U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF A-H-C-, LLC

DATE: APR. 30, 2019

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner,[1] a construction services company, seeks to temporarily employ the Beneficiary as general manager of its new office[2] 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 California Service Center denied the petition, concluding that the record did not establish, as required, that the Beneficiary: (1) had at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition; (2) was employed abroad in a managerial or executive capacity; and (3) would be employed in the United States in a managerial or executive capacity.

On appeal, the Petitioner disputes the three grounds for denial, contending that the Beneficiary met all eligibility requirements. The Petitioner asserts that the Director erred by disregarding evidence that demonstrates the Beneficiary's continued employment for the foreign entity, despite his presence in the United States.

Upon *de novo* review, we will dismiss the appeal because the Petitioner has not established that the Beneficiary was employed for the requisite one-year period within the three years prior to filing this petition. As this is a fundamental element of eligibility and the Petitioner has not satisfied this element, we will reserve the two remaining issues.[3]

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[1] The Petitioner stated its name as ' , LLC" on the Form I-129, Petition for a Nonimmigrant Worker, and as ' LLC" on the Form I-290B, Notice of Appeal or Motion. The record shows that the former is the correct name as registered in the State of Florida.

[2] 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.

[3] The record reflects that the Petitioner submitted a properly executed Form G-28. Therefore, we will recognize the attorney who submitted the properly executed Form G-28, as the attorney of record in this proceeding.

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.[4] 8 C.F.R. § 214.2(l)(3)(v)(B). 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).

According to the regulations, a beneficiary must have "one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition." 8 C.F.R. § 214.2(l)(3)(iii).

The term "intracompany transferee" is defined as:

> An alien who, within three years preceding the time of his or her application for admission into the United States, has been employed abroad continuously for one year by a firm or corporation or other legal entity or parent, branch, affiliate or subsidiary thereof, and who seeks to enter the United States temporarily in order to render his or her services to a branch of the same employer or a parent, affiliate, or subsidiary thereof in a capacity that is managerial, executive *or* involves specialized knowledge. Periods spent in the United States in lawful status for a branch of the same employer or a parent, affiliate, or subsidiary thereof and 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.

8 C.F.R. § 214.2(l)(1)(ii)(A).

II. EMPLOYMENT ABROAD

The primary issue in this proceeding is whether the Petitioner has established that the Beneficiary had at least one continuous year of full-time employment abroad with a qualifying organization within the three years immediately preceding the filing of the petition. Specifically, the issue is whether U.S. Citizenship and Immigration Services (USCIS) should reach over the Beneficiary's May 2015 admission to the United States in F-1 status in determining whether he has been employed abroad for one continuous year within the three years preceding the filing of the petition. Based on our review of the record and for the reasons discussed below, we find that the Petitioner has not established that the Beneficiary has one year of full-time continuous employment with the foreign entity during the relevant three-year period.

[4] This decision will not address whether the Petitioner had been doing business in the United States for less than one year at the time the petition was filed.

A. Procedural History

The Petitioner filed the instant Form I-129 on March 23, 2018. The petition form stated that the Beneficiary owns 100% of the foreign parent, which in turn owns 51% of the U.S. entity and that he has been employed with the foreign parent in Venezuela from January 2014 to April 2015. The Beneficiary's curriculum vitae also indicated that he has been employed with the foreign parent in Venezuela from January 2014 to April 2015. Records show that the Beneficiary entered the United States in F-1 nonimmigrant status on May 30, 2015, and remained in that status as of the date of filing. Records do not show that the Beneficiary has departed the United States. The Beneficiary resided in the United States as a nonimmigrant student for approximately two years and eight months before the instant petition was filed. The Petitioner submitted foreign payroll documents indicating the Beneficiary continued to receive a salary during his absence from the Venezuelan foreign parent starting in June 2015.

In response to the Director's request for evidence, *N.C.*, Human Resources, of the foreign parent stated that the Beneficiary received a salary from January 2014 to April 2015 in his position as Director of Operations. The Petitioner explained that the Beneficiary's employment status with the foreign parent remained active during his stay in the United States as a student. The Petitioner's response also included: (1) the foreign parent's monthly payroll summaries for 2014 through 2018, which indicated that the Beneficiary received annual wages or salary of various amounts as remuneration for holding the position of Operations Manager for these years; and (2) the Beneficiary's Venezuelan income tax returns for 2014 through 2017.

