U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF T-P-F- LLC

DATE: DEC. 28, 2017

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, which intends to open several restaurants in the United States, seeks to temporarily employ the Beneficiary as its operations and quality control manager under the L-1A nonimmigrant classification for intracompany transferees. *See* 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 has been employed abroad in a managerial or executive capacity. The Director also concluded that the Petitioner seeks to open a new office, but has not established, as required, that the new office would be able to employ the Beneficiary in a managerial or executive capacity within a year of the approval of the petition.

The matter is now before us on appeal. In its appeal, the Petitioner submits several exhibits, most of them copies of previous submissions, and asserts that it has met its burden of proof.

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

I. LEGAL FRAMEWORK

To establish eligibility for the L-1A nonimmigrant visa classification, a qualifying organization must have employed the beneficiary "in a capacity that is managerial, executive, or involves specialized knowledge," for one continuous year within three years preceding the beneficiary's application for admission into the United States. Section 101(a)(15)(L) of the Act. 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 or executive capacity. *Id.*

II. EMPLOYMENT ABROAD IN A MANAGERIAL OR EXECUTIVE CAPACITY

The Director found that the Petitioner did not establish that the Beneficiary has been employed abroad in a managerial capacity. The Petitioner does not claim that the Beneficiary has been employed in an executive capacity or a capacity involving specialized knowledge.

A managerial capacity is an assignment within an organization in which the employee primarily manages the organization, or a department, subdivision, function, or component of the organization, and exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." *See* sections 101(a)(44)(A)(i) and (ii) of the Act. Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. A personnel manager supervises and controls the work of other supervisory, professional, or managerial employees; the duties of a first-line supervisor are not considered managerial unless the employees supervised are professional. A personnel manager must also have the authority to execute or recommend personnel actions such as hiring, firing, and promotions. A function manager need not directly supervise other employees, but must manage an essential function within the organization, or a department or subdivision of the organization, and function at a senior level within the organizational hierarchy or with respect to the function managed. Section 101(a)(44)(A) of the Act.

A. Duties

The Petitioner must establish that the Beneficiary was employed abroad in a managerial capacity. 8 C.F.R. § 214.2(l)(3)(iv). The definition of a managerial capacity has two parts. First, the Petitioner must show that the Beneficiary performed certain high-level responsibilities. *Champion World, Inc. v. INS*, 940 F.2d 1533 (9th Cir. 1991) (unpublished table decision). Second, the Petitioner must prove that the Beneficiary was *primarily* engaged in managerial duties, as opposed to ordinary operational activities alongside other employees. *See Family Inc. v. USCIS*, 469 F.3d 1313, 1316 (9th Cir. 2006); *Champion World*, 940 F.2d 1533.

The Petitioner stated that the Beneficiary had worked for the Petitioner's foreign affiliate[1] as a quality control and operations manager since 2013. On the petition form, regarding the Beneficiary's position abroad, the Petitioner listed the following responsibilities:

> Develop strategies to improve sanitation and overall company food safety programs at manufacturing, food service and distribution level; Food safety training for both hourly and salaried employees for Food Safety Manager Certification purposes; Development of new products, elaboration of technical sheets, new developments training, cost calculations and evaluation and calculation the chain [*sic*] cost of goods sold (COGS); Elaboration of manuals and auditing of compliance with the chain'[s] standard procedures; Staff Training, development of new restaurants, work routine, receipts and scheduling of sales productions; Costumers [*sic*] assistance follow-up.

[1] The Petitioner refers to the foreign entity as the parent company, but the foreign entity holds no ownership interest in the petitioning entity. Instead, the Petitioner and the foreign entity are affiliates by virtue of shared ownership. *See* 8 C.F.R. § 214.2(l)(1)(ii)(L)(*1*).

