



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF L-W-D-C-A-L-C-, L.L.C.

DATE: NOV. 9, 2015

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a child day care and education center, seeks to employ the Beneficiary as its director/general manager under the immigrant classification of a multinational executive or manager. *See* Immigration and Nationality Act (the Act) § 203(b)(1)(C), 8 U.S.C. § 1153(b)(1)(C). The Director, Texas Service Center, denied the petition. The matter is now before us on appeal. The appeal will be dismissed.

I. LAW

Section 203(b) of the Act states in pertinent part:

(1) Priority Workers. – Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

.....

(C) *Certain multinational executives and managers.* An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and the alien seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision only to those executives and managers who have previously worked for a firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and who are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a Form I-140, Petition for Alien Worker, to classify a beneficiary under section 203(b)(1)(C) of the Act as a multinational executive or manager. The regulation at 8 C.F.R. § 204.5(j)(5) states:

No labor certification is required for this classification; however, the prospective employer in the United States must furnish a job offer in the form of a statement which indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such letter must clearly describe the duties to be performed by the alien.

II. MANAGERIAL OR EXECUTIVE CAPACITY

The only issue on appeal is whether the Petitioner established that the Beneficiary will be employed in a qualifying managerial or executive capacity. Section 101(a)(44) of the Act, 8 U.S.C. § 1101(a)(44), provides:

(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.

(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;

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- (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.

Finally, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, U.S. Citizenship and Immigration Services (USCIS) must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. Section 101(a)(44)(C) of the Act.

A. Facts

The Petitioner filed Form I-140 on June 17, 2013. An introductory letter dated June 13, 2013, indicated: “The beneficiary directs and manages the [petitioning] day care center/school and also manages the foreign affiliated company” in [REDACTED], Mexico.

The Petitioner submitted a two-page job description outlining the Beneficiary’s duties. The 24 listed duties break down into the following broad categories:

- Reviewing and formulating policies, activities, and programs
- Hiring, training, and evaluating staff
- Monitoring classes, scheduling, ensuring compliance with various standards
- Meetings and liaison with parents and the International Montessori Association

The Petitioner also provided job descriptions for infant teachers, toddler teachers, and pre-kindergarten teachers. These descriptions read, in part:

Infant Teacher

All the babies have to be fed and changed according to their neces[s]ities. The teachers need to report to the director and present to her the lesson plan that they develop to record all the activities of the babies. . . . The teacher performs a daily report to present to parent.

Toddler Teacher

Maintains an open, friendly, and cooperative relationship with each child and family. . . . Promotes parent-child bonding and nurturing parent-child relationships. Promotes feelings of security and trust in toddlers to feel home like in the classroom.
...

The toddler teacher also plans a weekly lesson plan with activities for t[h]e children to perform during the week.

Pre kinder [*sic*] teachers.

. . . She develops and applies the lesson plan that is plan[n]ed weekly and is revised by the director of the center.

The teacher is responsible for managing the group, both in decoration and organizing monthly educational materials and games.

[T]he class begins with a theme that she develops in circle time, where a subject previously exposed and selected by the director and the development of the day will be according to the theme. . . .

The teacher together with the director performs bimonthly assessments on child development, and plan strategies and educational psychology to help mature the child.

The Petitioner also submitted an organizational chart with the petition, which showed the Beneficiary at the top of the Petitioner's organizational hierarchy. The chart identified 23 employees:

- The Beneficiary, identified as director
- Assistant
- Administrator
- Three cooks
- Seven teachers
- Six assistants
- Three directors (of affiliated centers in Mexico)

The Director issued a request for evidence (RFE) on May 21, 2014. The Director requested a more detailed job description for the Beneficiary, including the percentage of time spent on each duty. The Director also asked for additional information about the Beneficiary's subordinate staff, including information about their level of education and copies of recent IRS Forms W-2, Wage and Tax Statements, for each employee.

