U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF P-D-C- LLC

DATE: AUG. 10, 2018

APPEAL OF VERMONT SERVICE CENTER DECISION

PETITION: FORM I-129, PETITION FOR A NONIMMIGRANT WORKER

The Petitioner, a company operating dry cleaners, seeks to temporarily employ the Beneficiary as the chief executive officer (CEO) of its new office[1] under the L-1A nonimmigrant classification for intracompany transferees. Immigration and Nationality Act (the Act) section 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L). The L-1A classification allows a corporation or other legal entity (including its affiliate or subsidiary) to transfer a qualifying foreign employee to the United States to work temporarily in a managerial or executive capacity.

The Director of the Vermont Service Center denied the petition, concluding that the record did not establish, as required, that the Beneficiary acted in a managerial or executive capacity abroad. The Director also determined that the Petitioner did not demonstrate that the Beneficiary would be employed in a managerial or executive capacity within one year of an approval of the petition.

On appeal, the Petitioner contends that the Director incorrectly concluded that the Beneficiary would not act in a managerial or executive capacity within one year. The Petitioner emphasizes its already existing operations and its plans to hire managers subordinate to the Beneficiary during the first year. In addition, the Petitioner asserts that the Director ignored evidence of the Beneficiary's engagement in tactical and strategic decisions, negotiation with third parties, and involvement in hiring and firing decisions abroad indicating that she oversees an essential function.

Upon *de novo* review, we will dismiss the appeal.

I. LEGAL FRAMEWORK

To establish eligibility for the L-1A nonimmigrant visa classification in a petition involving a new office, a qualifying organization must have employed the beneficiary in a managerial or executive capacity for one continuous year within three years preceding the beneficiary's application for admission into the United States. 8 C.F.R. § 214.2(l)(3)(v)(B). In addition, the beneficiary must

[1] The term "new office" refers to an organization which has been doing business in the United States for less than one year. 8 C.F.R. § 214.2(l)(1)(ii)(F). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows a "new office" operation no more than one year within the date of approval of the petition to support an executive or managerial position.

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 or executive capacity. *Id.*

The petitioner must submit evidence to demonstrate that the new office will be able to support a managerial or executive position within one year. This evidence must establish that the petitioner secured sufficient physical premises to house its operation and disclose the proposed nature and scope of the entity, its organizational structure, its financial goals, and the size of the U.S. investment. *See generally*, 8 C.F.R. § 214.2(l)(3)(v).

II. U.S. EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY

We will first analyze whether the Petitioner established that it would employ the Beneficiary in a managerial or executive capacity within one year of the petition's approval.

"Managerial capacity" means an assignment within an organization in which the employee primarily manages the organization, or a department, subdivision, function, or component of the organization; 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; has authority over personnel actions or functions at a senior level within the organizational hierarchy or with respect to the function managed; and exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. Section 101(a)(44)(A) of the Act.

The statute defines an "executive capacity" as an assignment within an organization in which the employee primarily directs the management of the organization or a major component or function of the organization; establishes the goals and policies of the organization, component, or function; exercises wide latitude in discretionary decision-making; and receives only general supervision or direction from higher-level executives, the board of directors, or stockholders of the organization. Section 101(a)(44)(B) of the Act.

In order to determine whether the Petitioner established that its new office will support a managerial or executive position within one year, we will review the Beneficiary's proposed job duties, along with the Petitioner's business and hiring plans and evidence that the business will grow sufficiently to support the Beneficiary in the intended managerial or executive capacity. The totality of the evidence must be considered in analyzing whether the proposed managerial or executive position is plausible, considering a petitioner's anticipated staffing levels and stage of development within a one-year period. *See* 8 C.F.R. § 214.2(l)(3)(v)(C).

A. Duties

In support of the petition, the Petitioner stated that it had purchased a dry cleaning business, P-D-C- (Dry Cleaner A), using funds invested by the foreign employer. The submitted evidence reflected that the Petitioner was owned by the following members: 55% by [redacted] 15% by [redacted] 15% by [redacted], and 15% by the Beneficiary.

Later in response to the Director's request for evidence (RFE), the Petitioner indicated that it had also purchased two other dry cleaning businesses, I-C- (Dry Cleaner B) and S-C- (Dry Cleaner C). The Petitioner also provided supporting documentation reflecting that Dry Cleaner B had been purchased by a separate legal entity, P-USAG- LLC, and that Dry Cleaner C had been purchased by I- LLC. The submitted evidence indicated that P-USAG- LLC, the purchaser of Dry Cleaner B, was 50% owned by [redacted] and 50% owned by [redacted] Further, the provided documentation reflected that I- LLC, the company that purchased Dry Cleaner C, was owned by the same members and in the same membership percentages as the Petitioner.

