

U.S. Department of Homeland Security
20 Mass. Ave. N.W. Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY



D7

File: WAC 04 007 51296 Office: CALIFORNIA SERVICE CENTER Date: SEP 02 2005

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: 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 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 Nevada corporation licensed to do business in California, claims to be the subsidiary of [REDACTED], located in Danao City, the Philippines. The petitioner seeks to operate an elderly care facility, and intends to employ the beneficiary as its general manager to assist in the opening of a new office in the United States.

The director denied the petition concluding that the petitioner did not establish that (1) the beneficiary had been employed abroad in a primarily managerial or executive capacity; or that (2) the beneficiary would be employed in the United States in a primarily managerial or executive capacity.

The petitioner filed an appeal in response to the denial. On appeal, the petitioner contends that the director's decision was erroneous and claims that the petitioner provided sufficient evidence to establish that the beneficiary's duties qualified him as a manager or executive in both the U.S. and abroad. In support of this contention, counsel 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.

- (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 (l)(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.

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 first issue in this matter is whether the beneficiary was employed abroad in a primarily managerial or executive capacity.

In the initial petition, the petitioner submitted a brief description of the beneficiary's duties abroad on the L Classification Supplement to Form I-129. Specifically, the petitioner stated that the beneficiary had been employed with the company abroad since January 2001 and that his duties included:

Over-all and general management of company; directly supervises the administrative, financial, and technical staff of company; executes and emplements orate [sic] policies & business strategies; organizes staff; hires and fires employees.

On December 5, 2003, the director issued a request for evidence. The director advised the petitioner of the deficiencies in the evidence pertaining to the beneficiary's qualifications as a manager and/or executive abroad and specifically requested that it submit evidence regarding: (1) the number of employees on staff at the foreign entity; (2) an organizational chart for the foreign entity showing the names and position titles of its employees along with a statement pertaining to their salaries and education backgrounds; and (3) a more specific description of the beneficiary's duties abroad, including the percentage of time the beneficiary devoted to each area of his duties and the number of employees he oversaw. The director also requested information regarding the purpose of the beneficiary's transfer to the United States.

In a response dated February 23, 2004, the petitioner addressed each of the director's requests. The petitioner stated that the foreign entity currently employed twenty-five employees and provided an organizational chart which displayed the foreign entity's organizational hierarchy. In addition, the petitioner submitted a notarized

certificate of employment which set forth the beneficiary's functions abroad and also provided an explanation regarding the purpose of the transfer and how the foreign entity would cope with the beneficiary's absence.

On March 17, 2004, the director denied the petition. The director found that the totality of the evidence in the record was insufficient to establish that the beneficiary had been primarily employed in a managerial or executive capacity while abroad. In addition, the director concluded that based on the salaries provided for the company's other employees, it appeared that those workers were mainly skilled or semi-skilled workers. As a result, the director concluded that the beneficiary did not appear to be acting primarily as a manager or executive because it appeared that he was merely overseeing non-professional employees.

On appeal, the petitioner submits a detailed statement regarding the beneficiary's duties as general manager of the foreign entity. It further examines the positions of the employees directly under the beneficiary's supervision and urges reconsideration based on the allegation that the beneficiary is overseeing a staff of managerial employees.

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 description of duties provided by the petitioner in the initial petition did little to describe the beneficiary's actual duties, nor did it describe the nature of the beneficiary's day-to-day tasks. Instead, it merely provided a generic description of the nature of his duties and at times merely paraphrased the regulatory definitions. As previously stated, the initial evidence submitted was insufficient to warrant approval and, consequently, the director requested more specific information in his request for evidence, including an organizational chart discussing the petitioner's other employees. In response, the petitioner provided the requested organizational chart, which demonstrated that the beneficiary, as general manager, reported to the proprietor/owner of the company and oversaw three employees: (1) a marketing manager; (2) a housekeeping manager; and (3) a room service manager. With regard to further details about the beneficiary's position, the petitioner provided a Certificate of Employment on the foreign entity's letterhead which was signed by the owner. This statement provided the following description of the beneficiary's duties:

As General Manager [the beneficiary] performs, among others, the following duties and responsibilities:

- 1) Sets the goals and objectives of the company.
- 2) Reviews and approves the company's yearly operational and capital budgets.
- 3) Hires and fires employees within the managerial level.
- 4) Represents the company and any and all contracts entered into by the company with outside parties.
- 5) Trains employe[es] within the managerial level.

Although the petitioner provides a letter with further details in response to the request for evidence, the letter only discusses the beneficiary's proposed duties for the United States position.

The AAO, upon review of the record of proceeding, concurs with the director's finding that the beneficiary was not employed abroad in either a primarily managerial or executive capacity. First, despite the fact that the beneficiary is the general manager and oversees, as indicated on the organizational chart, at least fifteen other employees, there is no indication that he is supervising a staff of professional, subordinate, or managerial employees. Although the beneficiary is not required to supervise personnel, if it is claimed that her 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.