The Petitioner also submitted a separate document with job descriptions for several positions identified, on an organizational chart, as managerial. The job description for "Operations Manager" reads as follows:

> The Operations Manager is the professional responsible for managing a number of operational and logistics [matters] including deposit operations, warehouse and distribution, forecasting, planning, logistics systems, customer service and purchasing. It is within the responsibilities of an Operations Manager to supervise all products handled, by managing through planning, control and evaluation of efficiency, organize the resources required, and making sure that the storage, distribution and service, meet the company's needs, plan the project to be developed, create the conditions to ensure the proper functioning and performance of all activity, direct and plan the entire logistics operation, with strategic vision involving the large volume of demand, manage and coordinate the planning, maintaining control (physical and administrative) of stock, monitor the preparation of inventories, develop the study and define the strategy to improve the efficiency of the process, coordinate the receipt, conference and product storage, manage the operations team and the quality area, work with the management of the logistic flow of loading and unloading of the food industry [*sic*] and inventory, coordinating the planning and scheduling of production, storage, distribution and transportation of products, meeting requests for sales and delivery. In order for the professional to perform well as an Operations Manager, in addition to training, it is essential to have knowledge of rotating inventory, processes and mapping thereof, financial management and indicators.

The two job descriptions quoted above are very different from one another, particularly regarding food safety, which is prominent in one description, but absent from the other.

In a request for evidence, the Director observed that the submitted job descriptions "are not consistent," and therefore "[i]t is not apparent what duties the beneficiary performed abroad." The Director asked the Petitioner to "describe the beneficiary's typical managerial duties, and the percentage of time spent on each." In response, the Petitioner submitted a translation of a longer job description, but did not explain its prior submission of two conflicting job descriptions for the Beneficiary. The new job description did not specify the time spent on individual duties.

The new job description, more than four pages long, began with these general passages (note: errors in the translation have not been corrected):

> **Position Purpose:**
>
> The quality manager guarantees a high level of service to internal and external customers, throughout the standardization of all products and services of the [foreign affiliate].

The quality manager investigate and corrects all customer's problems and complaints related to quality, by means of the elaboration of manuals, dishes standardization, kitchen unit training and auditing kitchen and salon.

The quality manager also guarantees sanitary and hygiene control of the stores through productions best practices, cleaning schedule and Hazard Analysis and Critical Control Point (HACCP). The quality manager is responsible for new products development, auditing suppliers, evaluation and calculation of the restaurants cost of goods sold (COGS).

General Responsibilities:

Standardization and control of all products and services qualities of the [foreign affiliate].

The rest of the job description is divided into daily, monthly, and semiannual/annual activities. Examples follow (note: errors in the translation have not been corrected):

Bianual/Anual:

- Participate . . . in the definition of the quality policy . . . .
- Plan the implementation of new restaurants . . . by elaborating the restaurant's operational flow (verifies the architectural plant alongside the architect), specifying and testing equipment, establishing the number of employees and jobs together with the Human Resources department, elaborating the training schedule of kitchen, food and salon hygiene, developing and approving new suppliers alongside the purchase department
- Inauguration of new restaurants: Work alongside with the human resources department, for the selection and hiring of kitchen employees, requests [orders] for the purchase department . . . . Trains the kitchen and the salon teams on quality controls standards in the kitchen . . . , standardization of receipts . . . and customer's services. Develop the working schedule for the employees . . . , follows the customer's satisfaction . . . , and manages the restaurants cost of goods sold (COGS), through a daily and weekly inventory control and report evaluations
- Participate in the human resources management, conducting performance evaluation of the kitchen crew and managers

Monthly Activities:

- Developing new dishes and drinks for the restaurants alongside with the Head Chef/Barman . . . .
- Testing and approval of new ingredients (raw material), disposables, cleaning products, utensil and equipment for the purchase department

- Manage and lead the quality control team, in order to inspect the entry and exit of products, to ensure that the quality control standards are met, in the food production department

Daily Activities:

- Restaurant's audit in order to maintain the work condition safe, to employees and customers. Prompt resolution to all security issues
- Training of new employees in the best practices of manufacturing, technical sheets and customers services
- The dissemination of the quality culture for all the employees

In the denial notice, the Director asserted that the Petitioner's submission of conflicting job descriptions raised greater questions of credibility. Regarding the final version of the job description, the Director stated that "many of the duties . . . are generic." The Director also found that setting employee work schedules and conducting performance evaluations appear to be tasks for a first-line supervisor, rather than a manager. Also, the Director questioned how tasks such as "testing equipment" relate to the role of a quality manager.

