U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF B-, INC.

DATE: NOV. 8, 2018

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, an importer, wholesaler, and retailer of interior and exterior doors, seeks to temporarily employ the Beneficiary as sales director of its new office[1] 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 Acting Director of the Vermont 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 contends that neither the request for evidence (RFE) nor the U.S. Citizenship and Immigration Services (USCIS) website stated that the Beneficiary had to be physically outside of the United States during his period of foreign employment.

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. *See* 8 C.F.R. § 214.2(l)(3)(iii). However, we will reserve the remaining two issues as the Petitioner has not satisfied a fundamental element of eligibility, which requires it to establish that the Beneficiary was employed abroad for one year during a specific three-year period.

[1] 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.

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. 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 submit evidence to demonstrate that the new office will be able to support a managerial or executive position within one year. This evidence must establish that the petitioner secured sufficient physical premises to house its operation and disclose the proposed nature and scope of the entity, its organizational structure, its financial goals, and the size of the U.S. investment. *See generally*, 8 C.F.R. § 214.2(l)(3)(v).

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 only issue we will discuss in this decision is whether the Petitioner 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. 8 C.F.R. § 214.2(l)(3)(iii). Specifically, the question is whether the Beneficiary's periods of physical presence in the United States in B1/B2 status should be counted towards the required one-year period of continuous employment abroad.

A. Facts and Procedural History

The Petitioner filed the instant Form I-129 on November 16, 2017.[2] The petition form states that the Beneficiary has been employed by the Petitioner's parent entity from February 1, 2017, through the present and that prior to this time, the Beneficiary was employed by the parent entity's Russian affiliate from August 5, 2016, through January 31, 2017. The aggregate of these two time periods of employment totals to 469 days. However, records show that during this 469-day period the Beneficiary entered and remained in the United States in B-1 or B-2 nonimmigrant status for a total of 142 days during the following time periods: (1) September 20 to October 3, 2016; (2) March 6 to May 5, 2017; and (3) June 26 to August 31, 2017.

In the RFE, the Director noted the above dates of the Beneficiary's absences and informed the Petitioner that the extended trips to the United States may not be deemed brief and therefore they may preclude the Beneficiary from being able to meet the foreign employment requirement, which states that the Beneficiary must have one continuous year of full-time employment abroad in the three years preceding the filing of the petition. The Petitioner was asked to provide evidence to demonstrate that the Beneficiary meets this requirement.

In response, the Petitioner stated that each of the Beneficiary's periods of stay in the United States was for less than 90 days and should therefore be deemed as brief. The Petitioner also provided the Beneficiary's translated paystubs demonstrating full-time employment with [redacted] from February through November 2017 as well as payroll records demonstrating full-time employment with [redacted] from August 2016 through January 2017.[3]

In the denial, the Director subtracted the 142 days during which the Beneficiary was physically present in the United States from the 469 total number of days claimed employment abroad and determined that the Beneficiary had only 327 days – less than one year – of employment abroad with a qualifying entity during the relevant three-year time period that preceded the filing of this petition.

On appeal, the Petitioner disputes the denial and asserts that the Beneficiary's absences were brief. The Petitioner explains that it sought guidance from the USCIS website, which does not state that

[2] Given that the one-year period of foreign employment with a qualifying entity must have taken place between the date of filing and three years prior to that date, the relevant three-year time period we will use as our point of reference here is from November 16, 2014, through the date of filing.

[3] The translated payroll record from [redacted] lists the year 2016 next to each month of the Beneficiary's six-month period of employment with that entity. With the exception of January, the payroll record lists all the other months in ascending order from August through December; it lists January 2016 last, despite the fact that January 2016 precedes all the months from August through December 2016. However, we have reviewed the Russian language original payroll record, which shows 2016 next to the first five months listed – August through December – and 2017 for the final month of January. When this information is considered within the context of the Russian language original payroll record and the information in the petition form – which indicates that the Beneficiary was employed by [redacted] from August 2016 through January 2017 – it appears that the year "2016" next to the month of January in the translated payroll record was likely a typographical error and is not indicative of an inconsistency between the Petitioner's claim and the supporting evidence.

the Beneficiary must be physically present outside of the United States in order to meet the foreign employment requirement. The Petitioner further contends that the RFE also neglected to mention this requirement.

B. Analysis

In the present matter, the Petitioner does not dispute the Beneficiary's presence in the United States during the time period in question; rather, the Petitioner's appeal focuses on whether the Beneficiary's absences were long enough to be deemed interruptive of the Beneficiary's period of employment abroad.[4] Upon review, we find that the Petitioner's focus on whether the absences were "brief" is misplaced as the definition of "intracompany transferee" acknowledges that while such visits "shall not be interruptive of the one year of continuous employment abroad," the time periods during which a beneficiary is physically present in the United States "shall not be counted toward fulfillment of that requirement." 8 C.F.R. § 214.2(l)(1)(ii)(A).

Therefore, the Director correctly subtracted the 142 days during which the Beneficiary was physically present in the United States from the 469 total number of days of claimed employment abroad. The remaining 327 days is less than one year and therefore the Petitioner did not establish that the Beneficiary met the foreign employment criteria, which requires a beneficiary to have one continuous year of full-time employment with a qualifying entity during the relevant three-year time period that preceded the filing of this petition. Because the remaining number of days during the relevant time period is less than one year, we do not need to analyze whether those 142 days were "brief" or interruptive of the Beneficiary's employment abroad. Accordingly, in this matter, it is not the length of the Beneficiary's visits in the United States in B-1 or B-2 status, but rather the insufficient time spent working abroad as a result of those visits that renders the total time spent working abroad with a qualifying entity insufficient to meet the required period of one year.[5] *See id.* For the reasons discussed above, we find that the Beneficiary was employed abroad for only 327 days during the relevant three-year time period.

III. CONCLUSION

The Petitioner did not establish that the Beneficiary had one year of continuous employment with a qualifying entity abroad in the three years preceding the filing of the petition.

[4] To the extent that the Petitioner relied on information on the USCIS website and the RFE's lack of notice regarding this issue, we note that the USCIS website only contains filing instructions and general information regarding this classification. The specific eligibility criteria is found in the relevant sections of the Code of Federal Regulations and the Immigration and Nationality Act. Further, while the RFE often provides relevant definitions and some eligibility criteria, it is not the sole source from which petitioners should expect to obtain a comprehensive list of eligibility requirements; rather, the purpose of an RFE is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8).

[5] The fact that the Beneficiary continued to receive a full salary during his physical presence in the United States does not exempt the Petitioner from the regulatory provisions discussed herein.

ORDER: The appeal is dismissed.

Cite as *Matter of B-, Inc.*, ID# 1727686 (AAO Nov. 8, 2018)