U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF PFFAA-, [redacted]

DATE: SEPT. 27, 2017

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, which compiles and analyzes data from football games, seeks to temporarily employ the Beneficiary as an NFL product manager under the L-1B 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-1B classification allows a corporation or other legal entity (including its affiliate or subsidiary) to transfer a qualifying foreign employee with "specialized knowledge" to work temporarily in the United States.

The Director of the California Service Center denied the petition, concluding that the record did not establish, as required, that the Beneficiary has been employed abroad as a manager or executive, or in a position involving specialized knowledge, for at least one continuous year during the three years preceding the filing of the petition.

On appeal, the Petitioner asserts that, despite unusual arrangements relating to the Beneficiary's remuneration, the Petitioner's foreign subsidiary has been the Beneficiary's full-time and exclusive employer throughout the relevant period.

Upon *de novo* review, we find that the Petitioner has provided sufficient evidence to overcome the sole basis for denial. Therefore, we will sustain the appeal.

I. LEGAL FRAMEWORK

To establish eligibility for the L-1B 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.[1] 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 specialized knowledge capacity. *Id.*

[1] The regulation at 8 C.F.R. § 214.2(l)(3)(iii) requires "at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition."

II. THE BENEFICIARY'S EMPLOYEE STATUS ABROAD

The Director found that the Beneficiary provided services to the foreign entity as an independent contractor, and that he therefore was not an employee of the foreign entity. The Director largely based this finding on the documentation of the Beneficiary's remuneration. The Beneficiary did not consistently receive the same amount from one pay period to the next, and some payments were issued to what appeared to be a consulting company named after the Beneficiary. The Director acknowledged that the foreign company had control over the Beneficiary's work, but found that the Petitioner had not submitted a written contract with the Beneficiary or otherwise provided enough detailed information to show that the Beneficiary was an employee rather than an independent contractor. The law requires the Beneficiary to have been an "employee" who was "employed" abroad continuously for one year by the Petitioner's affiliate. Sections 101(a)(15)(L) and (44)(A)-(B) of the Act.

While neither the former Immigration and Naturalization Service nor U.S. Citizenship and Immigration Services has defined the terms "employee," "employer," or "employed" by regulation for purposes of the intracompany transferee nonimmigrant classification, the Supreme Court has determined that where the applicable federal law does not define "employee," the term should be construed as "intend[ing] to describe the conventional master-servant relationship as understood by common-law agency doctrine." *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-323 (1992) (*Darden*) (quoting *Comty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 739-40 (1989) (*C.C.N.V.*)). The Court stated:

> In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

Id. at 323-324 (quoting *C.C.N.V.*, 490 U.S. at 751-52); *see also Clackamas Gastroenterology Assocs. P.C. v. Wells*, 538 U.S. 440, 445, 447 & n.5 (2003) (*Clackamas*).

A reference to a worker being a "contractor" shall not, on its own, result in a conclusion that the worker is not an employee. *Cf. Clackamas*, 538 U.S. at 450. As the common-law test contains "no shorthand formula or magic phrase that can be applied to find the answer, . . . *all of the incidents of the relationship must be assessed and weighed with no one factor being decisive*." *Darden*, 503 U.S. at 324 (quoting *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 258 (1968)) (emphasis added).

In the present matter, the Director found that "[t]he billing invoices show that the beneficiary is a self-employed independent contractor who contracts his services to [the Petitioner's foreign subsidiary] through his own company . . . [which is] a non-qualifying entity." The Director identified this company as the Beneficiary's surname followed by the word "Consulting." The record, however, does not show that such a company exists as a legal entity. Some of the monthly pay invoices show the word "consulting" after the Beneficiary's surname, but others show the Beneficiary's surname followed by "contractor," and still others simply show the Beneficiary's surname. As the Petitioner notes on appeal, the Beneficiary's personal bank account, held in his own name rather than that of a consulting firm, shows deposits directly from the Petitioner.

While we do not dispute that references to the Beneficiary as a "contractor" or "consultant" are relevant to the issue of the Beneficiary's status as an employee of the foreign entity, the pay invoices are not the only relevant evidence in the record of their relationship. The record includes several other elements that the Director should have weighed in determining whether the Beneficiary was an employee of the Petitioner's foreign subsidiary.

