



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF P-&J-F- LLC

DATE: JUNE 6, 2016

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, which operates a [REDACTED] sandwich shop franchise, seeks to permanently employ the Beneficiary as its president under the first preference immigrant classification for multinational executives or managers. *See* Immigration and Nationality Act (the Act) section 203(b)(1)(C), 8 U.S.C. § 1153(b)(1)(C). This classification allows a U.S. employer to permanently transfer a qualified foreign employee to the United States to work in an executive or managerial capacity.

The Director, Nebraska Service Center, denied the petition. The Director concluded that the evidence of record did not establish that: (1) the Beneficiary will be employed in the United States in a managerial or executive capacity; and (2) the Beneficiary has been employed abroad in a managerial or executive capacity.

The matter is now before us on appeal. In its appeal, the Petitioner submits background materials and asserts that the Director erred by misinterpreting and disregarding evidence of the Beneficiary's eligibility.

Upon *de novo* review, we will withdraw the Director's decision and remand the matter to the Director for entry of a new decision.

I. LEGAL FRAMEWORK

Section 203(b) of the Act states in pertinent part:

- (1) Priority Workers. – Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

....

- (C) *Certain multinational executives and managers.* An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and the alien seeks to enter

the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

A United States employer may file Form I-140, Immigrant Petition for Alien Worker, to classify a beneficiary under section 203(b)(1)(C) of the Act as a multinational executive or manager. A labor certification is not required for this classification.

The regulation at 8 C.F.R. § 204.5(j)(3) lists the required initial evidence, including the Petitioner's statement that the Beneficiary has been employed abroad, and will be employed in the United States, in a managerial or executive capacity.

II. EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY

The Petitioner filed the Form I-140 petition on January 16, 2014. The Director denied the petition based on a finding that the Petitioner did not establish that: (1) the Beneficiary will be employed in a managerial or executive capacity; and (2) the Beneficiary has been employed abroad in a managerial or executive capacity. The Petitioner does not claim that the Beneficiary will be, or has been, employed in a managerial capacity. Rather, the Petitioner claims that the Beneficiary's past and intended future employment have been in an executive capacity.

The regulation at 8 C.F.R. § 204.5(j)(5) requires the Petitioner to submit a statement which indicates that the Beneficiary is to be employed in the United States in a managerial or executive capacity. The statement must clearly describe the duties to be performed by the Beneficiary.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity." The same definition appears at 8 C.F.R. § 204.5(j)(2).

If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, U.S. Citizenship and Immigration Services must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. *See* section 101(a)(44)(C) of the Act.

The Petitioner submitted job descriptions for the Beneficiary's foreign and U.S. positions in the form of charts that divided the Beneficiary's responsibilities into broad categories. The categories, in turn, were subdivided into individual duties, each marked with the approximate percentage of time devoted to that duty. Each category identified one or more "managed professionals" associated with that area of responsibility such as the Beneficiary, the Petitioner's manager, and a field consultant from the franchisor's headquarters.

In the denial notice, the Director stated that "the majority of [the listed] duties are divided between the beneficiary and another employee," so that "there is no way to determine what the beneficiary actually does (or did) on a daily basis for either company."

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On appeal, the Petitioner states that each “chart is clearly a breakdown [of] the Beneficiary’s duties only, and does not include any duties and responsibility of any other employee” of either the Petitioner or its foreign affiliate.

Upon review, we find that the charts list only the Beneficiary’s duties, as stated on appeal. Each chart has a column on the left with the legend “President,” which identifies the listed duties as the Beneficiary’s. Furthermore, several of the stated duties refer to a level of authority over the manager, and therefore cannot refer to the manager’s own duties, and other “managed professionals” do not work for either company at all, but instead for third parties such as banks and franchisors. The formatting of the charts is unclear upon initial review, which appears to have led the Director to conclude that the Beneficiary shared most of the listed duties with his subordinates.

The Director’s finding regarding the Beneficiary’s past and intended future duties rests entirely on an incorrect reading of the job description charts. Therefore, that finding cannot stand. The Director must issue a new decision based on the merits of the job descriptions themselves rather than on the ambiguous structure of the charts.