Though requested by the director, the petitioner did not provide the level of education required to perform the duties of the managers directly under the beneficiary's supervision. Any failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Thus, the petitioner has not established that these employees possess or require an advanced degree, such that they could be classified as professionals. Nor has the petitioner shown that either of these employees 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. Although the organizational chart lists three managerial positions (namely, marketing, housekeeping, and room service), the fact that these persons possess the title of "manager" does not necessarily mean that they are managerial employees. In fact, a review of the payroll records submitted shows that the salary for [REDACTED] room service manager, is 4200 Philippine Pesos per month, whereas Nonito Aguilar, identified as a plumber, earns 5040 pesos per month. Similar discrepancies exist for the housekeeping manager, [REDACTED] who earns 3552 pesos per month. This salary is comparable to his claimed subordinates, [REDACTED] and [REDACTED] who earn 3480 pesos and 3408 pesos, respectively. Considering that at the time of this decision, 1 Philippine Peso is equal to 0.0178971 U.S. Dollars, the difference between a salary of 3552 pesos (\$63.57) is not much different than 3480 pesos (\$62.28) or 3408 pesos (\$60.99). As a result of these small monthly salaries, it is also unclear whether many of these subordinate employees, including those with managerial titles, work part-time or full-time schedules. Thus, the petitioner has not shown that the beneficiary's subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

On appeal, the petitioner argues that the three subordinate "managers" are indeed managers by virtue of their positions, duties, and educational qualifications. Specifically, the petitioner indicates that in the petitioner's country, a minimum educational qualification of at least a Bachelor's degree is required to fill these positions. Furthermore, the petitioner asserts that [REDACTED] assistant manager abroad, also reported directly to the beneficiary. The AAO notes, however, the organizational chart provided did not indicate that the beneficiary oversaw an assistant manager. Instead, he was merely laterally aligned with the assistant manager, who in turn appeared to have a position of authority equal to that of the beneficiary.

Despite providing new and detailed assertions on appeal, the petitioner's statements will not be considered. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See

8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); see also *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered with regard to the educational backgrounds and qualifications required for the managerial positions, or if it wanted to introduce a new organizational structure not previously disclosed, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal.

Furthermore, the assertions of the petitioner on appeal are not supported by independent evidence. The petitioner alleges that the minimum educational requirements to fill a position such as that of a housekeeping manager in the Philippines is a Bachelor's degree. In addition, the petitioner asserts that its housekeeping manager, along with the other managers, all possess Bachelor's degrees. However, the petitioner has not provided any tangible evidence to corroborate such claims. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

For the reasons set forth above, the petitioner has failed to establish that the beneficiary was employed in a managerial or executive capacity while abroad. For this reason, the appeal will be dismissed.

The second issue in this matter is whether the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity.

In the initial petition, the petitioner submitted a brief description of the beneficiary's duties on the L Classification Supplement to Form I-129. The petitioner stated that the beneficiary's proposed duties in the United States consisted of the following:

To set up company in US: Over-all management of company; in-charge of development market; develop, train & hire staff; institute marketing & management strategies compatible with parent company; search new products/equip. [sic] in US with potential market of parent company in the Philippines.

The director found this description to be insufficient and consequently issued a request for additional evidence on December 5, 2003. The director requested that the petitioner submit evidence establishing that the beneficiary would function as a manager or executive in the United States, specifically requesting evidence of the number of employees on staff at the U.S. office, an organizational chart demonstrating the structure of the petitioner as well as staff names, duties, salaries, and position titles, and a more detailed description of the beneficiary's proposed duties. In a response dated February 23, 2004, the petitioner

submitted its proposed hiring plan for the U.S. entity along with its proposed organizational chart and a more detailed description of the beneficiary's duties.

On March 17, 2004, the director denied the petition. The director found that the description of the beneficiary's proposed duties was too broad and too general to definitively identify what the beneficiary's actual duties would be, and based on the remaining evidence submitted the director concluded that the beneficiary would merely be functioning as a first line supervisor. On appeal, the petitioner alleges that it clearly established that the beneficiary was to be employed in an executive capacity and claimed that he was not offered the position of general manager to merely handle the day-to-day affairs of the company.

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.*

In response to the director's request for evidence, the petitioner provided the following updated description of the beneficiary's proposed duties while in the United States:

[The beneficiary] will fill the position of Manager of [the petitioner] in the United States branch office. This position is a key managerial one for the new office, because it will be his responsibility to organize and start the new business. This position requires him to: (1) Hire and train initially three employees. Since [the beneficiary] will be coming to the U.S. to start up the new business, there are no employees as of now. However, it is anticipated that there will be at least 3 of these individuals 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 [his] assignment.