The foreign entity's vice president (VP) of football operations stated that many of its analysts work from home, and the Beneficiary is the only analyst based in Ireland.[2] The VP stated that the company lacks "the capacity to execute payroll for the Republic of Ireland" and therefore the Beneficiary "has been paid outside of our normal payroll procedure." He continued:

> Despite the manner in which he receives his compensation, [the Beneficiary] has been a full-time employee of [the foreign entity] since September 2010 in all other respects. [The Beneficiary's] employment is held to the same standard as [company] employees based in the UK, and [the Beneficiary's] day-to-day activities are controlled and directed by his supervisors, including me. . . . [The company] provides him with the tools and resources that he needs to perform his role.
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> [The Beneficiary] reports directly to me. I provide him with weekly assignments and deadlines and engage in discussions with him regarding the nature and deadlines of his projects and daily work.

Evidence of exchanges between the Beneficiary and the VP illustrate the company's control over the Beneficiary's work schedule and other details. In a January 2016 performance review (which referred to the Beneficiary as an "Employee"), the VP indicated that the Beneficiary is "[i]nvolved in the hiring and development of new full time staff" and "[i]nstrumental in development of NFL product."

The Director gave the performance reviews diminished weight because some of them lack dates and signatures "and did not address any issues related to personnel management. Therefore, they cannot be deemed as evidence to prove [the Beneficiary's] employment history." By themselves, the

[2] The foreign entity is based in the United Kingdom.

evaluations are not sufficient evidence of past employment, but the Petitioner did not submit them by themselves. Rather, the Petitioner intended them to be parts of a larger whole.

The Beneficiary has written online and spoken on broadcast media, including on platforms operated by the major The record shows that he performed these activities on the petitioning organization's behalf. The Petitioner has also written extensively on the Petitioner's own website, as a member of its "Analysis Team." In this way, the Beneficiary has consistently presented himself to the public as an integral part of the petitioning organization. The Director acknowledged this evidence but dismissed it, saying that "the documentation does not demonstrate that the Beneficiary is actually an employe[e]" of the petitioning organization. The evidence described above is relevant because it shows that the Beneficiary has not only performed work for the company, but has often appeared as its public face, in a manner that identified him as a part of that company rather than as a hired spokesman or consultant.

The company's policy supports the above conclusion with this provision, emphasized in the original document: "Using [the company's name] in a is to be restricted to **only full-time staff members.**" The Beneficiary drafted the policy himself, and therefore he was demonstrably aware of that policy when he included the petitioning organization's name in his own In the capsule biography on his page, the Beneficiary called himself the company's "Lead NFL Analyst."

The Director stated: "Generally, you must withhold income taxes, withhold and pay Social Security and Medicare taxes, and pay unemployment tax on wages paid to an employee . . . . Upon review of the file, you did not show that you have withh[e]ld or pa[id] any taxes on payment to the beneficiary." The Beneficiary worked outside the United States for an employer based in the United Kingdom, and therefore we should not expect to see taxes withheld for U.S. programs such as Social Security or Medicare. Furthermore, the Beneficiary's pay receipts from 2016 *do* show several deductions from the Beneficiary's gross pay, including withholding of taxes.

The foreign entity further acts in the capacity of an employer by controlling the Beneficiary's work and providing him with the analytical tools that he uses to carry out his assigned tasks. The record does not contain any agreement limiting the time of the Beneficiary's service with the company. He is subject to the managerial control of the company and is subject to annual performance evaluations conducted by senior management to whom the Beneficiary answers in the capacity of a subordinate employee.

After considering all relevant factors, we find that the Petitioner has established, by a preponderance of the evidence, that the Beneficiary has more likely than not been a full-time employee of the foreign entity.[3] Despite inconsistent references to the Beneficiary as a consultant or contractor,

[3] Although the Beneficiary's compensation varied from one pay period to the next, it did not vary to such an extent that the work could be considered part-time. An employee's compensation can vary from one pay period to the next, just as a contractor's work agreement could stipulate uniform payments.

which the Petitioner has endeavored to explain, a comprehensive review of the record leads us to conclude that an employer-employee relationship did and continued to exist between the foreign entity and the Beneficiary during the requisite period in question. Because the Petitioner has overcome the only stated ground for denial, we hereby withdraw the Director's decision.

III. CONCLUSION

The Petitioner has established that its foreign subsidiary continuously employed the Beneficiary for at least one year during the three years preceding the filing of the petition.

ORDER: The appeal is sustained.

Cite as *Matter of PFFAA-*, [redacted], ID# 528431 (AAO Sept. 27, 2017)