U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 30165728

Date: MAR. 1, 2024

Appeal of California Service Center Decision

Form I-129, Petition for a Nonimmigrant Worker (L-1B Specialized Knowledge Worker)

The Petitioner, a freight forwarding company, seeks to employ the Beneficiary temporarily as an import and export analyst under the L-1B 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-1B 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 capacity involving specialized knowledge.

The Director of the California Service Center denied the petition, concluding that the record did not establish that the Beneficiary had been employed abroad by a qualifying employer for at least one continuous year during the three years preceding the filing of the petition. The matter is now before us on appeal. 8 C.F.R. § 103.3.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). We review the questions in this matter de novo. *Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, we will dismiss the appeal.

I. LAW

To establish eligibility for the L-1B nonimmigrant visa classification, 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 specialized knowledge capacity. Section 101(a)(15)(L) of the Act. 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. ANALYSIS

A petitioner must submit evidence that the beneficiary has at least 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). Brief trips to the United States for business or pleasure shall not

interrupt 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).

The Director determined that the Beneficiary had accrued less than the required continuous year of employment with the Petitioner's foreign affiliate. We agree, as explained below.

The Beneficiary entered the United States as a B-2 nonimmigrant visitor on November 13, 2022, and was still in the United States when the Petitioner filed the petition on May 11, 2023. Therefore, the Petitioner must establish the Beneficiary's continuous employment with the Petitioner's foreign affiliate for at least one continuous year before the Beneficiary's arrival in the United States on November 13, 2022.

Initially, the Petitioner indicated that the Beneficiary's employment abroad began on December 13, 2021. In June 2023, the Director issued a notice of intent to deny the petition (NOID), informing the Petitioner that government travel records show that the Beneficiary was in the United States for 14 days in December 2021 and for 43 days in August and September 2022 before his last U.S. entry in November 2022. The Director calculated that "the beneficiary was abroad for a total of only 276 days" between his December 13, 2021 hiring and his November 13, 2022 entry into the United States.

In response, the Petitioner asserted that the Beneficiary's travel to the United States did not interrupt or break the continuity of his employment abroad, because the trips were work-related. The Petitioner also claimed that the Beneficiary actually began working for the foreign entity as a contractor on September 15, 2021.

The Director denied the petition, stating that the Petitioner's new claim contradicted earlier documents and statements made under penalty of perjury. The Director also cited statements that the Beneficiary made on a nonimmigrant visa application in October 2021, which were consistent with the Petitioner's initial claims but not the subsequent revisions.

On appeal, the Petitioner protests that the Director did not give any prior notice about the information in the Beneficiary's nonimmigrant visa application. We agree that the Director should not have produced this information for the first time in the denial notice. The regulations require prior notice of derogatory information from outside the record:

> If the decision will be adverse to the applicant or petitioner and is based on derogatory information considered by the Service and of which the applicant or petitioner is unaware, he/she shall be advised of this fact and offered an opportunity to rebut the information and present information in his/her own behalf before the decision is rendered. . . . Any explanation, rebuttal, or information presented by or in behalf of the applicant or petitioner shall be included in the record of proceeding.

8 C.F.R. § 103.2(b)(16)(i).

We will disregard the information from the nonimmigrant visa application because the Director did not mention that information in the NOID. Nevertheless, even without this information, the record supports the Director's decision to deny the petition.

The originally stated starting date of the Beneficiary's employment abroad, December 13, 2021, was less than a year before the Beneficiary's entry into the United States on November 13, 2022. The Beneficiary was still in the United States when the Petitioner filed the petition in May 2023. This information, by itself, is sufficient to show that the Beneficiary's continuous employment abroad with the Petitioner's affiliate lasted less than one year. In the NOID, however, the Director did not mention this apparent *prima facie* ineligibility, instead citing the Beneficiary's travel history in 2021 and 2022 and concluding that "the beneficiary was abroad for a total of only 276 days" during his employment with the Petitioner's foreign affiliate.

In response to the NOID, the Petitioner asserted that the Beneficiary's travel to the United States did not interrupt or break the continuity of his employment abroad, because the trips were work-related. The Director did not argue otherwise. But the regulations unambiguously state that any time that a beneficiary is physically present in the United States "shall not be counted toward fulfillment of [the] requirement" of one year of continuous employment abroad. 8 C.F.R. § 214.2(l)(1)(ii)(A).

The Petitioner also claimed that "a work contract signed in September, 2021" shows that "the Beneficiary actually started working for the qualifying foreign employer from September 15th to December 12, 2021, as a full-time temporary professional contractor." The Petitioner contended that this newly claimed "additional period can be added to complete the one-year foreign employment requirement." The Petitioner also claimed that "at the beginning of September, 2021, the Beneficiary was placed under a 60-day's Notice of Termination of Contract by his prior employer," and that, during that period, the Beneficiary's "obligations and his time dedicated to his prior employer were minimal."

