U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF S-B-S-H- LLC

DATE: NOV. 8, 2018

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a Brazilian restaurant, seeks to temporarily employ the Beneficiary as its chief executive officer 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 Petitioner did not establish, as required, that the Beneficiary: (1) was employed abroad in a managerial or executive capacity; (2) would be employed in the United States in a managerial or executive capacity; and (3) 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.

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.

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).

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 June 2015 admission to the United States in B-2 status (and subsequent change to 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.

A. Procedural History

The Petitioner filed the instant Form I-129 on September 21, 2017. The petition form states that the Beneficiary owns both the U.S. and foreign entities and that he has been employed with the affiliate in Brazil from August 2008 through the "present." Records show that the Beneficiary entered the United States in B-2 nonimmigrant status on June 19, 2015, and remained in that status until May 18, 2016, when his change of status request was approved to an F-1 nonimmigrant. The Beneficiary resided in the United States as a nonimmigrant visitor or student for approximately two years and

three months before the instant petition was filed. Although the Petitioner submitted foreign payroll documents indicating the Beneficiary continued to receive a salary during his absence from the Brazilian affiliate starting in June 2015, the Petitioner also provided a supporting cover letter, which explained that [redacted] the foreign entity's "Executive and Operational Director," was "entrusted" with managing the foreign entity during the Beneficiary's absence.

In a request for evidence (RFE), the Director observed that the Beneficiary made several trips to the United States "in B2/F2/F1 status" between the time period of September 2013 and the present. The Petitioner was instructed to provide a further explanation and evidence regarding those trips to establish that the Beneficiary had one continuous year of full-time employment abroad in the three years preceding the filing of the petition.

In response, the Petitioner stated that the Beneficiary continued to provide "executive level of direction of [the foreign entity] remotely" via telephone and email. It also provided a signed proxy in which the Beneficiary granted the authority to manage the foreign entity's day-to-day operations to three family members. Regarding the Beneficiary's absences, the Petitioner explained that prior to his U.S. arrival in June 2015, the Beneficiary's visits were only for brief stays that lasted between ten and 25 days. The Petitioner stated that the purpose of the June 2015 visit was a combination of tourism and business, claiming that the Beneficiary "initially visited local tourist attractions" and later engaged in negotiations to purchase a business in [redacted] Florida. The Petitioner explained that after purchasing the Florida business, the Beneficiary sought to change his status to that of an F-1 student so that he could attend a U.S. educational institution to improve his ability to speak, read, and write in English. The Petitioner asserted that the Beneficiary's pursuit of educational interests in the United States was not interruptive of his foreign employment and pointed to the previously submitted paystubs as evidence that the Beneficiary maintained his foreign employment, despite his residence in the United States in F-1 status.

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 June 2015.[1] The Director did not find that the Beneficiary's June 2015 entry to the United States as a B-2 nonimmigrant and his subsequent change of status to that of an F-1 nonimmigrant was equivalent to being in lawful status for the purpose of working for the same employer or a parent, affiliate, or subsidiary thereof.

[1] Although the Director referred the Beneficiary's continuous U.S. presence since February 2015, the records indicate that the Beneficiary's U.S. entries in B-2 status prior to June 2015 were for periods that did not exceed 25 days. The Beneficiary's continued long-term absence that resulted in the interruption of his foreign employment commenced in June 2015.

On appeal, the Petitioner disputes the denial and asserts that the Beneficiary did not interrupt his continuous period of employment with the foreign entity despite remaining in the United States for an extended stay, which commenced in "the later part of 2015." The Petitioner points to the Beneficiary's paystubs as proof of his continued employment with the foreign entity and further contends that the Beneficiary uses the internet and "various forms of technological communications" to continue to carry out his responsibilities with the foreign entity.

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. When the definition of "intracompany transferee" is construed together with the regulation at 8 C.F.R. § 214.2(1)(3) and section 101(a)(15)(L) of the Act, the statutory phrase "preceding the time of his application for admission into the United States" refers to a beneficiary whose admission or admissions were "for a branch of the same employer or a parent, affiliate, or subsidiary thereof" or for "brief trips to the United States for business or pleasure."

