U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF E- LLC

DATE: OCT. 17, 2017

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a supplier of wires, cables, and accessories for the electrical energy transmission and telecommunications industries, seeks to temporarily employ the Beneficiary as an "International Business Manager" of its new office[1] under the L-1A nonimmigrant classification for intracompany transferees. *See* Immigration and Nationality Act (the Act) § 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 an executive or managerial capacity.

The Director of the Vermont Service Center denied the petition, concluding that the Petitioner did not 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 the petition, as the Beneficiary had been in the United States in F-1 student status for nearly three years. The Director determined that Beneficiary's stay was interruptive of his employment with the Petitioner's foreign affiliate and disagreed with the Petitioner's position that U.S. Citizenship and Immigration Services (USCIS) should instead look at the three year period preceding the Beneficiary's initial admission to the United States as an F-1 nonimmigrant student.

The Petitioner subsequently filed a motion to reopen. The Director reopened the matter to consider the Petitioner's new evidence, but affirmed the denial of the petition.

The matter is now before us on appeal. In its appeal, the Petitioner submits additional evidence and asserts that the Director erred by disregarding the purpose of the Beneficiary's stay in the United States as an F-1 nonimmigrant, contending that such stay was for the benefit of the Petitioner.

Upon *de novo* review, we will dismiss the appeal.

[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, 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 qualifies 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); *see also* 8 C.F.R. § 214.2(l)(3)(v) (requiring employment of the beneficiary abroad for "one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity . . . " for new offices).

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 USCIS should reach over the Beneficiary's 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.

A. Procedural History

The Petitioner filed the instant Form I-129 on April 17, 2014, seeking to temporarily employ the Beneficiary as its international business manager.

The Petitioner stated on the form that the Beneficiary was employed by its affiliate in Venezuela from August 2008 until May 2011 and that he has since been on a "leave of absence." The record shows that the Beneficiary had been residing in the United States in F-1 nonimmigrant status for approximately two years and eleven months as of the date of filing.

In a request for evidence (RFE), the Director advised the Petitioner that it had not established that the Beneficiary had one continuous year of full-time employment abroad in the three years preceding the filing of the petition. The Director observed that the initial evidence included the Beneficiary's severance payment, which established that his employment with the Petitioner's foreign affiliate was terminated on May 19, 2011, and emphasized that the Beneficiary has been in the United States in F-1 status since May 2011.

In response, the Petitioner asserted that the Beneficiary's leave of absence from his employment abroad while in pursuit of educational interests in the United States is not interruptive of his foreign employment and that the Director should look at the three-year period preceding his initial admission in F-1 status. The Petitioner submitted evidence in support of its claim that the foreign employer supported the Beneficiary's educational pursuits in the United States during his leave of absence. This included evidence that the Beneficiary remained on the foreign entity's employee roster and continued to receive health insurance through the foreign entity despite not receiving a salary after May 2011.

In the denial, the Director emphasized that the Petitioner had not established that the Beneficiary had one year of continuous full-time employment in the three years preceding the filing of the petition. Specifically, the Beneficiary could not meet this requirement because he had been residing in the United States in F-1 status for approximately two years and 11 months prior to filing. The Director determined that the Beneficiary's extended absence while pursuing an education in the United States was interruptive and therefore, the Director did not reach back to the three year period preceding his admission as a nonimmigrant in May 2011.

The Petitioner subsequently filed a motion to reopen, in which it asserted that the language used in the Director's decision implied that "admission in F-1 status at the request of and for the benefit of an employer stops the 3-year L-1 clock." The Petitioner asserted that the Beneficiary's educational leave of absence, which he claims was funded by and at the request of the foreign entity, is analogous to that of a beneficiary who has been in the United States in H-1B status prior to the filing of an L-1A petition. The Petitioner claims that the Beneficiary went to the United States at the request of the foreign entity and points to evidence showing that, subsequent to the filing of the

petition, the foreign entity reimbursed the Beneficiary for money spent on tuition at the three educational institutions he attended.

The Director reopened the matter and issued a new decision affirming the denial of the petition. The Director determined that the Beneficiary's presence in the United States in F-1 status is not equivalent to being in lawful status for the purpose of working for the same employer or a parent, affiliate, or subsidiary thereof. The Director emphasized that the foreign entity's promise to employ the Beneficiary in the future indicates that the Beneficiary is not currently employed.

The Director further noted that the reimbursement for tuition from the foreign entity, which took place over three years after the Beneficiary actually incurred and paid for his education expenses, is not sufficient to establish that the foreign employer paid for the Beneficiary's education.

On appeal, the Petitioner disputes the denial and asserts that the Beneficiary continued to work for the foreign entity as a part-time consultant after taking his educational leave of absence. The Petitioner asserts that the Beneficiary's pursuit of education in the United States was for the benefit of the foreign entity and that the Beneficiary's time spent in the United States therefore should not be deemed as interruptive of his former period of employment. The Petitioner cites *Matter of Continental Grain Co.*, 14 I&N Dec. 140 (D.D. 1972) in support of its assertion that time spent in the United States for the benefit of the foreign employer should not be deemed interruptive.

