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20 Massachusetts Ave., N.W., Rm. A3042  
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File: WAC-02-279-53605 Office: CALIFORNIA SERVICE CENTER Date:

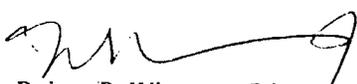
IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

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)

IN BEHALF OF PETITIONER:  
[Redacted]

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, Director  
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 President 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 is a corporation organized in the State of California that operates a residential care facility for the elderly. The petitioner claims that it is the affiliate of [REDACTED] located in Cebu City, Philippines. The beneficiary was initially granted a period of stay in L-1A status, and the petitioner now seeks to extend the beneficiary's stay for a two-year period.

The director denied the petition concluding that the petitioner did not establish that the beneficiary will 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 asserts that the beneficiary will be employed in a primarily managerial or executive capacity, and that other employees will perform the tasks necessary to provide the petitioner's care services. In support of these assertions, counsel for the petitioner submits a brief.

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 issue in the present matter is whether 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.

In a letter filed with the initial petition on September 16, 2002, the petitioner described the beneficiary's job duties as follows:

[The beneficiary] is the President of both [the foreign entity] and [the petitioner] . . . . [The beneficiary] is required to direct the management of the U.S. affiliate and establish organizational goals and policies. He exercises a wide latitude of discretionary decision-making. He hires/fires personnel and has complete autonomy regarding personnel matters. [The beneficiary] formulates company financial and business goals and develops business strategies. [The beneficiary] develops marketing strategies to increase business, investigates new markets if [sic] investment and acts as a liaison with the home company.

\* \* \*

[The beneficiary] is responsible for the supervision, control and coordination of the activities of the managerial and administrative personnel such as the Manager and Accountant . . . .

\* \* \*

We contemplate that at least a two-year extended assignment in the United States will be necessary for the completion of a refocus of operations here and the expanded enterprise is expected to have hired additional personnel at all levels within the coming year for the two residential care facilities.

On November 5, 2002, the director requested additional evidence. In part, the director requested: (i) an organizational chart for the petitioner; (2) a description of the beneficiary's subordinates, including their duties, educational level, and annual compensation; and (3) a more detailed description of the beneficiary's duties, including an indication of the percentage of time the beneficiary devotes to his respective tasks.

In a response dated January 21, 2003, in part the petitioner submitted an organizational chart and a letter addressing the director's concerns. The letter further described the beneficiary's subordinates and duties as follows:

The beneficiary at present directly supervises the Administrator/Registered Nurse . . . , who is a fully Registered Nurse in the State of California. [The petitioner] employs one full-time certified caregiver . . . , and one part-time caregiver . . . when needed on a 1099 basis.

\* \* \*

[The beneficiary] is not required to supervise any of the actual day-to-day labor, which is the care giving itself and the looking after all of the needs and requests of the residents, rather he is an entrepreneur actively seeking to expand the investment of the foreign entity. He is managing the function of expansion and all overlying decision making for [the petitioner] . . .

\* \* \*

The beneficiary has invested the management and allocation of all day-to-day operations to [the Administrator/Registered Nurse] . . . .

\* \* \*

It is planned with the most recent projections, that [the petitioner] will operate two Elderly Residential Care Facilities before the end of 2003, for which an additional team will be hired.

\* \* \*

[W]e provide the following information reflecting a regular work week for the beneficiary;

**Development of the business;**

**Negotiating contracts 10% of work week**

- for the food, supplies, and other commodities. [The beneficiary] is also required to reassess the fees associated with the care provided should a resident become more dependant [sic] on the services of [the petitioner].

**Marketing/Advertising Facility and Employment Opp. 15% of work week**

Beneficiary contacts and proofs the advertisements with the Elderlink, NewLifestyles.com and similar residential correspondence. He is actively involved in the internet marketing as well and has been conducting a feasibility study and research of additional target areas for the second [guest home of the petitioner], by studying the competition.

**Liaison between the foreign entity and the US Investment Venture: 25% of work week;**

[The beneficiary] is actively involved with interim Operating Manager of [the foreign entity] . . . . He is required to negotiate contracts, and ensure that efficiency and effectiveness are still in place even after the temporary transfer of [the beneficiary] to the US . . . . [The beneficiary] is in the process of opening a second hardware store in the Cebu City area, and will be required to temporarily travel to the Philippines sometime in March/April to personalize the deal and supervise the first few weeks of operations.

