U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF D-P- LLC

DATE: FEB. 7, 2019

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a pizzeria, seeks to temporarily employ the Beneficiary as its chief executive officer 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 California Service Center denied the petition, concluding that the record did not establish, as required, that the Petitioner will employ the Beneficiary in the United States in a managerial or executive capacity.

The matter is now before us on appeal. On appeal, the Petitioner asserts that the Director erred by categorizing the petitioning entity as a new office, and by disregarding evidence of eligibility.

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.* The petitioner must also establish that the beneficiary's prior education, training, and employment qualify him or her to perform the intended services in the United States. 8 C.F.R. § 214.2(l)(3).

II. NEW OFFICE

Although the Director's decision refers to the Petitioner as a new office, the record indicates that the petitioning entity has been doing business since 2013, nearly five years before the filing of the petition. *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).

The regulations at 8 C.F.R. § 214.2(l)(3)(v) show that the term "new office" refers to a newly established U.S. business operation, rather than an already established but newly acquired business. Those regulations refer to acquisition of a work space, hiring of staff, and other preparations suited to a start-up business.

Although the Petitioner established a qualifying relationship with the Beneficiary's foreign employer less than a year prior to the filing date, the Petitioner is the same legal entity as it was before the Beneficiary purchased it in 2017. The Petitioner did not simply purchase the assets of a separate business and assimilate them into a new business entity. On the petition form, the Petitioner answered "no" when asked if the Beneficiary would be opening a new office.

We agree with the Petitioner's assertion on appeal that it is not a "new office" under the pertinent regulations. The Director's erroneous finding to the contrary, does not materially affect the Director's separate findings regarding the Beneficiary's claimed executive capacity, discussed below.

III. EMPLOYMENT IN AN EXECUTIVE CAPACITY

The Director denied the petition based on a finding that the Petitioner did not establish that it would employ the Beneficiary in a managerial or executive capacity. The Petitioner specifies that it seeks to employ the Beneficiary in an executive capacity. Therefore, we need not address the separate requirements for a managerial capacity.

When examining the claimed executive capacity of a given beneficiary, we will look to the petitioner's description of the job duties. 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 in a managerial or executive capacity. *See* 8 C.F.R. § 214.2(l)(3)(ii). Beyond the required description of the job duties, we examine 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.

Accordingly, we will discuss evidence regarding the Beneficiary's job duties along with evidence of the nature of the Petitioner's business and its staffing levels.

A. Duties

The Petitioner stated that the Beneficiary would have three major responsibilities:

- Company Repositioning: The Petitioner already owns one restaurant. The Beneficiary will oversee the purchase of another restaurant and oversee their renovation and "forge [a] strategic partnership with nearby hotels."

- Marketing Strategy: The Beneficiary "will develop and approve [a] new marketing strategy" and "oversee the execution of [a new promotional] campaign."
- Human Resources (HR) Management Development: The Beneficiary "will develop [an] HR management system" and "oversee development and adjustment of job duties," and will hire "a qualified labor attorney, who will develop new employee handbooks."

The Petitioner also provided a two-page job description for the Beneficiary, summarized below:

- Develop and adjust the Petitioner's marketing and strategic plans for business expansion (20% of the Beneficiary's time)
- Direct and coordinate development and elaboration of the Petitioner's plans for marketing and operational support for the company's expansion (15%)
- Develop, approve and introduce new goals and policies; approve sales and operational plans and monitor their implementation (15%)
- Formulate and control pricing policy (15%)
- Oversee financial transactions (15%)
- Supervise and control the work of the operations manager and floor manager (15%)
- Negotiate with suppliers and oversee placement of orders (5%)

The Director denied the petition, finding that the Petitioner had not provided enough details about the Beneficiary's intended work in the United States, and that the job description was repetitive. The Director noted that three of the seven listed elements involved developing plans. The Director also found that the Petitioner had not shown that the Beneficiary "will be primarily directing [the] management of the organization."

On appeal, the Petitioner maintains that the Beneficiary will primarily work in an executive capacity. The record shows that the Beneficiary would have ultimate discretionary authority over the petitioning entity, but the record does not support the Petitioner's assertion that the Beneficiary will direct the management of the company. The Petitioner asserts that the Beneficiary will direct the management through his supervision of the operations manager and the floor manager, but the Petitioner has not shown that those positions are managerial as claimed. Below, we will address this issue in greater detail.

The Petitioner asserts that it provided a detailed job description for the Beneficiary. While the description is not lacking in length, it refers to positions that the Petitioner has not yet filled, such as administrative and marketing manager. Because the Petitioner had no such employee at the time of filing, that person could not have performed marketing research, prepared reports for the Beneficiary to review, or acted on the Beneficiary's instructions to implement plans and policies. The Petitioner did not explain who performs those duties in the absence of a dedicated employee.

The Petitioner's intention to fill additional positions at a later time cannot remedy this deficiency. The Petitioner must meet all eligibility requirements at the time of filing. *See* 8 C.F.R. § 103.2(b)(1). *See also Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg'l Comm'r 1978)

(A petitioner must establish that the position offered to a beneficiary merits classification as a managerial or executive position at the time of filing).

