneficiary is not required to supervise personnel, if it is claimed that a beneficiary qualifies for managerial capacity as a personnel manager, the petitioner must demonstrate that the beneficiary primarily supervises and controls the work of supervisory, professional, or managerial employees. *See* § 101(a)(44)(A)(ii) of the Act.

The petitioner claims that the beneficiary directly supervises two employees, a finance manager/treasurer and an administrator. However, the AAO notes that the petitioner initially indicated that the finance manager reports directly to the president of the company, and not to the beneficiary, who was depicted on the initial organizational chart as supervising only the administrator. 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). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). Therefore, the petitioner has not demonstrated that the beneficiary manages the finance manager/treasurer.

While it appears that the administrator may be employed in a professional and/or supervisory capacity, evidence submitted on appeal indicates that this employee works only 20 hours per week. Given that the petitioner operates two facilities which are required to be staffed 24 hours per day, the record does not establish that supervising the administrator is in fact the beneficiary's primary responsibility, and therefore, she cannot be considered to be employed in a primarily managerial capacity based on her supervisory responsibilities alone. Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that the beneficiary's duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Here, the petitioner fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. For this reason, the AAO cannot determine whether the beneficiary is primarily performing the duties of a manager or executive. *See, e.g., IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Without a detailed description of the beneficiary's duties on which to base his determination, the director reasonably looked to the petitioner's staffing levels to determine if the petitioner submitted evidence to support its claim that the beneficiary would be employed in a primarily managerial or executive capacity. The petitioner's description of the beneficiary's duties cannot be read or considered in the abstract, rather the AAO must determine based on a totality of the record whether the description of the beneficiary's duties represents a credible perspective of the beneficiary's role within the organizational hierarchy.

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. In the present matter, however, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require CIS to examine the organizational structure and staffing levels of the petitioner. See 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in CIS regulations that allows for an extension of this one-year period. If the business does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension.

At the time of filing, the petitioner was a one-year-old company operating two residential elderly care facilities with a maximum capacity of twelve residents and a current population of six residents, who were placed at both of the company's locations. According to the petitioner's brochure, the facilities provide three meals per day, medication monitoring, 24-hour professional staff, assistance with daily life activities, housekeeping and laundry services, social activities and recreational programs, individual care plans, transportation to medical appointments and documentation of each resident's daily activities. At the time of filing, the company employed the beneficiary as vice president/operations manager, a president, a treasurer/finance manager, a part-time administrator, and two caregivers.

Based on the petitioner's representations regarding the nature of its business and the services it provides, the record does not establish that two caregivers, even if employed full-time, could attend to all of the resident's needs in two facilities 24 hours per day, seven days per week. Although the record does suggest that the petitioner may have a live-in arrangement with the caregivers, the petitioner has not clearly described the schedules worked by these employees, nor established how a single employee could perform all of the duties associated with caring for residents and maintaining the facilities without some relief, assistance, or supervision. It is appropriate for CIS 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. *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.*

The only person claimed to supervise the caregivers is the administrator, who works only 20 hours per week and therefore could spend no more than two hours per day at each facility. On appeal, counsel notes that the "officers" have substituted for the caregivers as necessary. However, based on the petitioner's staffing levels it is reasonable to assume, and has not been shown to be otherwise, that the beneficiary, who has a medical background, is required to assist in the day-to-day operation of the petitioner's home care facilities and/or directly supervise the caregivers on a regular basis in order for the facilities to remain operational and in compliance with regulatory requirements.

Therefore, the director appropriately concluded that the petitioner does not yet have a supporting staff who could relieve the beneficiary from performing primarily operational tasks associated with operating two elderly care facilities. 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).

In sum, the petitioner has not demonstrated that the beneficiary, as a personnel manager, will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel. *See* section 101(a)(44)(A)(ii) of the Act. Furthermore, the petitioner has not established that it employs a staff that will relieve the beneficiary from performing non-qualifying duties so that the beneficiary may primarily engage in managerial duties. Further, regardless of the beneficiary's position title, the record is not persuasive that the beneficiary will function at a senior level within an organizational hierarchy. Even though the enterprise is in a preliminary stage of organizational development, the petitioner is not relieved from meeting the statutory requirements. Based on the limited documentation furnished, it cannot be found that the beneficiary will be employed primarily in a qualifying managerial or executive capacity.

Although the petitioner cites delays in obtaining the licenses needed to operate its facilities as a reason for its delay in growth during the first year of operations, and indicates that the company expects to grow and hire additional employees in the future, the regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in CIS regulations that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position. Accordingly, the appeal will be dismissed.

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.