The Petitioner's revision of the Beneficiary's starting date with the foreign company, adding exactly enough time to make up for the 89-day shortfall, raises very significant questions of credibility.

The Petitioner's initial submission repeatedly and consistently indicated that the Beneficiary's qualifying employment abroad began on December 13, 2021. The Petitioner provided that date on the Form I-129 petition, which the Petitioner's owner and chief executive officer (CEO) signed under penalty of perjury. The owner/CEO also initialed every page of that form, including the page specifying the dates of employment abroad. In an accompanying letter, the Petitioner stated that the Beneficiary "has been working . . . for the Brazilian parent company nonstop since December, 2021." The Petitioner's initial submission also included the following documents:

- The Beneficiary's résumé, showing that the Beneficiary's previous employment ended "11/20/2021," and showing a starting date of "12/13/2021" with the Petitioner's foreign affiliate;
- A letter from the owner/CEO of the foreign company, who is also the owner/CEO of the petitioning U.S. company, stating that the Beneficiary "was hired for this company in December, 2021"; and
- Translated employee lists from Brazil's Ministry of Labor and Ministry of Finance, dated at roughly monthly intervals from December 2021 to December 2022, all showing the date "13/12/2021" in the day/month/year format.

Those same government employee lists show that the Beneficiary received a lower salary in December 2021, which would be consistent with less than a full month of employment.

The Petitioner's response to the NOID introduced a conflicting claim that the qualifying employment began on September 15, 2021. The Petitioner must resolve this inconsistency in the record with independent, objective evidence pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

In this instance, the evidence that the Petitioner submitted to support the new claim of a September hiring date is less thorough and persuasive than the initial evidence pointing to a December date. The Petitioner submitted a copy of the claimed contract, which the Petitioner did not mention in its initial filing. The contract does not state that the Beneficiary would begin working for the foreign entity on September 15, 2021. Rather, that is the date printed on the contract, and the contract does not indicate that the Beneficiary would begin working for the foreign entity immediately upon signing that contract. Therefore, this contract does not directly corroborate the newly claimed starting date.

The Petitioner also submitted a copy of a memorandum from the executive director of the foreign entity, purportedly dated December 7, 2021. The translation of the memorandum states that the Beneficiary "joined the company on September 15th, 2021," and "due to [his] high performance and significant contributions," the company decided to hire him directly "starting from December 13th, 2021."

These materials do not outweigh the earlier materials showing a December 13th hiring date. We note that, in seeking to establish that the Beneficiary's travel to the United States in 2021 and 2022 was business-related, the Petitioner submitted copies of materials such as email messages. The Petitioner did not submit comparable work products from before December 13th. Also, the Petitioner did not submit any evidence of the monthly R$3,500 payments specified in the purported contract.

Given the sparse documentation of the revised hiring date, we do not conclude that the Petitioner has established, by a preponderance of the evidence, that the Beneficiary possesses the necessary employment experience abroad to qualify for L-1B nonimmigrant classification.

The Petitioner also asserts on appeal, for the first time, that the Beneficiary owned the company where he worked earlier in 2021, and that he terminated the operations of that company in order to work for the Petitioner's foreign affiliate. Information about the Beneficiary's former business does not corroborate the material issue before us or explain why the original information provided by both the Petitioner and the Beneficiary consistently indicated that the Beneficiary left his earlier job in November 2021 and started working for the Petitioner's affiliate in December.

Furthermore, briefs submitted with the NOID response and on appeal both include unsubstantiated claims about the Beneficiary. The NOID response brief contains this passage: "The Beneficiary's argument is that [after] the beginning of September, 2021 . . . , his obligations and his time dedicated to the prior employer were minimal." But the Petitioner submitted no statement from the Beneficiary to that effect, and no other evidence to support this new claim. The appellate brief contains this claim: "The Beneficiary decided to close his company . . . at the beginning of September, 2021, to work exclusively for" the Petitioner's foreign affiliate.

Statements in a brief, motion, or notice of appeal are not evidence and thus are not entitled to any evidentiary weight. *See Matter of S-M-*, 22 I&N Dec. 49, 51 (BIA 1998).

As noted above, we have disregarded the information taken from the Beneficiary's nonimmigrant visa application because that information was not disclosed to the Petitioner before the denial of the petition. At the same time, we note that the Petitioner is now demonstrably on notice regarding that information, and therefore we will consider that information in the future if the Petitioner chooses to pursue this matter further.

Because the Petitioner's revision of the Beneficiary's employment dates abroad are insufficiently corroborated, and conflict with specific information in several previously submitted materials, we conclude that the Petitioner has not established that the Beneficiary had at least one continuous year of employment abroad with a qualifying employer.

III. CONCLUSION

The Petitioner has not met its burden of proof to establish by a preponderance of the evidence that a qualifying entity employed the Beneficiary outside the United States for at least one continuous year during the three years preceding the filing of the petition. We will therefore dismiss the appeal.

ORDER: The appeal is dismissed.