

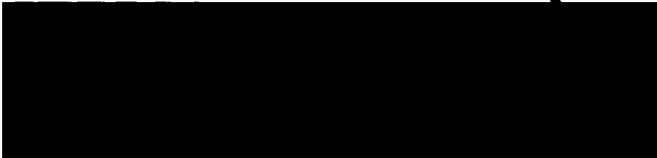
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U.S. Department of Homeland Security
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U.S. Citizenship
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Services

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APR 05 2005

File: WAC-03-166-50298 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary:



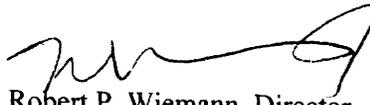
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

IN BEHALF OF PETITIONER:

SELF-REPRESENTED

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 employ the beneficiary as its General Manager 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), in order to open a new office in the United States. The petitioner is a corporation organized in the State of Nevada that intends to operate as a provider of nursing services. The petitioner claims that it is the subsidiary of [REDACTED], located in Davao City, Philippines.

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 within one year.

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 perform exclusively managerial and executive functions in the United States. In support of this assertion, the petitioner submits an attachment to Form I-290B, additional evidence, and previously submitted documents.

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.

- (v) If the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office in the United States, the petitioner shall submit evidence that:
 - (A) Sufficient physical premises to house the new office have been secured;
 - (B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation; and
 - (C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (1)(1)(ii)(B) or (C) of this section, supported by information regarding:
 - (1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;
 - (2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and
 - (3) The organizational structure of the foreign entity.

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 within one year.

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 the initial petition filed on May 7, 2003, on Form I-129 the petitioner described the beneficiary's prospective job duties as follows:

To set up company in U.S[.]: Over-all [sic] management of company; in-charge [sic] of development market; develop; train & hire staff; institute marketing & management strategies compatible with parent company promote or otherwise secure products for and on behalf of parent company; search new products/equipment in U.S. with potential market parent company in the Philippines

On June 25, 2003, the director requested extensive additional evidence. In part, the director requested: (1) an indication of the proposed number of employees in the United States and the types of positions they will hold; and (2) an explanation of how the beneficiary will, within one year, be employed in a primarily managerial or executive capacity.

In a response dated August 4, 2003, the petitioner submitted: (1) a letter providing the petitioner's staffing plans; (2) a business plan; and (3) a letter from the foreign entity providing a prospective job description for the beneficiary as follows:

[The beneficiary] will fill the position of Manager of [the petitioner] in the United States branch office. [T]his position is a key managerial one for the new office because it will be her responsibility to organize and start the new business. This position requires her to: (1)

Hire and train, initially, three employees. Since [the beneficiary] will be coming to the U.S. to start up the business, there are no employees as of now. However, it is anticipated that there will be at least 3 of these persons to be employed (either a U.S. citizen or permanent resident) within the first year of operation and who will eventually run the business after [the beneficiary] completes her assignment. (2) Promote, develop, and expand the market reach of the Philippine company goods. (3) Develop and establish marketing plans, Administrative and Financial policies and procedures, import/export operating procedures and oversee the proper administration and execution of such policies. (4) Manage and oversee the shipping, distribution and control of products from the Philippines to the U.S. and vice versa.

She will exercise a wide latitude in decision making in the day to day operations of the business. She must spend a majority of her time coordinating the various responsibilities and managing her staff. Strong managerial and organizational skills are needed for the important functions performed by the Manager of a new business [in the] U.S. [The beneficiary] will report directly to [the proprietor of the petitioner] for approval of major plans.

* * *

We propose to transfer [the beneficiary] to the United States for a temporary period of one year at an annual salary of \$21,000.00 plus \$500.00 per month as housing allowance

The petitioner's staffing plan states the following:

1. [The beneficiary]
General Manager

Brief Job Duties: [The beneficiary] will be responsible for the overall operation of [the petitioner]. She will have the final say in hiring and firing of employees. She will supervise directly the Marketing Manager, Home Care Facility Administrator, Nurses, Nursing assistants, Care givers, and the Cashier of the entity.