In a letter dated July 17, 2014, the Petitioner stated that the Beneficiary "is charged with the authority and responsibility to plan, direct, and control all activities of the schools, including their licensing, staffing, staff training, financing, reporting, and the welfare and safety of the children enrollees." The Petitioner submitted the following breakdown of the Beneficiary's daily duties (note: errors in the original text have not been changed):

- 6.25% Monitor school opening and children's arrival daily
- 3.75% Monitor food service and children lunch period daily

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- 12.50% Review and approve daily lesson plans for each classroom
- 2.50% Supervise and revise security arrangements, surveillance technology and policy of the facility
- 12.50% Review and approve food and nutrition program and Daily menus
- 5.63% Participate in Parent Conferences as needed
- 3.75% Make decisions to resolve issues of teachers with children
- 2.50% Review, revise and implement programs of school publicity and Marketing
- 3.75% Direct school assessments of students' Psychomotricity level
- 2.50% Conduct daily Conference on-line with both Daycares in [REDACTED]
- 3.75% Handle Phone conferences with Daycares in [REDACTED] as exceptions require
- 3.00% Devise and implement salary payments for providers in [REDACTED]
- 1.25% Review and Revise online updates to the Public Education Agency for Daycares in [REDACTED]
- 1.86% Inspect and review food service kitchen
- 2.50% Plan Teachers Schedules
- 2.50% Develop plans to implement new daycare centers, grow the business
- 1.25% Review and respond to changes and requirements of the State Licensing Department
- 5.00% Attend/Assess teacher performance in the Center
- 2.50% Review cash position daily and make necessary financial arrangements to meet expenses
- 2.80% Administer Employee payroll
- 2.70% Administer Tax Payments (payroll, property and income taxes)
- 3.13% Review and plan budgets
- 2.50% Analyze financial operations income and expense information
- 2.50% Plan and implement Training of staff on children's development
- 3.75% Review Food Purchasing, set policies for the food service operations
- 1.50% Plan and Supervise evacuation programs and emergency preparedness
- 1.88% Plann and supervise of Afterschool Pick up program routes.

A new organizational chart showed the Beneficiary in charge of the following subordinates:

- Administrator/accountant
- Three cooks
- Ten teachers
- Four assistants
- General manager (in Mexico)
- Two directors (in Mexico)

The individual named as an administrator/accountant on the new chart was previously shown as the administrator on the first chart.

The Petitioner also submitted new job descriptions for the U.S. subordinates. The Petitioner indicated that the administrator/accountant maintains student and financial records; prepares operational reports; pays bills; collects tuition; and supervises the kitchen and maintenance services.

The Petitioner stated that the Infant, Toddler 1, Toddler 2, Pre-Kindergarten, and Montessori teachers are responsible for meeting the educational and hygienic needs of their respective age groups. The infant teachers, for example, are responsible for feedings, diaper changes, and basic learning activities including games, songs, and basic vocabulary.

The Director denied the petition on February 25, 2015, concluding that the Petitioner had not established that it would employ the Beneficiary in a qualifying managerial or executive capacity. The Director stated that the Petitioner did not establish that any of the Beneficiary's subordinates are professionals, supervisors, or managers. The Director also stated that, because the Petitioner did not submit the requested IRS Forms W-2, the Petitioner did not show that the subordinate employees were employed on a full-time basis.

On appeal, the Petitioner asserts that the Beneficiary supervises "professional-level employees, although . . . the position is managerial because it supervises other supervisory personnel whether or not those personnel are also professional employees." The Petitioner submits copies of IRS Forms W-2 for 2013 and 2014; copies of academic degrees held by employees; a contract "[p]rovided as an example of beneficiary's activities establishing goals and policies of the Petitioner"; and a brief.

B. Analysis

Upon review, the Petitioner has not established that the Beneficiary will be employed in a qualifying managerial or executive capacity in the United States.

When examining the executive or managerial capacity of a given beneficiary, we look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). 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 in either an executive or a managerial capacity. *Id.* Beyond the required description of the job duties, we review the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to understanding the beneficiary's actual duties and role in a business. A beneficiary's discretionary authority over a business does not establish eligibility as a multinational manager or executive within the meaning of sections 203(b)(2) of the Act.

The Petitioner, on appeal, states that the Beneficiary's ownership of the company, "her position at the top of the organization chart," and her involvement in major initiatives such as the center's recent absorption of 50 students following the closure of a competing center, all show "that the beneficiary establishes the goals and polices of the organization."

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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 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 Beneficiary's undisputed discretionary authority addresses only the first of these two parts.

The Petitioner states that the "Beneficiary is managerial not because she manages professionals but because she manages other supervisory employees, only three of whom are members of the professions holding bachelor's degrees." The Petitioner does not identify the claimed supervisory employees, but the assertion that three of them hold bachelor's degrees permits us to identify them through the academic documents submitted on appeal. The Petitioner submits documentation of four baccalaureate-level degrees:

Name	Baccalaureate field	Title from personnel list
[REDACTED]	Special Education	Not shown
	Spanish	Toddlers II
	Accounting	Administrator/Accountant
	Preschool Education	Montessori Teacher

The 2013 organizational chart (the only one to show [REDACTED] indicated that several teachers, including [REDACTED] and [REDACTED], had assistants, and that [REDACTED], as "Administrator," supervised three cooks. [REDACTED] title subsequently changed, but the newer chart also named the cooks as his subordinates.