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 is already in the United States as a nonimmigrant and "working for" an entity that has the requisite relationship with the beneficiary's foreign employer, USCIS will look to the three years preceding his or her admission to the United States to determine whether he or she had the requisite one year of employment abroad. 8 C.F.R. § 204.5(j)(3)(i)(B). For a beneficiary who entered the United States to work for a qualifying entity as a nonimmigrant (whether in L-1, H-1B, E, 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. Under the regulations governing the multinational executive or manager immigrant classification, a beneficiary who was in 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 and could not qualify for that classification if his or her period of stay as an F-1 nonimmigrant exceeded two years.

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 and cannot qualify for L-1 status if we consider his employment during the three years preceding the filing of the instant petition, rather than the three years preceding his application for admission as an F-1 nonimmigrant. Therefore, the question before us is whether the Beneficiary's stay in F-1 status may constitute an authorized stay "*for* a branch of the same employer

or a parent, affiliate, or subsidiary thereof."

The Petitioner contends that there should be a broader interpretation, such that time spent in the United States "for" a qualifying entity would include time spent "for the benefit of" the Beneficiary's foreign employer, and not be limited to time spent "working for" a qualifying entity in the United States as a nonimmigrant. The Petitioner compares the Beneficiary's F-1 status and circumstances to those in *Matter of Continental Grain Co.*, 14 I&N Dec. 140 (BIA 1972), where an L-1 petition was approved on behalf of a beneficiary whose employment abroad was interrupted by a twenty-eight-month training period during which he was in the United States in lawful status as a nonimmigrant H-3 trainee.

We find that the Petitioner's reliance on *Matter of Continental Grain* is unpersuasive. In *Matter of Continental Grain*, the BIA determined that "the beneficiary's period of training within the United States, during which time he was in the United States lawfully in pursuit of further training related to his qualifying employment, should not be regarded as interruptive . . . ." *Id.* The 1972 decision predates the current statutory definition of intracompany transferee by 18 years, the definition of "intracompany transferee" at 8 C.F.R. § 214.2(l)(1)(ii)(A) by 15 years, and the first L-1 regulations by 11 years. The definition of "intracompany transferee," proposed in 1986 and adopted in 1987, was intended to "reflect the Service's interpretation and application" of this term as of that time, after more than 15 years of agency experience with adjudicating L-1 petitions. Documentary Requirements: for Nonimmigrants; Waivers, Admission of Certain Inadmissible Aliens, Parole, 51 Fed. Reg. 18,591, 18,592 (May 21, 1986). It was not intended to codify the specific interpretation found in the 1972 decision.

In any event, that decision is silent on several factual issues, such as what organization sponsored the beneficiary's H-3 training and paid his expenses, the specifics of that training, and whether the Beneficiary was considered to be an employee of the foreign entity during his 28 months of employment in the United States. While the decision set a precedent for making exceptions to the continuous employment abroad requirement for beneficiaries who have spent time in the United States, it has been supplanted by amendments to the statute at 101(a)(15)(L) and the implementation of regulations, such that its relevance to current L-1 adjudications is limited.

For the reasons discussed above, we find that only time spent in the United States working for a branch, subsidiary, affiliate, or parent of the foreign employer will be deemed non-interruptive. Any period of authorized stay in nonimmigrant status that is not work authorized and sponsored by a qualifying organization will be deemed interruptive if the period of stay exceeds two years in length.

Accordingly, it is not the Beneficiary's F-1 status, but the length of his stay in this status, which renders the stay interruptive. Had the Petitioner filed the Form I-129 before the Beneficiary completed his second year of studies, it could have met the one year of continuous employment abroad requirement. By the time the Petitioner filed the petition, nearly three years had passed since the Beneficiary's employment with the foreign entity had been terminated, and the Beneficiary had spent more time as a community college student in the United States than he had working as a

manager with the foreign entity. The fact that the foreign entity continued to pay the Beneficiary's health insurance and kept his name on its roster is not sufficient to establish his continuous employment with the same multinational organization.

Lastly, we will address the Petitioner's interpretation of a letter, dated March 25, 1994, written by Jacquelyn Bednarz, then Chief of Nonimmigrant Branch of Adjudications for the former INS. In referencing the contents of the letter, the Petitioner focuses exclusively on the portion where Ms. Bednarz stated that "the alien's qualifying L-1 employment must have occurred within the three-year period immediately preceding the alien's application for admission to the United States." However, a review of Ms. Bednarz's entire letter indicates the error of the Petitioner's interpretation. In fact, in the follow-up statement, Ms. Bednarz expressly pointed out the requirement "that time spent by the alien in the United States as an H-1B nonimmigrant alien be for a firm related in a qualifying capacity to the alien's previous foreign employer." Thus, Ms. Bednarz's letter is in line with the current regulatory provision, which expressly states that the alien's time in the United States must be "for a branch of the same employer or by a parent, affiliate, or subsidiary thereof" in order for such time to not be deemed as interruptive of the statutorily mandated one-year period of employment abroad. 8 C.F.R. § 214.2(l)(1)(ii)(A).

III. CONCLUSION

For the reasons discussed above, we consider the Beneficiary's period of stay as an F-1 nonimmigrant student from May 2011 to April 2014 to be interruptive, and we will not reach back to the three year period preceding his admission in F-1 status. The Petitioner did not establish that the Beneficiary had one year of full-time continuous employment with a qualifying foreign entity in the three years preceding the filing of the petition. For this reason, the appeal will be dismissed.

ORDER: The appeal is dismissed.

Cite as *Matter of E- LLC*, ID# 105445 (AAO Oct. 17, 2017)