Under [the beneficiary] are the following prospective employees:

2. [REDACTED] US Citizen, Administrator, wages \$39.00/hour: Hiring Date upon approval of ET visa.
Administrator

Brief Job Duties: [REDACTED] will be responsible for the management and caring for the patients of the facility.

3. [REDACTED] U.S. Citizen, wages \$12/hour; Hiring date is upon approval of ET visa.
Caregiver

Brief Job Duties: [REDACTED] will be in charge of all marketing plans and programs subject to final approval of the General Manager. She will deal extensively with patients and clients. She will supervise the daily activities of the patients.

4. [REDACTED] - US Citizen, Caregiver, Wages \$12/hour;
Hiring date is upon approval of L1 Visa.

Brief Job Duties: To take care of patients by bathing and giving personal care and also assisting in daily routine. Night shift Nursing Assistant

5. [REDACTED] US Citizen; Certified Nursing Assistant, Wages \$18/hour;
Hiring Date is upon approval of L1 Visa.

Brief Job Duties: Assisting the patient in and out of wheel chair and meal preparation. Day shift Nursing assistant.

In the business plan, the petitioner stated that the beneficiary completed a bachelor's degree in sociology and an associate degree in "Nursing Aide and Caregiver." The petitioner stated that the beneficiary is "well trained as [a] medical provider and caregiver." The business plan further provides that "[t]he purpose of [the petitioner] is to provide certified nurse aids, companions and homemakers to assist the elderly in their daily living activities"

On January 22, 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 within one year. Specifically, the director stated the following:

Although the petitioner has stated that the beneficiary will be supervising local management personnel, at the end of the one-year period, the description of duties indicates that the beneficiary will be performing more as a care giver than as an executive manager. As such, substantially all of the beneficiary's duties are not at the executive or managerial level. Instead, the beneficiary is involved with all of the day-to-day duties of a caregiver, rather than directing activities through executives or managers, or other professionals.

On appeal, counsel for the petitioner asserts that the beneficiary will perform exclusively managerial and executive functions in the United States. In an attachment to Form I-290B, counsel further describes the beneficiary's duties as follows:

The beneficiary is expected to manage and direct the following managers:

1. Marketing Manager
2. Home Care Facility Administrator
3. Chief Cashier

These are subordinate staff of professional, managerial or supervisory personnel who, in turn, will manage and handle the day-to-day affairs of their respective departments and make direct contacts with the bottom tier employees. The beneficiary was hired not to provide day-to-day services to the clients but as a manager who will have the over-all [sic] management and administration of the business and to coordinate the various needs and activities of the component departments so that each of them will function efficiently and in harmony with the ultimate goal of making the home care facility a profitable and highly competitive business enterprise.

Going to more specifics, nurses, nursing assistants and care givers will have to report and deal directly with [REDACTED] the Home Care Facility Administrator. [The Home Care Facility Administrator], in turn, will be solely accountable to the beneficiary for the efficient operations of the entire facility. The Marketing Manager [REDACTED] will initiate the formulation of the facility's marketing plans and programs and will be responsible for their implementation. [REDACTED] will be accountable for the programs' success or failure before the beneficiary. The Chief Cashier, who is in charge of the cash flow and cash disbursements will have the exclusive authority in planning and implementing safeguards and procedures to guarantee the financial success of the company. The Chief Cashier will likewise be accountable to the beneficiary.

The petitioner provided an employment contract for the beneficiary which discusses her duties, and states that she "will be required to work a minimum of forty hours a week under a flexible time schedule to be approved by [her] superior." The contract provides that the beneficiary "will receive a weekly compensation of \$450.00," and she "will be provided also with free room and board." The contract notes that the beneficiary "will supervise directly the following prospective employees: a) General Manager b) Marketing Manager c) Operating Manager d) Cashier e) Registered Nurse f) Certified [sic] Nursing Assistant and Care Givers."