The job descriptions for the teachers did not refer to supervisory duties. The presence of assistants in some classrooms does not establish that the teachers have significant supervisory responsibility over those assistants.

The administrator/accountant's job description submitted in response to the RFE, however, does appear to include supervisory duties. Specifically, the description specified that the "position . . . provides direct supervision of the kitchen and of the cleaning services and maintenance services required for the school."

Upon review, the Petitioner has not shown that the Beneficiary's subordinates are full-time employees who require full-time supervision. The documents submitted on appeal show that the Beneficiary and the administrator/accountant are the only employees who earned more than \$17,000 per year in 2013 and 2014. This minimal compensation is not consistent with full-time, year-round employment. Likewise, despite the claimed supervisory duties of the administrator/accountant, the record does not show that the administrator/accountant would devote significant time each day to

¹ Form I-140 identifies [REDACTED] as the Beneficiary's spouse.

supervising the three cooks, whose 2014 earnings (ranging from \$1,738.50 to \$11,116.02) indicate part-time employment. Moreover, a newly prepared table of earnings and job titles refers to the highest-paid cook as the “Food Service Manager,” a title that did not appear on either of the two organizational charts submitted previously. The record, as a whole, does not establish several layers of management between the Beneficiary and the two lower-paid cooks.

The Beneficiary’s detailed list of duties includes several functions related to finance and food service, although the Petitioner has also claimed that the administrator/accountant is responsible for those functions. Furthermore, other duties, represented as ongoing functions, appear to be short-term or one-time activities, such as planning emergency preparedness and afterschool pickup routes. The Petitioner has not explained why these activities would require constant revision throughout the year, and therefore place consistent demands on the Beneficiary’s time.

The Beneficiary’s list of tasks includes duties involved in the day-to-day operations of a school such as staff training, staff scheduling and making staff assignments. Therefore, the record shows that the Beneficiary will be performing a number of administrative, operational and first-line supervisory tasks which, while necessary to the operation of the day care center, are not managerial or executive in nature. An employee who “primarily” performs the tasks necessary to produce a product or to provide services is not considered to be “primarily” employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one “primarily” perform the enumerated managerial or executive duties); see also *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm’r 1988).

The original two-page list of duties overlaps with the chart submitted in response to the RFE, but the list includes tasks not shown on the chart, and vice versa. For example, the initial list referred to “liaison with the international association Montessori,” and the subsequent chart included several duties relating to the affiliated centers in Mexico. These discrepancies call into question the accuracy of the assigned percentages of time shown on the chart. In addition, the chart includes numerous non-qualifying duties accounting for over 45% of the Beneficiary’s time such as reviewing daily lesson plans, reviewing and approving the nutrition program and daily menus, participating in parent conferences, inspecting and reviewing the food service kitchen, planning teacher schedules, administering payroll, planning budgets, implementing training, and planning evacuation programs and program routes. Further, the chart indicates that the Beneficiary spends another 10% of her time monitoring school opening, children’s activities, food service, and the children’s lunch period. However, not only are these duties not managerial, but they are also vague, as it is not clear who or what the Beneficiary is actually monitoring. Specifics are clearly an important indication of whether a beneficiary’s duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *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).

Finally, the chart indicates that the Beneficiary will devote time to reviewing and implementing school publicity and marketing. However, the Petitioner did not establish that it has personnel on

staff to perform publicity and marketing duties in order to relieve the Beneficiary from performing those duties herself. While performing non-qualifying tasks necessary to produce a product or service will not automatically disqualify the Beneficiary as long as those tasks are not the majority of the Beneficiary's duties, the Petitioner still has the burden of establishing that the Beneficiary is "primarily" performing managerial or executive duties. *See* section 101(a)(44) of the Act.

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). Based on the deficiencies discussed above, the Petitioner has not established that the Beneficiary will be employed in a qualifying managerial or executive capacity. Accordingly, we will dismiss the appeal.

III. CONCLUSION

We will dismiss the appeal for the above stated reasons. 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, the Petitioner has not met that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of L-W-D-C-A-L-C-, L.L.C.*, ID# 14439 (AAO Nov. 9, 2015)