Additional evidence may be necessary in order to verify the Petitioner’s claims regarding the Beneficiary’s duties. For example, the Petitioner claims that the Beneficiary spends a considerable portion of his time reviewing reports from subordinates, but the record does not include sample copies of these reports. Such examples would serve to establish their existence and to give an idea of how much time the Beneficiary would need to devote to their review.

Furthermore, the Petitioner claims that the Petitioner had, and has, broad discretion regarding matters such as sourcing supplies and updating the employee handbook. Copies of the franchise agreements between the Petitioner and [REDACTED] and between the Petitioner’s foreign affiliate ([REDACTED] and [REDACTED]) would help to establish how much discretion the Beneficiary had, and will have, regarding the types of decisions described in the submitted charts.

The Director’s other stated basis for the denial of the petition concerned the Petitioner’s staffing. The denial rested not on general concerns about the adequacy of that staffing, but rather on the specific finding that the Petitioner had documented only two full time managers, with all other employees “paid in the range of \$2-4000.00 per year,” consistent with part time employment.

On appeal, the Petitioner asserts, correctly, that several of its non-managerial employees earned more than \$4000 per year. The Petitioner had previously submitted copies of 13 IRS Forms W-2, Wage and Tax Statements, for 2014, along with payroll documentation identifying the hours each employee worked during each bimonthly pay period. These forms show a range of salaries that is considerably broader than the \$2000-\$4000 range that the Director asserted in the denial notice. The record, therefore, overcomes this narrowly stated factual basis for denial.

We note, nevertheless, that the record does not fully support the Petitioner’s claims regarding its staffing. The Petitioner identified five individuals as having worked full time throughout 2014, but

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the record supports that claim for only two of those individuals. Team Leader/Cashier/Cook [REDACTED] worked 1580 hours, averaging 30.38 hours per week. [REDACTED] identified as a full time cook/fryer/expeditor, worked 7692.50 hours in 2014, for an average of 14.79 hours per week. [REDACTED] a cook/cashier/expeditor, worked 3890.25 hours that year, for an average of 8.31 hours per week. These figures, from the Petitioner's own tax and payroll documentation, refute the Petitioner's assertion that the individuals are full time employees. This information, however, did not figure in the Director's denial notice. Therefore, on remand, the Director should conduct a new analysis of the Petitioner's staffing levels and structure in reviewing the totality of the evidence submitted. Additional evidence, such as copies of weekly work schedules, may assist in establishing whether the Petitioner has sufficient part time and full time staff to cover all shifts during its regular operating hours.

III. ABILITY TO PAY

Beyond the Director's decision, our *de novo* review of the record indicates that the Petitioner did not establish its ability to pay the Beneficiary's proffered wage. The regulation at 8 C.F.R. § 204.5(g)(2) reads as follows:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

The Petitioner has stated that the Beneficiary's proffered wage is \$48,000 per year.

Because the Petitioner filed the Form I-140 petition on January 16, 2014, its 2014 finances are material to this proceeding. The Petitioner did not issue an IRS Form W-2 to the Beneficiary for 2014,¹ but payroll records show that the Petitioner paid the Beneficiary \$36,300 that year, in monthly increments of \$3025. This amount is \$11,700 short of the proffered annual wage.

¹ We note that the Petitioner issued an IRS Form W-2 to one [REDACTED] with the same residential address as the Beneficiary but a different Social Security number. No other documents indicate that the Petitioner employed [REDACTED] in 2014.

The Petitioner submitted a copy of its 2014 IRS Form 1120S, U.S. Income Tax Return for an S Corporation. The Petitioner reported \$4677 in ordinary business income. Schedule L of the return shows \$7355 in current assets. Neither of these amounts is sufficient to cover the \$11,700 shortfall between the Beneficiary's proffered wage and the salary he actually received.

For the above reasons, the Petitioner has not established that it was able to pay the Beneficiary's proffered salary of \$48,000 per year in 2014, the year it filed the petition. The Director must take this information into account when issuing a new decision.

IV. CONCLUSION

The Director's decision will be withdrawn and the case remanded for the above stated reasons. 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; *Matter of Otiende*, 26 I&N 127, 128 (BIA 2013).

ORDER: The decision of the Director, Nebraska Service Center, is withdrawn. The matter is remanded to the Director, Nebraska Service Center, for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

Cite as *Matter of P-&J-F- LLC*, ID# 17254(AAO June 6, 2016)