He will exercise a wide latitude in decision making in the day to day operations of the business. He must spend a majority of his time coordinating the various responsibilities and managing his 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 undersigned for approval of major plans.

The AAO, upon review of the record of proceeding, concurs with the director's finding that the beneficiary will not be employed in either a primarily managerial or executive capacity. First, despite the fact that the beneficiary will initially be its sole employee, the petitioner failed to specifically articulate the nature of the beneficiary's duties. While the petitioner did identify its overall business goals and the beneficiary's role in reaching those goals, it failed to specifically discuss what the beneficiary did during an actual workday. 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). Although the petitioner provided descriptions of the beneficiary's duties in both the initial petition and the response to the request for evidence, these descriptions did not articulate of what a specific day in the role

of the beneficiary would consist. Instead, the descriptions merely provided a brief synopsis of the beneficiary's overall duties and stated that he will have "a wide latitude in decision making" and that he will "hire and fire" employees. The descriptions, however, failed to discuss or identify job-specific tasks or obligations the beneficiary was required to perform. Whether the beneficiary is a manager or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. See sections 101(a)(44)(A) and (B) of the Act. Furthermore, the descriptions provided appear to merely paraphrase the regulatory definitions.

On appeal, the petitioner reasserts that the beneficiary is a qualified executive. The petitioner contends that his responsibilities include the overall administration of the business, and thus his duties are managerial and/or executive. The petitioner, however, fails to support these contentions with convincing documentary evidence or further details regarding steps the petitioner will take to hire sufficient staff to relieve him of day-to-day tasks within one year of the approval of the petition. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co. v. Sava*, at 1108; *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). Furthermore, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

It is undisputed that at the time of filing, the beneficiary was to be the sole employee of the petitioner. The petitioner clarifies its hiring plan and states that it is optimistic that three other employees will soon be hired. However, the nature of the petitioner's business is that it is an elderly care facility, which undoubtedly requires staff interaction with patients and/or residents. Food service, housekeeping, and other duties such as providing entertainment are also likely. Even if the petitioner hired three employees in the first few months, such a staff would be insufficient to allow the beneficiary to engage in solely executive or solely managerial tasks. Although managerial and executive tasks are most certainly required in the establishment and operation of such a business, the actual day-to-day functions, such as caregiving, food preparation, and even administration and record keeping are likely to be the sole duties of the beneficiary. 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). Consequently, the AAO must conclude that the beneficiary's duties will not be *primarily* managerial or executive, although it is likely that the beneficiary's duties include some higher level tasks.

When a new business is established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed. In order to qualify for L-1 nonimmigrant classification during the first year of operations, the regulations require the petitioner to disclose the business plans and the size of the United States investment, and thereby establish that the proposed enterprise will support an executive or managerial position within one year of the approval of the petition. See 8 C.F.R. § 214.2(l)(3)(v)(C). This evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it

moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties.

In this matter, the proposed position of the beneficiary is general manager of an elderly care facility. 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. For this reason, the petition may not be approved.

Beyond the findings in the previous decision, the AAO notes that the petitioner has failed to submit sufficient evidence of the proposed business plan for the U.S. entity. As contemplated by the regulations, a comprehensive business plan should contain, at a minimum, a description of the business, its products and/or services, and its objectives. See *Matter of Ho*, 22 I&N Dec. 206, 213 (Assoc. Comm. 1998). Although the precedent relates to the regulatory requirements for the alien entrepreneur immigrant visa classification, *Matter of Ho* is instructive as to the contents of an acceptable business plan:

The plan should contain a market analysis, including the names of competing businesses and their relative strengths and weaknesses, a comparison of the competition's products and pricing structures, and a description of the target market/prospective customers of the new commercial enterprise. The plan should list the required permits and licenses obtained. If applicable, it should describe the manufacturing or production process, the materials required, and the supply sources. The plan should detail any contracts executed for the supply of materials and/or the distribution of products. It should discuss the marketing strategy of the business, including pricing, advertising, and servicing. The plan should set forth the business's staffing requirements and contain a timetable for hiring, as well as a job description for all positions. It should contain sales, cost, and income projections and detail the bases therefor. Most importantly, the business plan must be credible.

Id.

In this case, the petitioner claims it will operate an elderly care facility, and merely submits a copy of its business license and a brief description of its hiring plan and proposed staffing of the U.S. entity. It fails to discuss in detail its business objectives, contracts it intends to execute, income projections or marketing strategy, all of which it is required to submit pursuant to 8 C.F.R. § 214.2(l)(3)(v)(C). Without these additional details, the proposed nature of the petitioner's business in the United States cannot be ascertained. 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).

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if she shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *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).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.