The Petitioner has not shown that the breakdown of the Beneficiary's claimed duties is realistic for a pizzeria with eight employees. For instance, the Petitioner claims that the Beneficiary will devote six hours per week to "formulation and control over pricing policy," but the Petitioner has not shown that the restaurant has a large enough menu, and changes prices frequently enough, to justify this level of constant attention to pricing. The same can be said of the Petitioner's assertion that the Beneficiary would devote six hours each week to developing and introducing new goals and policies. The Petitioner has not established that the submitted job description is realistic for the entity as it existed at the time of filing, and the assertion that the company plans to grow over the next several years cannot overcome this deficiency.

B. Staffing

At the time of filing, the Petitioner had eight employees:

- Operations Manager, supervising:
  - 3 Cooks
- Floor Manager, supervising:
  - 2 Waiters
  - Delivery Driver

The Petitioner stated its intention to hire additional workers, such as a restaurant manager, administrative and marketing manager, and a sales/marketing assistant, but the Petitioner did not employ these individuals at the time of filing. As the Petitioner acknowledges on appeal, it was not a new office at the time of filing. Therefore, we cannot take the Petitioner's hiring plans into consideration.

The Petitioner stated that the operations manager is "[r]esponsible for overseeing the company's day-to-day kitchen and administrative activities," while the floor manager is "[r]esponsible for overseeing the company's day-to-day front of the house activities." The job description, as worded, indicated that the operations manager spends 40% of his time interacting with restaurant managers and an administrative/marketing staff. Because the Petitioner had not yet filled those positions at the time of filing, the description cannot be accurate. The vacancies also raise the question of who now performs the duties of those lower-level positions.

Many of the elements listed in the job descriptions of the operations manager and floor manager are general responsibilities that do not specify how the employees will meet those responsibilities. For example, the operations manager is "[r]esponsible for achieving . . . financial and kitchen goals" and for "[e]nsuring that all products are received in correct unit count and condition." The floor manager is "[r]esponsible for implementing [the] company's policies" and "[e]nsuring that all guests feel welcome and are given responsive, friendly and courteous service."

The Director found that some employees worked part-time or for less than the minimum wage. Regarding the latter conclusion, the workers earning the lower salaries are waiters. Because tips augment their income, such employees qualify for a lower minimum wage. At the time of filing in March 2018, the Petitioner's wait staff earned $7.00 per hour; Florida's minimum wage for tipped employees was $5.23 per hour.[1] Payroll statements in the record support the Director's finding that some employees worked less than full-time hours, but the two claimed subordinate managers generally worked 80 hours per two-week pay period.

More significantly, the Director also found that the Petitioner did not establish that the operations manager and floor manager are managers. On appeal, the Petitioner cites O*NET, a Department of Labor-sponsored database of employment information, to show that the duties of operations managers and floor managers "are complex enough to constitute 'managerial positions' within the Petitioning organization." The record, however, does not support this assertion.[2]

More fundamentally, under the Petitioner's organizational structure at the time of filing, the two individuals were in fact the first-line supervisors of food preparation and serving workers. Authority over first-line supervisors is a defined element of a managerial capacity, but not of an executive capacity. Even then, the Beneficiary's own job description is deficient for reasons already discussed above, and we will not default to a finding that the Beneficiary will primarily serve in a managerial capacity.

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 "management" for a beneficiary to direct, and a beneficiary 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 an owner or sole managerial employee. A beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general

[1] https://www.dol.gov/whd/state/tipped2018.htm#Florida (last visited Feb. 6, 2019).

[2] O*NET is a general reference tool rather than a binding guide as to which job titles qualify as managerial or executive. Even then, the Petitioner has not shown that the operations manager and floor manager positions are comparable to the cited O*NET listing for "General and Operations Manager" positions. The Petitioner stated that those positions typically require a bachelor's degree, and O*NET shows the 2017 median wage for general and operations managers was $48.27 per hour. https://www.onetonline.org/link/summary/11-1021.00 (last visited Feb. 6, 2019).

The Petitioner's operations manager has a high school diploma and earns $15.00 per hour. The floor manager holds a General Education Diploma in lieu of a high school diploma and earns $12.00 per hour. Their qualifications, duties, and salaries more closely resemble the O*NET listing for "First-Line Supervisors of Food Preparation and Serving Workers," which "usually require a high school diploma" and had a median wage of $15.37 per hour in 2017. https://www.onetonline.org/link/summary/35-1012.00 (last visited Feb. 6, 2019).

supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.*

Based on the deficiencies discussed above, the Petitioner has not established that it would employ the Beneficiary in an executive capacity in the United States.

IV. CONCLUSION

The Petitioner did not establish that the Beneficiary's intended position as chief executive officer qualifies as a primarily executive capacity.

ORDER: The appeal is dismissed.

Cite as *Matter of D-P- LLC*, ID# 2179988 (AAO Feb. 7, 2019)