**Actively seeking/Pursuing New investment ventures for the petitioner; 30% of work week**

[The beneficiary] has spent a great deal of his L-1 transfer on the field actively seeking further investments as it has been relatively easy to allow the current staff to run the facility without his daily presence. Work with real estate brokers on available properties for the [petitioner's second guest home]. Visit the places with the broker when applicable.

**Financial related responsibilities; 20% of work week**

Monthly meeting with accountant on the investment ventures (budgeting, projections, cash flow, expenses, sales figures, accounts payable...) Arranging the investment finance in co-

ordination [sic] with the parent company. Deal with the administrator weekly and address any suggestions and ways to cut costs while maintaining complete resident satisfaction.

On January 31, 2004, the director denied the petition. The director determined that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity. Specifically, the director stated:

The information provided by the petitioner describes the beneficiary's duties only in broad and general terms. There is insufficient detail regarding the actual duties of the beneficiary. Duties described as responsible for the supervision, control and coordination of the activities of the managerial and administrative personnel such as the manager and accountant are without any context in which to reach a determination as to whether they would be qualifying. The use of the position title of "president" is not sufficient.

\* \* \*

Further, the petitioner's evidence is not sufficient in establishing that the beneficiary has been or will be managing a subordinate staff of professional, managerial, or supervisory personnel who relieve him/her from performing nonqualifying duties.

On appeal, counsel for the petitioner asserts that the beneficiary will be employed in a primarily managerial or executive capacity, and that other employees will perform the tasks necessary to provide the petitioner's care services. Counsel submits a brief, in which he describes the beneficiary's duties as follows:

Beneficiary will be performing the following executive duties for Petitioner:

- Negotiate all contracts with guests and family members of the guests at the care home to secure the best deal possible which in turn allowed for increase profit; (20%)
- Be responsible for planning and developing market strategies to increase the company's awareness to potential guests; (15%)
- Be responsible for the preparation of all legal matters regarding contracts drafted, company yearly registration requirements, and all aspects of governmental required registration involved with running a care home; (15%)
- Be responsible for all major financial decisions regarding bank loans, pricelist computations and profit margins; (25%)
- Work on the quarterly forecast for profit and loss with the company's CFO [REDACTED]

- Meet with [REDACTED] Administrator of the company to discuss employee progress reviews to ensure that the employees understand their roles in advancing the company; (5%)
- Work on the updated training schedules for employees and pass along memos addressing performance indicators to keep the employees challenged; (5%)
- Work with the accounting firm on the yearly financial statements and tax returns. (10%)

Counsel asserts that the beneficiary's duties meet the two-part test for managerial or executive capacity discussed by the Board of Immigration Appeals in *Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). Counsel further cites an unpublished AAO decision to stand for the proposition that a beneficiary's duties, not the petitioner's staff size, determine whether a beneficiary is employed in a primarily managerial or executive capacity.

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 must specifically state whether the beneficiary is primarily employed in a managerial or executive capacity. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

In the instant case, the petitioner asserts that the beneficiary is primarily engaged in both managerial duties and executive duties. To sustain such an assertion, the petitioner must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive duties under section 101(a)(44)(B) of the Act, and the statutory definition for managerial duties under section 101(a)(44)(A) of the Act. At a minimum, the petitioner must establish that the beneficiary is primarily employed in one or the other capacity. See 8 C.F.R. § 214.2(l)(3)(ii).

The petitioner states that the beneficiary will spend 10 percent of his time negotiating contracts for food, supplies, and other commodities, as well as evaluating existing contracts for guests at the petitioner's facility. However, the petitioner has provided no evidence of such contracts for food and supplies. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). While the petitioner submitted copies of three contracts for care giving services, it is doubtful that negotiation for these three contracts required or will require 10 percent of the beneficiary's time. The petitioner states that the beneficiary will spend 15 percent of his time performing marketing and advertising tasks. As the petitioner has not indicated that the beneficiary's subordinates assist with these duties, it is presumed that the beneficiary is exclusively responsible for all related non-qualifying duties such as creating advertisements and contacting media sources to arrange for placement of such ads. The petitioner provides that the beneficiary will spend 25 percent of his time acting as a liaison between the foreign entity and the petitioner. Yet, the petitioner has