On appeal, the Petitioner states that it has "demonstrated . . . by a preponderance of the evidence that the beneficiary has served in a managerial capacity in the Brazilian company whereby she was . . . managing important functions of the foreign company that operates multiple large restaurants in Brazil."

The Petitioner's appeal does not address any of the specific concerns that the Director cited in the denial notice. The Petitioner has not addressed or resolved the credibility issues arising from its submission of conflicting job descriptions. In fact, the Petitioner resubmits two of the job descriptions on appeal, without acknowledging or explaining the differences between them. The Director cited *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988), which states "[d]oubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition." *Id.* at 591. The submitted job descriptions are incompatible; they cannot all accurately reflect the nature of the same position. But the Petitioner has not shown which version is the most accurate, or explained why it submitted descriptions that were less accurate. In light of these unanswered questions, the Petitioner has not met its burden of proof.

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). The actual duties themselves reveal the true nature of the employment. *Id.* Therefore, reciting a beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. In several instances, it is not clear whether the Beneficiary would be

managing particular tasks, or actually performing them. Examples include developing new recipes and monitoring inventory.

The Petitioner has attributed several managerial-level responsibilities to the Beneficiary, such as involvement in setting company policies and supervising staffing, but many other tasks appear to be, as the Director observed, more suited to first-line supervisors, such as setting schedules and training new employees. The Petitioner has not specified how much time the Beneficiary devoted to each of these tasks, and therefore the Petitioner has not shown that the Beneficiary worked primarily in a managerial capacity.

B. Staffing

Beyond the required description of the job duties, U.S. Citizenship and Immigration Services reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the company's organizational structure, the duties of a beneficiary's subordinate employees, the presence of other employees to relieve a beneficiary from performing operational duties, the nature of the business, and any other factors that will contribute to understanding a beneficiary's actual duties and role in a business.

Before addressing the merits of the Petitioner's statements regarding the staffing of the foreign entity, we note that the Director concluded that the Petitioner provided conflicting information about that staffing. Specifically, the Petitioner submitted an organizational chart naming a particular human resources official, but later stated that the position was vacant and a lower-level employee had acted in a representative capacity. The Director concluded that the organizational chart was therefore outdated and lacking in credibility.

The Petitioner, however, submitted the organizational chart several months before it submitted the letter from the lower-level employee. There is no evidence that the organizational chart was inaccurate or outdated at the time of its submission.

The Petitioner stated that it submitted "job descriptions for senior executive[s] and managers who report to the Beneficiary," but the descriptions pertain to the financial director, commercial unit manager, and expansion manager. None of those positions are subordinate to the Beneficiary, according to the accompanying organizational chart for the foreign entity's "Headquarters Executive Office Center." That chart showed five departments under the Beneficiary's authority, staffed as follows:

- Human Resources (one coordinator, two analysts, one assistant)
- Supplies (one buyer)
- Marketing (one analyst)
- Information Technology (one analyst)
- Operations (one nutritionist, two nutritionists, and all restaurant staff)

The Petitioner did not submit job descriptions for the positions named as being under the Beneficiary's authority. The organizational chart labeled areas under the Beneficiary's authority as "Management of Human Resources," "Management of Supplies," and so on, but did not indicate that those divisions actually had managers.

The Petitioner also provided organizational charts for individual restaurants within the organization in Brazil, but these charts are not legible.

The Director's requests for evidence and denial notice did not touch directly on the staffing of the foreign company. On appeal, the Petitioner asserts that the Beneficiary "was managing multiple management level employees and was also managing important functions of the parent company."

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." *See* sections 101(a)(44)(A)(i) and (ii) of the Act. Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. 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; 8 C.F.R. § 214.2(l)(1)(ii)(B)(*4*). If a petitioner claims that a beneficiary directly supervises other employees, those subordinate employees must be supervisory, professional, or managerial, and the beneficiary must have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. Sections 101(a)(44)(A)(ii)-(iii) of the Act; 8 C.F.R. §§ 214.2(l)(1)(ii)(B)(*2*)-(*3*).

To determine whether the 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 United States 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."