The Petitioner explained in a RFE response letter that the Beneficiary would work at Dry Cleaner C, while her asserted subordinate managers would operate out of Dry Cleaner A. In a separate letter, the foreign employer stated that the Beneficiary would act as CEO of the Petitioner and Dry Cleaner A performing the following duties:

- Ensure ongoing local programmatic excellence,
- Recommend timelines and resources needed to achieve strategic goals,
- Support strong communication with the foreign employer board of directors,
- Develop an organizational plan incorporating goals and objectives that work towards the strategic direction,
- Oversee the efficient and effective day-to-day operation of the organization,
- Draft policies for the approval of the foreign employer board, review existing policies, and recommend changes,
- Monitor the day-to-day delivery of the programs and services, and
- Recruit, interview and select staff that have the right technical and personal abilities.

In addition, in a business plan, the Petitioner also provided a separate U.S. duty description specific to the Beneficiary's oversight of Dry Cleaner A. This duty description set forth some of the following tasks:

- Measure productivity and goal achievement,
- Direct, design, and implement strategic plans,
- Manage integrated project plans and develop scope of work documents for all projects,
- Review and improve production processes,
- Determine new staff requirements and oversee training of new personnel through staff,
- Direct and approve service and product strategies, price policies, and discounts,
- Establish and communicate goals and objectives,
- Plan weekly meetings,
- Prepare documents, reports, and financial statements for the foreign employer,
- Promote [the] company on social media, and

- Develop new innovative marketing campaigns.

The proposed U.S. duties submitted for the Beneficiary are overly vague and they do not effectively convey the Beneficiary's actual day-to-day managerial or executive tasks. The Beneficiary's job description includes several generic duties that could apply to any manager or executive acting in any business or industry; such duties do not provide insight into the actual nature of her role. The Petitioner provided few specifics related to how the Beneficiary's day-to-day duties fit specifically within the company's first year business plans. For instance, the Petitioner did not specify the actions the Beneficiary would take during its first year of operation to assure that the business develops as necessary to support her in a managerial or executive capacity within one year. In fact, the Beneficiary's duty description includes few references to the company's intended business, the operation of a dry cleaning business or businesses.

The Petitioner submits few examples of how the Beneficiary would ensure "programmatic excellence," timelines and resources she would recommend, strategic goals she would set, operational plans she would implement, policies she would draft, review, and change, or "programs" she would monitor. Further, the Petitioner did not articulate "integrated project plans" the Beneficiary would manage, scope of work documents she would develop, production processes she would review and improve, service and product strategies she would approve, goals and objectives she would communicate, or innovative marketing campaigns she would develop. The record requires more detail as to the Beneficiary's specific tasks to assess whether she would act primarily in a managerial or executive capacity within one year. 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).

Moreover, the Petitioner appears to have provided two materially different U.S. duty descriptions leaving question as to the actual managerial and executive-level duties the Beneficiary would perform during the first year. For instance, the Petitioner offers conflicting statements as to the Beneficiary's responsibilities during the first year, at times indicating that she would exclusively oversee the Petitioner and Dry Cleaner A, while elsewhere asserting that she would manage three separate legal entities and dry cleaners. The Petitioner also does not clearly articulate what percentages of time the Beneficiary would devote to each business and legal entity, leaving uncertainty as to her actual role. In addition, some of the Beneficiary's duties appear to bear little relation to managing a dry cleaning business or businesses, such as delivering "programs," managing "integrated project plans," and reviewing and improving "production processes."

The fact that the Beneficiary would manage the business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 101(a)(44) of the Act. By statute, eligibility for this classification requires that the duties of a position be "primarily" managerial or executive in nature. Section 101(A)(44)(A) and (B) of the Act. Even though the Beneficiary would exercise discretion over the Petitioner's day-to-day operations and possess the requisite level of authority with respect to discretionary decision-

making, these elements are not sufficient to establish that the actual duties the Beneficiary would perform within one year of the petition's approval would be primarily managerial or executive in nature. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd.*, 724 F. Supp. 1103, 1108. Here, the Petitioner provided a vague job description that does not adequately convey the Beneficiary's actual proposed day-to-day tasks or establish that she would devote her time primarily to managerial or executive duties within one year.