In making this determination, we note that there is a clear nexus between the L-1 nonimmigrant classification for intracompany transferees and the first preference employment-based immigrant classification for multinational executives or managers. In promulgating the regulations on 203(b)(1)(C) of the Act, the former INS commented that "this regulation reflects the statute and follows criteria long in place for the adjudication of petitions for nonimmigrant intra-company transferees . . . ." Employment-Based Immigrants, 56 Fed. Reg. 30703, 30705 (July 5, 1971). Accordingly, it is reasonable to consider the regulations governing similar circumstances in the immigrant visa category when contemplating ambiguities in the statutory and regulatory provisions that pertain to the nonimmigrant L-1 visa classification.

In the multinational executive or manager immigrant context, if a beneficiary entered the United States to work for a qualifying entity as a nonimmigrant (for example H-1B or another work-authorized status), USCIS will reach back three years from the date of his or her admission to determine whether he or she had the requisite one year of employment. *Matter of S-P- Inc.*, Adopted Decision 2018-01 (AAO Mar. 19, 2018); 8 C.F.R. § 204.5(j)(3)(i)(B). However, under the statute and regulations that govern the multinational executive or manager immigrant classification, a beneficiary who was in B-2 or F-1 status at the time of filing an immigrant petition would not be considered to be "working for" a qualifying entity as a nonimmigrant. Therefore, a beneficiary who

worked abroad for a qualifying multinational organization for at least one year, but left its employ for a period of two years or longer *after* being admitted to the United States as a nonimmigrant, cannot be deemed as having worked for the qualifying foreign entity for the requisite one-year period and therefore would not satisfy the foreign employment requirement for immigrant classification as a multinational manager or executive. *Id.*

As noted, this regulation was intended to be consistent with regulations governing prospective L-1 nonimmigrant intracompany transferees who spend time in the United States after acquiring one year of qualifying employment with a foreign entity. For those beneficiaries, periods spent in the United States in lawful status for a branch, parent, affiliate, or subsidiary of their foreign employer are not interruptive of the beneficiary's qualifying year of foreign employment. *See* 8 C.F.R. § 214.2(l)(1)(ii)(A). In promulgating regulations for the immigrant visa classification, it is evident that the former INS interpreted "Periods spent in the United States in lawful status for a branch of the same employer or a parent, affiliate, or subsidiary thereof," as periods spent in an authorized status "working for" a qualifying entity.

Therefore, according to the plain purpose of the Act and regulations, USCIS will not reach back to the three year period preceding the Beneficiary's admission as a nonimmigrant in all circumstances. Unless the authorized period of stay in the United States is either brief or "for" a qualifying employer, the period of stay will be deemed interruptive. *See* Temporary Alien Workers Seeking Classification Under the Immigration and Nationality Act, 52 Fed. Reg. 5738, 5742 (Feb. 26, 1987). It logically follows that any non-qualifying period of stay in the United States that is longer than two years would prevent a beneficiary from meeting the "one-in-three" requirement at 8 C.F.R. § 214.2(l)(3)(iii).

The Beneficiary in this case had been in the United States for well over two years at the time the petition was filed. Therefore, the question before us is whether the Beneficiary's successive stays in B-2 and F-1 status may constitute an authorized stay "*for* a branch of the same employer or a parent, affiliate, or subsidiary thereof." We find that the Beneficiary's over two-year stay in the United States was not for the purpose of employment that was authorized and sponsored by a qualifying organization.

To clarify, it is not the Beneficiary's individual stays in B-2 or F-1 status that severed eligibility for this visa classification, but rather the combined length of his continuous stays in those statuses 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 with the foreign entity had ceased.[2]

III. CONCLUSION

For the reasons discussed above, we consider the Beneficiary's cumulative period of stay, first as a B-2 nonimmigrant visitor and then as an F-1 nonimmigrant student from June 2015 to September 2017, to be interruptive and we will not reach back to the three-year period preceding his June 2015 admission in B-2 status. The Petitioner did not establish that the Beneficiary had one year of full-time continuous employment with a qualifying entity abroad in the three years preceding the filing of the petition.

ORDER: The appeal is dismissed.

Cite as *Matter of S-B-S-H- LLC*, ID# 1669011 (AAO Nov. 8, 2018)

[2] We note that 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 same multinational organization. *Cf. Matter of S-P-*, Adopted Decision 2018-01. 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. We further point to the Beneficiary's execution of a proxy in which he granted his authority over the foreign entity's financial and business matters to three family members. The existence of this document further detracts from the Petitioner's claim that the Beneficiary continued to work for the foreign entity while he resided in the United States from June 2015 through the date this petition was filed.