In this instance, the Petitioner has claimed that the Beneficiary "was managing multiple management level employees," but the Petitioner has not identified those employees. We cannot ignore the Petitioner's submission of conflicting job descriptions for the Beneficiary. The Petitioner has claimed that the Beneficiary had broad authority over many different aspects of the restaurants, and over the entire staff of each restaurant. But other submitted information indicates a much narrower purview, with authority over food quality and safety concerns and some aspects of new restaurant development. Emblematic of this uncertainty, different materials in the record variously refer to the Beneficiary as the "quality manager," "operations manager," or some combination of the two. Translated copies of pay receipts, arguably the most direct evidence of the Beneficiary's employment in Brazil, identified the Beneficiary's position as "quality manager" (abbreviated as "*ger qualidade*" in the original Portuguese).

We acknowledge that the foreign affiliate's organizational chart shows the Beneficiary as having authority over several company functions and all of the restaurants that the foreign company operated at the time. That chart, however, is uncorroborated by other evidence in the record, and by itself it does not overcome the issues discussed above, regarding the Beneficiary's stated duties on their face and the inconsistencies regarding those duties.

The Petitioner also has not articulated a specific function that the Beneficiary will manage. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act. If a petitioner claims that a beneficiary will manage an essential function, it must clearly describe the duties to be performed in managing the essential function. In addition, the petitioner must demonstrate that:

> (1) the function is a clearly defined activity; (2) the function is 'essential,' i.e., core to the organization; (3) the beneficiary will primarily *manage*, as opposed to *perform*, the function; (4) the beneficiary will act at a senior level within the organizational hierarchy or with respect to the function managed; and (5) the beneficiary will exercise discretion over the function's day-to-day operations.

Matter of G- Inc., Adopted Decision 2017-05 (AAO Nov. 8, 2017). In this matter, the Petitioner has not described or provided evidence that the Beneficiary manages an essential function.

The Petitioner has indicated that the Beneficiary held a managerial title in Brazil, but has not provided enough substantiated, consistent evidence to establish that the duties of that position were primarily managerial as the Petitioner claims.

III. NEW OFFICE

New office means an organization which has been doing business in the United States through a parent, branch, affiliate, or subsidiary for less than one year. 8 C.F.R. § 214.2(l)(1)(ii)(F).

If the petition indicates that a 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 must submit evidence that it has secured sufficient physical premises to house the new office have been secured, and that the intended United States operation, within one year of the approval of the petition, will support an executive or managerial position. 8 C.F.R. § 214.2(l)(3)(v).

On the petition form, in response to the question, "is the beneficiary coming to the United States to open a new office?," the Petitioner answered "no." However, the Director adjudicated the petition under the regulatory provisions for a new office. We find that even if the Petitioner filed this petition as a new office petition, the petition would still not be approvable under this more lenient standard.

The Director found that the Petitioner has not shown that it would be ready to commence doing business in the United States upon approval of the petition. On the petition form, the Petitioner indicated that it sought to employ the Beneficiary beginning on August 1, 2016. This date had already passed by the time the Petitioner prepared the petition form on August 8, and filed it on September 14, but nevertheless the Petitioner indicated, in effect, that it expected to hire the Beneficiary immediately rather than at a particular future date.

The Petitioner signed a lease for the restaurant's planned location in October 2015, and its business plan forecast gross revenue of $3.6 million in 2017, with more than double that amount in 2017, but the restaurant had not yet opened when the Petitioner filed the petition in September 2016. Subsequent information indicated that the Petitioner intended to open the restaurant on June 1, 2017, but in a supplement to the appeal, submitted after that target date, the Petitioner states "the restaurant will open soon."

The record supports the Director's conclusion that, because the Petitioner has not been able to document an opening date for the restaurant, the Petitioner had not established that the new office would support a managerial or executive position within one year of approval of the petition. The restaurant's unfinished state also bears on the requirement that the Petitioner has secured sufficient physical premises to house the new office. The Petitioner leased a site and at least planned construction, but the Petitioner did not show that the Beneficiary would have anywhere to work while construction was underway. On the petition form, the Petitioner specified that the Beneficiary would work at the restaurant's location, but the Petitioner did not explain how this would be a viable workplace before and during the extensive renovation and construction detailed in the record.