B. Business Plan and Projected Staffing

In the case of a new office petition, we review the petitioner's business and hiring plans and evidence that the business will grow sufficiently to support a beneficiary in the intended managerial or executive capacity. A petitioner has the burden to establish that it would realistically develop to the point where it would require the beneficiary to perform duties that are primarily managerial or executive in nature within one year of the petition's approval. Accordingly, we consider the totality of the evidence in analyzing whether the proposed managerial or executive position is plausible based on a petitioner's anticipated staffing levels and stage of development within a one-year period. *See* 8 C.F.R. § 214.2(l)(3)(v)(C).

In an organizational chart provided with the petition, the Petitioner indicated that the Beneficiary would oversee a manager and an outsourced accountant. The chart further reflected that a manager subordinate to the Beneficiary would oversee a supervisor who would in turn supervise two shirt pressers, two pressers, a "steamer," a general helper, and customer attendant/driver. In a business plan for Dry Cleaner A submitted in response to the RFE, the Petitioner projected that it would have three full-time employees and six part-time employees during the first year, including an operational supervisor (laundry expert), a general helper, two pressers, a "steamer," two shirt pressers, and a driver. The Petitioner also provided a Florida quarterly wage report indicating that it had paid wages to these asserted employees as of June 2017.[2] Further, it also stated in the Dry Cleaner A business plan that it would hire an operational supervisor and an administrative supervisor subordinate to the manager reporting to the Beneficiary in its second year of operation.

In addition, the Petitioner submitted business plans specific to Dry Cleaner B and Dry Cleaner C, which as we have noted, are owned by separate legal entities. Organizational charts specific to these legal entities and dry cleaning businesses listed the Beneficiary as CEO overseeing two general helpers and a tailor working at Dry Cleaner B and a general helper working for Dry Cleaner C. As previously discussed, the Petitioner stated in the RFE response that the Beneficiary would be "working at [Dry Cleaner C] and the Manager, Operational Supervisor, and Administrative Supervisor will be working at the offices of [Dry Cleaner A]."

First, on appeal, the Petitioner does not clearly articulate whether the Beneficiary would act in a managerial or executive capacity within one year, but only vaguely indicates that the Beneficiary will have supervisory subordinates and act in both capacities. A petitioner claiming that a

[2] We note that the petition was filed on July 11, 2017.

beneficiary will perform as a "hybrid" manager/executive will not meet its burden of proof unless it has demonstrated that the beneficiary will primarily engage in either managerial or executive capacity duties. *See* section 101(a)(44)(A)-(B) of the Act. While in some instances there may be duties that could qualify as both managerial and executive in nature, it is the petitioner's burden to establish that the beneficiary's duties meet each criteria set forth in the statutory definition for either managerial or executive capacity. A petition may not be approved if the evidence of record does not establish that the beneficiary will be primarily employed in either a managerial or executive capacity.

The Petitioner has not submitted sufficient evidence to establish that the Beneficiary would act as a personnel manager during the first year. The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." *See* section 101(a)(44)(A)(i) and (ii) of the Act. We note that the Petitioner does not contend that the Beneficiary would act as a function manager within one year; as such, we will only analyze whether she would act as a personnel manager. Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that 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)(A) of the Act. If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 214.2(l)(1)(ii)(B)(*3*).

The Petitioner submits an unclear hiring timeline that does not sufficiently demonstrate that the Beneficiary would supervise managerial or professional subordinates within one year. For instance, the Petitioner indicates that during year one (listed as eight months) it would employ an operational supervisor and seven operational level employees working at Dry Cleaner A. The Petitioner also stated that during "Year 2" it would add other subordinate managers, including a manager above the operational supervisor and an administrative supervisor. However, elsewhere in the same business plan, it indicated that all the projected managers would be hired during the first year. As such, given this ambiguity, it is difficult to discern the Petitioner's actual first year hiring timeline.

Regardless, the duties of these proposed managers do not sufficiently establish that these managerial positions would be required during the first year. The duties of the projected managers significantly overlap with each other and with the duties of the Beneficiary, leaving question as to whether the Petitioner would require multiple managers to operate its projected business within the first year. For instance, the operational supervisor/laundry expert's duty description indicated that he or she would be tasked with controlling the operations and production of the laundry and dry cleaning process and ensuring proper processing between the three referenced dry cleaners. This duty description also explained that the supervisor/laundry expert would focus on "the development of plans and projects to optimize production processes, supporting reports and productivity improvement plans," and the "development and implementation of marketing campaigns." These

duties significantly overlap with the duties of the Beneficiary which also discuss responsibility for plans, projects, production, and marketing plans.