In the denial, the Director determined that the Petitioner had not established that the Beneficiary had one year of continuous full-time employment abroad in the three years preceding the filing of the petition. Specifically, the Director found that the Beneficiary's extended stay in the United States since 2015 was interruptive of his period of continuous foreign employment; therefore, the Director did not reach back to the three-year period preceding the Beneficiary's admission as a nonimmigrant in May 2015. The Director did not find that the Beneficiary's 34-month stay in F-1 status was equivalent to being in lawful status for the purpose of working for the same employer or a parent, affiliate, or subsidiary thereof.

On appeal, the Petitioner disputes the denial and asserts that "[t]he record will demonstrate that all the required evidence was submitted to prove the Beneficiary met this specifically stated eligibility requirement . . . ." The Petitioner points to the Beneficiary's Venezuelan income tax returns as proof of his continued employment with the foreign parent.

B. Analysis

The statute indicates that the relevant three-year period to be used as a reference point in determining whether the beneficiary had one year of continuous full-time employment with a qualifying entity abroad is the three years "preceding the time of his application for admission into the United States . . . ." Section 101(a)(15)(L) of the Act. The statute, however, is silent with regard to those beneficiaries who have already been admitted to the United States in a different nonimmigrant classification. The regulation at 8 C.F.R. § 214.2(l)(3) clearly requires that the petition be

accompanied by evidence that the beneficiary has been employed for one continuous year in the three year period "preceding the filing of the petition" in an executive or managerial capacity.

A recent policy memorandum clarified the agency's policy that USCIS will use the date of filing of the initial L-1 petition as the reference point for determining the one year foreign employment requirement. USCIS Policy Memorandum PM-602-0167, *Satisfying the L-1 1-Year Foreign Employment Requirement; Revisions to Chapter 32.3 of the Adjudicator's Field Manual (AFM)* 4 (Nov. 15, 2018), https://www.uscis.gov/legal-resources/policy-memoranda ("*L-1 1-in-3 Policy Memo*"). USCIS will adjust that reference point only in those instances where the beneficiary entered the United States to work for a qualifying entity as a nonimmigrant in a work-authorized status (for example, H-1B or E-2 status). In those cases, USCIS will reach back to the three year period preceding a beneficiary's entry in a work-authorized status.

However, "if a beneficiary was admitted as an F-1 nonimmigrant . . . , the time spent in F-1 nonimmigrant status will not result in an adjustment to the three-year period, because the purpose of admission was for study and not to work 'for' the qualifying organization." *Id.* And even if a qualifying organization financed the F-1 nonimmigrant's studies, the time spent in F-1 status does not result in an adjustment. *Id.* Therefore, "[an] F-1 student would be ineligible for L-1 classification if the last period of qualifying employment with the L-1 qualifying organization abroad was more than two years prior to the time of filing of the instant L-1 petition." *Id.* at n. 9.

The Beneficiary in this case had been in the United States for well over two years at the time the instant petition was filed. As the Beneficiary's stay during that time as an F-1 nonimmigrant was not "*for* a branch of the same employer or a parent, affiliate, or subsidiary thereof," we consider that period of stay to be interruptive and we will not reach back to the three-year period preceding his May 2015 admission in F-1 status. The fact that the foreign entity continued to pay the Beneficiary while he was in the United States does not establish his continuous employment with the foreign entity. *Id.* at 4. Any such compensation is irrelevant for the purpose of establishing his continuous employment abroad, given that the Beneficiary was not physically present abroad nor was he working in the United States for a qualifying entity when he received such compensation. The appeal will be dismissed as the Petitioner did not establish that the Beneficiary had one year of full-time continuous employment with a qualifying entity abroad during the three year period (3/22/2015 – 3/22/2018) that preceded the filing of the petition.

To clarify, it is not the Beneficiary's individual stays in B-1, B-2, or F-1 status that severed eligibility for this visa classification, but rather the combined length of his continuous stay in F-1 status that interrupted the Beneficiary's continuity of employment. Had the Petitioner filed the Form I-129 before the Beneficiary had been in the United States for a continuous period of over two years, it could have met the one year of continuous employment abroad requirement. However, by the time this petition was filed, more than two years had passed since the Beneficiary's employment abroad had ceased.

III. CONCLUSION

The appeal will be dismissed for the above stated reason. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. The Petitioner has not met that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of A-H-C-, LLC*, ID# 2150162 (AAO Apr. 30, 2019)