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(1)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* The petitioner must specifically state whether the beneficiary will be 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 will be primarily engaged in both managerial duties and executive duties within one year. To sustain such an assertion, the petitioner must establish that the beneficiary will meet 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 will be primarily employed in one or the other capacity. See 8 C.F.R. § 214.2(1)(3)(ii).

The prospective job descriptions submitted by the petitioner are brief and vague, providing little insight into the true nature of the tasks the beneficiary will perform in the United States. For example, the petitioner states that the beneficiary will "[p]romote, develop, and expand the market reach of the Philippine company goods" and "[m]anage and oversee the shipping, distribution and control of products from the Philippines to the U.S. and vice versa." Yet, the petitioner has not described any goods of the foreign entity, and as a small company providing copying services, it is unclear what products it offers that are transferable to the United States. Thus, the above statements do not reflect what the beneficiary will do on a daily basis. The petitioner indicates that the beneficiary will "exercise a wide latitude in decision making in the day to day operations of the business," and she will "spend a majority of her time coordinating the various responsibilities and managing her staff." However, these general statements provide no clear understanding of what actual tasks the beneficiary will perform. Specifics are clearly an important indication of whether a beneficiary's duties will be 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 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). The actual duties themselves reveal the true nature of the employment. *Id.* The provided job descriptions do not allow the AAO to determine the actual tasks that the beneficiary will perform, such that they can be classified as managerial or executive in nature.

Further, upon examining the evidence of record, the petitioner's assertion that "[the beneficiary] will be responsible for the overall operation of [the petitioner]" is questionable. The record presents conflicting evidence regarding who, in fact, will manage the petitioner's operations. The petitioner states that the beneficiary will hold the position of general manager. The beneficiary's employment contract notes that the beneficiary "will supervise directly" a general manager, a marketing manager, an operating manager, a cashier, a registered nurse, and a certified nursing assistant and care givers. The petitioner also indicates that it employs an administrator. The petitioner provides that the administrator "will be responsible for the management and caring for the patients of the facility," and that "nurses, nursing assistants and care givers will have to report and deal directly with [the administrator]." Thus, the petitioner presents conflicting information regarding who the petitioner's employees report to. 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). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

The record contains further evidence to suggest that the administrator, [REDACTED] is the true manager of the petitioner's operations. For example, the administrator signed all official documents in the file, including the Form I-129 petition on behalf of the beneficiary, the petitioner's fictitious name statement, the petitioner's California certificate of qualification, the petitioner's Nevada articles of incorporation, and the employment contract offering the beneficiary a position with the petitioner. Additionally, the evidence of record reflects that the administrator owns the property in which the petitioner intends to do business, and that the administrator leased the property to the petitioner. The petitioner's hiring plan reflects that the administrator is to be paid \$39 per hour. The petitioner has provided inconsistent information regarding the compensation of the beneficiary. However, at most, the petitioner indicates that the beneficiary will be paid \$21,000 per year for forty or more hours per week, which equals approximately \$10 per hour. Thus, the administrator will

be paid approximately four times that provided to the beneficiary. The beneficiary's employment contract indicates that the beneficiary's work schedule is to be approved by her superior, yet the petitioner has not indicated who the beneficiary's superior is. It is presumed that the beneficiary's superior is the administrator. The petitioner's claim that the administrator reports to the beneficiary, and that the beneficiary will have ultimate authority over the petitioner's operations, is unpersuasive.