Likewise, the duties of the projected "manager" indicate that he or she would be responsible for supervising the administrative and operations managers, "measur[ing] sales and business productivity through performance review," and "develop[ing] feature reports, statistics of production and sales, [and] financial and political forecasts." Again, these duties significantly overlap with those of the projected operations manager and Beneficiary, whose duties also include developing reports, financial forecasts, and analysis of "production." Lastly, the Petitioner stated that the administrative manager would be devoted to controlling the reports and budgets related to all three dry cleaners, "developing with the Manager measurable plans for financial control of the company," and controlling "payroll, hiring and firing of employees." However, again, the Beneficiary's duties also include substantial responsibility for hiring, firing, and training employees, and financial matters. As such, the Petitioner has not submitted credible day-to-day duty descriptions for the Beneficiary's proposed subordinate managers. In fact, it is unclear how the dry cleaning business would require the projected level of managerial support during the first year.

In addition, the duties of the Beneficiary's proposed managerial subordinates are generic and provide little insight into the actions of these projected managers in launching the business during the first year. For example, much like the Beneficiary's duties, the duties of the Beneficiary's proposed subordinate managers mention plans, projects, production, reports, improvement plans, marketing campaigns, and financial plans; however, the Petitioner provides few details regarding how these generic tasks translate to specific actions to grow the business during the first year.

In fact, the Petitioner indicates that the Beneficiary would work at Dry Cleaner C, a business it does not own, and which is stated to employ only one "general helper." The Beneficiary's presence at this location with only one operational employee suggests that she would be significantly involved in the non-qualifying operational aspects of this location.

Furthermore, the Petitioner has not demonstrated that the Beneficiary's projected first year subordinates would act as professionals. The Petitioner has not articulated bachelor's degree requirements for these positions and the duties of these positions do not indicate that such degrees would be required.[3] Therefore, the Petitioner has not submitted sufficient evidence to establish that the Beneficiary would act as a personnel manager within one year.

[3] In determining whether a beneficiary manages professional employees, we must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. *Cf.* 8 C.F.R. § 204.5(k)(2) (defining "profession" to mean "any occupation for which a U.S. baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation"). Section 101(a)(32) of the Act, 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 Petitioner also vaguely indicates that the Beneficiary would act in an executive capacity within the first year. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act. Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managers for a beneficiary to direct and they must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. A beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.*

The Petitioner has not demonstrated that the Beneficiary would likely act in an executive capacity within the first year. As we have discussed, it has submitted a vague duty description for the Beneficiary that does not sufficiently detail the executive-level duties she would perform within one year. The Petitioner also has not credibly articulated and documented how its dry cleaning location would support the Beneficiary in an executive capacity and the proposed subordinate managers within one year. The Petitioner's business plans and timeline do not adequately detail the first year actions it will undertake to successfully launch the business such that it would support the Beneficiary in an executive capacity within one year. The evidence does not demonstrate that the Beneficiary would primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise.

In conclusion, the Petitioner has not established that the Beneficiary would act in managerial or executive capacity within one year of an approval of the petition.

III. EMPLOYMENT ABROAD IN A MANAGERIAL CAPACITY

The Director also denied the petition concluding the Petitioner did not establish that the Beneficiary had been employed in a qualifying managerial or executive capacity abroad. In denying the petition, the Director concluded that the Beneficiary's foreign duties, and the duties of her foreign subordinates, were broadly cast and generic. On appeal, the foreign employer asserts that the Beneficiary oversaw four subordinates and contends that the evidence clearly demonstrates that the Beneficiary was involved in strategic decision making, negotiations with third parties, and hiring and firing of employees. The Petitioner specifically claims that the Beneficiary was employed abroad in a managerial capacity.

In its appeal, the Petitioner does not definitively address this basis for denial or provide any additional evidence related to the Beneficiary's foreign employment; for instance, it does not submit additional details regarding the Beneficiary's foreign duties or the duties of her claimed foreign subordinates. Following a review of the evidence, we find that the Petitioner has not established that the Beneficiary was employed abroad in a managerial capacity. Since the above ground of dismissal is

dispositive of the Petitioner's appeal, we will not address this issue further. Nevertheless, we note that if the Petitioner seeks to employ the Beneficiary in this classification in the future, it will need to submit sufficient evidence to establish that the Beneficiary was employed abroad in a qualifying managerial capacity.

IV. CONCLUSION

The appeal will be dismissed because the record does not include sufficient evidence to establish that the Beneficiary would be employed in a managerial or executive capacity within one year of the petition's approval and it does not demonstrate that she was employed in a managerial capacity abroad.

ORDER: The appeal is dismissed.

Cite as *Matter of P-D-C- LLC*, ID# 1488780 (AAO Aug. 10, 2018)