not sufficiently described the beneficiary's duties in this regard such that the AAO can determine whether they are managerial or executive in nature. The petitioner indicates that the beneficiary will spend 30 percent of his time seeking new investment ventures for the petitioner, such as searching for a location for a second care giving facility. Yet, the petitioner has not provided a detailed explanation or documentation to reflect what efforts the beneficiary has undertaken, and what he will do in the future. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. at 190. Thus, these duties have not been shown to be managerial or executive. The petitioner has failed to establish that these duties, comprising 80 percent of the beneficiary's time, are devoted to managerial or executive tasks.

On appeal, counsel provided a new breakdown of the beneficiary's duties and the amount of time he will devote to his respective tasks. However, this breakdown is inconsistent with the breakdown of duties submitted in response to the director's request for evidence. For example, counsel states that the beneficiary will spend 20 percent of his time negotiating contracts, while the petitioner previously stated he will devote 10 percent of his time to this task. Counsel states that the beneficiary will spend 25 percent of his time performing financial tasks, while the petitioner previously stated he will devote 20 percent of his time to these duties. The petitioner previously provided that the beneficiary will devote 30 percent of his time to pursuing new investment ventures, yet on appeal counsel accounts for 100 percent of the beneficiary's time but does not name this as one of the his responsibilities. On appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). 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). As counsel's job description provided on appeal contains material changes to the beneficiary's duties, it will not be given weight in this proceeding.

The petitioner's organizational chart reflects that the beneficiary will have supervisory authority over three employees, including an administrator/registered nurse, a part-time caregiver, and a full-time caregiver. Yet, on Form I-129 the petitioner indicates that it has only one employee. Further, the petitioner's documentation presents inconsistent information regarding who is the administrator/registered nurse. In response to the director's request for evidence, the petitioner stated that its administrator/registered nurse [REDACTED] yet the petitioner's payroll documents do not include evidence of payments to this individual. It is further noted that some of the petitioner's contracts were signed by [REDACTED] the administrator. On appeal, counsel now claims that the administrator is [REDACTED] yet counsel fails to explain whether there was a change in the petitioner's staffing. 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). Thus, the petitioner has failed to sufficiently establish the number of individuals it employs, or who those individuals are.

Although the beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. See § 101(a)(44)(A)(ii) of the Act.

In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by a subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. In the instant case, the petitioner indicates that the administrator/registered nurse earned a bachelor's degree in nursing. A bachelor's degree in nursing is understandably a prerequisite to managing the care of the petitioner's elderly clients and ensuring that the two caregivers adhere to safe procedures. Thus, the petitioner has provided sufficient explanation to establish that the administrator/registered nurse is a professional. The petitioner states that its two caregivers completed bachelor's degrees, yet it does not specify what subject was studied. Accordingly, the petitioner has not shown that such training is required in order to perform the duties of the caregivers, and they cannot be deemed professionals. Nor has the petitioner shown that the caregivers 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.

While the petitioner has shown that the beneficiary oversees one subordinate who is a professional, the petitioner has indicated that the beneficiary spends a minimal amount of time actually performing supervisory duties. In the breakdown of the time the beneficiary devotes to his duties, the petitioner only mentions the beneficiary's interaction with the administrator in the section that provides that the beneficiary devotes 20 percent of his time to financial matters. The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). While the petitioner has established that the beneficiary engages in the managerial task of supervising a professional, it has not shown that the beneficiary is primarily engaged with managerial or executive tasks. Thus, contrary to counsel's assertion, the petitioner has not established that the beneficiary's duties are "primarily at the managerial or executive level" as discussed in *Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988).

Counsel cites an unpublished AAO decision to stand for the proposition that a beneficiary's duties, not the petitioner's staff size, determine whether a beneficiary is employed in a primarily managerial or executive capacity. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. Further, as discussed above, the beneficiary's duties do not show that he is primarily engaged with managerial or executive duties.

The record is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The petitioner indicates that it plans to hire additional managers and employees in the future. However, 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. 1978). Accordingly, the petitioner has not established that the beneficiary will be employed in a primarily or managerial capacity, as required by 8 C.F.R. § 214.2(1)(3)(ii). For this reason, 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.