For these reasons, it has not been shown that the organization existed as described at the time of filing or would exist within a year.

IV. U.S. EMPLOYMENT IN A MANAGERIAL CAPACITY

The regulations require a petitioner to meet all eligibility requirements at the time of filing. *See* 8 C.F.R. § 103.2(b)(1). Because the petition did not indicate that the Beneficiary would be employed at a new office, the Petitioner must demonstrate that it already had a sufficient organizational structure in the United States *at the time of filing* to warrant a managerial position for the Beneficiary. The record shows that the Petitioner did not have such a structure in place at the time of filing in September 2016. At that time, the Petitioner was not yet doing business (defined at 8 C.F.R. § 214.2(l)(1)(ii)(H) as the regular, systematic, and continuous provision of goods and/or services, and not the mere presence of an agent or office).

The projected organizational chart for the Petitioner's first U.S. restaurant shows a nested structure of managers and supervisors that, on its face, would appear to warrant managerial oversight, but this structure did not exist at the time of filing, nor was it imminently about to do so. The Petitioner has not shown that the Beneficiary's intended position had any subordinate employees at the time of filing. A hiring and training schedule indicated that the Petitioner intended to hire over 70 restaurant

employees between May 1 and 26, 2017, and to open the restaurant on June 1, 2017. Even if the Petitioner had adhered to this schedule, the Petitioner has not shown or claimed that the restaurant had any employees at the time of filing. Therefore, at the time of filing, there were not yet any managerial responsibilities for the Beneficiary to perform relating to the operation of the restaurant. Above the restaurant level, the company described a headquarters structure with other high-level officials such as a chief executive officer, but those officials held ranks either equal or superior to that of the Beneficiary's intended title. As such, they were not part of any organizational structure under the Beneficiary's control.

In a two-page job description for the Beneficiary's intended position, the Petitioner listed 32 responsibilities, some of them under the headings "Career development and building," "Restaurant responsibilities," "Personal" and "Communication." Some of these responsibilities appear, on their face, to be managerial, for example:

- Defines the procedures and the necessary means for the implementation of the restaurants[']sanitary and hygiene control
- Hold weekly meetings and present notes and particularities to the operational manager
- Development of restaurants[']standardization manuals

Other responsibilities appear to be operational rather than managerial, such as:

- Develops new products, presentation, appliances, equipment and standard receipts
- Produces technical documents related to the quality area

Still others are so vaguely worded that they do not describe any identifiable activities, for instance:

- Develop and support positive attitude
- Keep open and positive[] relationships with all company divisions

In denying the petition, the Director concluded "it would appear that the beneficiary will serve as a first line supervisor to non-professional personnel."

On appeal, the Petitioner contends that "the beneficiary will manage multiple management level U.S. employees and also manage an important function within the U.S. company." The Petitioner did not specify or define the function that the Beneficiary would manage or establish that the company already performed that function, or was able to immediately begin performing it, at the time of filing.

The organizational chart indicates that the Beneficiary would have authority over at least one manager and several supervisors, consistent, on its face, with a managerial capacity. The record, however, contains many of the same deficiencies regarding the planned U.S. position as we have already discussed with respect to the Beneficiary's foreign position. The Beneficiary's prospective

job description includes a combination of qualifying and non-qualifying duties, with no indication of which type of duties would occupy the majority of the Beneficiary's time.

The Petitioner has proposed a level of organizational complexity that could warrant a managerial position with authority over its planned restaurants, but the Petitioner had not shown that the organization existed as described at the time of filing, or that the Beneficiary's responsibilities would be *primarily* managerial once the business has reached a stage in which the Beneficiary would be able to fulfill those responsibilities.

V. CONCLUSION

The Petitioner did not establish that the Beneficiary was employed abroad in a managerial capacity, and that the Petitioner seeks to employ the Beneficiary in a managerial capacity in the United States.

ORDER: The appeal is dismissed.

Cite as *Matter of T-P-F- LLC*, ID# 698800 (AAO Dec. 28, 2017)