U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF D-P, INC.

DATE: JULY 29, 2019

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, an international franchise restaurant business, seeks to temporarily employ the Beneficiary as its "Program Leader, eCommerce Activation" 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 Petitioner did not establish that the Beneficiary has been employed abroad, or would be employed in the United States, in a managerial or executive capacity.

On appeal, the Petitioner disputes the denial, arguing that the Director erroneously evaluated the Beneficiary's current and proposed positions under the criteria appropriate for personnel managers, and did not consider the Petitioner's claim that the Beneficiary manages, and will continue to manage, an essential function of the company.

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

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. WITHDRAWAL OF DIRECTOR'S DECISION

The statutory definition of "managerial capacity" allows for both "personnel managers" (who supervise managerial, supervisory, or professional employees) and "function managers" (who manage an essential function within the organization). *See* sections 101(a)(44)(A)(i) and (ii) of the Act.

The Petitioner has consistently claimed that the Beneficiary has been managing, and will continue to manage, an essential function. Specifically, the Petitioner asserts that the Beneficiary manages e-Commerce activation and associated digital marketing activities undertaken by the group's international master franchisees in the Americas region, which encompasses operations in 12 countries. The Petitioner did not claim that the Beneficiary has managed or will manage subordinate employees or that he qualifies as a personnel manager under the statutory definition of managerial capacity. Rather it explains that the Beneficiary is relieved from performing non-managerial duties with the support of internal marketing, digital media, and information systems departments, and by the franchisees' management teams and staff.

The Director's decision acknowledges that the Beneficiary will not have subordinate employees in the United States, but also states "you did not provide documentary evidence to demonstrate that the beneficiary will primarily supervise and control the work of the claimed subordinates" or provide evidence that "the subordinates will be primarily performing managerial or professional duties." The Director's analysis of the position abroad is similar and focuses on the fact that the Petitioner "did not provide any supporting evidence regarding the beneficiary's subordinates in the foreign entity." As a result, the Petitioner's key assertion – that the Beneficiary qualifies as a function manager – was not given due consideration.

After considering the Petitioner's claims and supporting evidence, we find that it has established by a preponderance of the evidence that the Beneficiary has been employed abroad, and will be employed in the United States, as a function manager. The Petitioner has established that its e-Commerce activation program is an essential function within the company, that the Beneficiary exercises substantial discretion over these activities in 12 countries, and that he serves as the senior employee for this function in the Americas region. Accordingly, the Director's decision is withdrawn.

III. BASIS FOR REMAND

Although the Petitioner has overcome the grounds for denial, it has not established that it meets all eligibility requirements for the requested classification. The Petitioner must establish that the Beneficiary had at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of this petition on October 2, 2018. *See* 8 C.F.R. § 214.2(l)(3)(iii).

On the Form I-129, Petition for a Nonimmigrant Worker, the Petitioner stated that the Beneficiary worked for its Brazilian subsidiary from September 1, 2017, until October 1, 2018. The Beneficiary's resume indicates that he has worked for the Petitioner in the United States from "September 2016 – present." Further, in response to the Director's request for evidence, the Petitioner stated: "Since September 2016, [the Beneficiary] has worked . . . with our subsidiary . . . in [redacted] Brazil," but

it did not provide an explanation for its earlier statement that he commenced employment with the Brazilian entity in September 2017.

The Petitioner submitted payroll records from the Brazilian subsidiary indicating that the Beneficiary received payment for services provided between September 2017 and August 2018. It also provided a copy of the Beneficiary's Annual Performance Appraisal for the 2017 calendar year, which references 2017 as his "first full year," thus implying that he joined the Petitioner's group in 2016. As a result, the record does not contain a definitive statement of the Beneficiary's employment history with the Petitioner's group of companies.

U.S. Citizenship and Immigrant Services (USCIS) records show that the Beneficiary spent most of the period between September 2016 and September 2017 in the United States in F-1 nonimmigrant student status.[1] He also had an employment authorization document valid from September 5, 2016, until September 4, 2017. If he did join the Petitioner's group in September 2016 as indicated in some of the submitted documentation, it is evident that he was not employed abroad during this period. The Beneficiary could not have accrued qualifying employment abroad while residing and working in the United States in F-1 status.

We have also considered the Petitioner's initial claim that the Beneficiary commenced employment with the foreign entity in September 2017. As noted, the Petitioner initially claimed that he worked for its Brazilian subsidiary from September 1, 2017 until October 1, 2018, a period of 395 days. However, in determining whether he has the full year of qualifying employment abroad, we must subtract any time he spent in the United States during this 13 month period. The regulation at 8 C.F.R. § 214.2(l)(ii)(1)(A) provides that "brief trips to the United States for business or pleasure shall not be interruptive of the one year of continuous employment abroad but such periods shall not be counted toward fulfillment of that requirement."

We have reviewed the relevant arrival and departure records and determined that the Beneficiary spent a total of 54 days in the United States during this 13 month period of employment with the foreign entity. This total includes 10 days in F-1 status (from September 1 until September 10, 2017), and 44 days in B-1 and B-2 nonimmigrant status (as a result of five short visits to the United States between October 2017 and July 2018). Assuming that his official state date with the foreign entity was September 1, 2017, the Beneficiary had only 341 days of employment abroad at the time of filing.

We will remand the matter to the Director for a new decision, taking the above issues into account. The Director may issue a new RFE or notice of intent to deny to seek clarification of the Beneficiary's employment dates abroad.

ORDER: The decision of the Director is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.

Cite as *Matter of D-P-, Inc.*, ID# 5122351 (AAO July 29, 2019)

[1] The Beneficiary spent approximately 30 days outside the United States between September 1, 2016, and September 1, 2017.