It is further noted that the beneficiary's compensation of approximately \$10 per hour is the lowest among any of the petitioner's proposed employees. The petitioner's hiring plan indicates that it intends to pay two care givers \$12 per hour and a certified nursing assistant \$18 per hour. The petitioner's business plan states that the beneficiary completed a bachelor's degree in sociology and an associate degree in "Nursing Aide and Caregiver." The petitioner stated that the beneficiary is "well trained as [a] medical provider and caregiver." Again, the petitioner's business plan provides that "[t]he purpose of [the petitioner] is to provide certified nurse aids, companions and homemakers to assist the elderly in their daily living activities" As the beneficiary is a trained nursing aide and caregiver, and she will be the lowest paid employee in the petitioner's operation, the evidence of record suggests that she will be primarily engaged with non-managerial and non-executive care giving duties. These duties are necessary to provide the petitioner's services. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

The petitioner alleges that the beneficiary will supervise subordinate employees. Yet, as discussed above, it is doubtful that the beneficiary will possess managerial authority. If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); see also *Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). Further, the petitioner has submitted inconsistent information regarding who the beneficiary's proposed subordinates would be. The petitioner's hiring plan submitted in response to the director's request for evidence provides that the beneficiary will oversee an administrator, two caregivers, and a certified nursing assistant. However, in the petitioner's statement submitted on appeal, it now asserts that the beneficiary will supervise a marketing manager, a home care facility administrator, and a chief cashier. In the beneficiary's employment contract submitted on appeal, the petitioner indicates that the beneficiary will directly supervise a general manager, a marketing manager, an operating manager, a cashier, a registered nurse, a certified nursing assistant, and caregivers. Further, on appeal, the petitioner now states that [REDACTED] serve as the marketing manager, yet she was identified as a caregiver in the petitioner's hiring plan submitted in response to the director's request for evidence. Again, 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. at 591-92.

These changes in the beneficiary's proposed supervisory responsibilities represent material changes on appeal. 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).

Based on the foregoing, the petitioner has failed to establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity within one year. *See* 8 C.F.R. § 214.2(l)(3)(v)(B). For this reason, the appeal will be dismissed.

Beyond the decision of the director, counsel has not established that the beneficiary was employed abroad in a primarily managerial or executive capacity as required by the regulation at 8 C.F.R. § 214.2(l)(3)(v)(B). The petitioner provided a document titled "Certificate of Employment" that describes the beneficiary's duties abroad. Yet, the foreign job description is brief and vague, providing little insight into the true nature of the tasks the beneficiary performed with her employer abroad. Again, 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 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). The actual duties themselves reveal the true nature of the employment. *Id.* The provided job description does not allow the AAO to determine the actual tasks that the beneficiary performed, such that they can be classified as managerial or executive in nature. For this additional reason, the appeal will be dismissed.

Also beyond the decision of the director, the record reflects that the U.S. entity did not secure a commercial lease until September 1, 2003, nearly four months after the petition was filed. The regulation at 8 C.F.R. § 214.2(l)(3)(v)(A) requires a petitioner that seeks to open a new office to submit evidence that it has acquired sufficient physical premises to commence doing business. For this additional reason, the appeal will be dismissed.

Also beyond the decision of the director, the petitioner has failed to submit evidence to show "[t]he size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States," as required by 8 C.F.R. § 214.2(l)(3)(v)(C)(2). For this additional reason, the appeal will be dismissed.

Also beyond the decision of the director, the petitioner has not established that it has a qualifying relationship with the beneficiary's foreign employer as required by 8 C.F.R. § 214.2(l)(1)(ii)(G). On the initial petition, the petitioner indicated that it is the subsidiary of the beneficiary's foreign employer. The petitioner submitted a copy of a stock certificate that reflects that the foreign entity acquired a majority interest in the petitioner on September 9, 2003. However, as the petition was filed four months earlier on May 7, 2003, this stock certificate is not evidence of the petitioner's relationship to the foreign entity as of the filing date. The fact that the petitioner's relationship to the foreign entity changed after filing calls into question what relationship the two entities had on the filing date. For this additional reason, the appeal will be dismissed.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683

(9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

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.