U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF F- INC

DATE: DEC. 21, 2017

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a cybersecurity company,[1] seeks to permanently employ the Beneficiary as its director of quality assurance under the first preference immigrant classification for multinational executives or managers. *See* Immigration and Nationality Act (the Act) section 203(b)(1)(C), 8 U.S.C. § 1153(b)(1)(C). This classification allows a U.S. employer to permanently transfer a qualified foreign employee to the United States to work in an executive or managerial capacity.

The Director of the Texas Service Center denied the petition, concluding that the record did not establish, as required, that the Beneficiary had been employed abroad by a qualifying entity, in a managerial or executive capacity, for at least one year during the three years preceding the Beneficiary's entry as a nonimmigrant.[2]

On appeal, the Petitioner asserts that the Director erred by considering the Beneficiary's initial entry to work for the Petitioner as a nonimmigrant and disregarding subsequent time that the Beneficiary spent working abroad.

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

I. LEGAL FRAMEWORK

An immigrant visa is available to a beneficiary who, in the three years preceding the filing of the petition, has been employed outside the United States for at least one year in a managerial or executive capacity, and seeks to enter the United States in order to continue to render managerial or executive services to the same employer or to its subsidiary or affiliate. Section 203(b)(1)(C) of the Act.

The Form I-140, Immigrant Petition for Alien Worker, must include a statement from an authorized official of the petitioning United States employer which demonstrates that the beneficiary has been

[1] We note that the party named on this decision's cover page acquired the petitioning entity while the petition was pending. This party has referred to itself as the original Petitioner's successor in interest, but acknowledges that the original petitioning entity "continues to exist as a wholly-owned subsidiary." We therefore consider the appellant to be a parent entity acting on behalf of its subsidiary, rather than as a substitute petitioner or successor in interest.

[2] The Director initially denied the petition for abandonment but later reopened the proceeding on the Petitioner's motion.

employed abroad in a managerial or executive capacity for at least one year in the three years preceding the filing of the petition, that the beneficiary is coming to work in the United States for the same employer or a subsidiary or affiliate of the foreign employer, and that the prospective U.S. employer has been doing business for at least one year. *See* 8 C.F.R. § 204.5(j)(3).

If a beneficiary is working in the United States for the petitioner as a nonimmigrant at the time of filing, then the petitioner must demonstrate that a qualifying related entity employed the beneficiary abroad for at least one year in a managerial or executive capacity in the three years preceding the beneficiary's entry as a nonimmigrant. *See* 8 C.F.R. § 204.5(j)(3)(i)(B).

II. EMPLOYMENT ABROAD

The Director did not dispute the managerial nature of the Beneficiary's employment abroad, but found that the Beneficiary had accrued less than a year of qualifying experience before entering the United States as a nonimmigrant to work for the Petitioner and thus did not satisfy the "one-in-three" requirement. The Petitioner asserts that the Director should have counted subsequent trips abroad by the Beneficiary. We disagree with the Petitioner, for the reasons explained below.

The Beneficiary worked for the subsidiary in Pune, India, for 311 days, and subsequently entered the United States on an H-1B nonimmigrant visa in order to work for the Petitioner in the United States on September 24, 2014.[3] The Petitioner stated that the Beneficiary began working in its [redacted] office on October 1, 2014, "continuing in the role of Director of Quality Assurance," and his job responsibilities as Director required him to return to India for certain periods. These periods spent abroad subsequent to his September 2014 arrival, and prior to the filing of this petition in October 2015, are as follows:

- March 23, 2015, through May 21, 2015; and
- July 4, 2015, through August 19, 2015

The Petitioner documented seven of the Beneficiary's entries into the United States, six of which occurred between his hiring in November 2013 and the filing of the petition in October 2015. Prior to his September 2014 H-1B entry, the Beneficiary briefly visited the United States in October 2011, January 2014, and August 2014.

The Director concluded that the cutoff point for the Beneficiary's employment abroad was his September 2014 entry, because prior entries were for brief visits rather than for employment, and the Beneficiary did not effectively relocate to the United States during his earlier trips. Regarding the Beneficiary's later travel, the Director concluded "the beneficiary traveled abroad while still maintaining his nonimmigrant status as an employee of the U.S. petitioner" and the Director did not count that time spent abroad towards the one-in-three requirement.

[3] According to the Petitioner, all subsequent entries to the United States by the Beneficiary have been under this H-1B visa.

On appeal, the Petitioner states: "The statute is luminously clear: the [Beneficiary] must have been employed abroad for one year *prior to the filing of the* [petition]." The Petitioner maintains that the Beneficiary's "job responsibilities as Director have required him to return to India" on occasion, and that the Beneficiary's work during those periods meets every requirement for employment abroad with the Petitioner or a related company. The Petitioner also notes that the Beneficiary was not maintaining H-1B status while outside the United States, because nonimmigrant status by definition applies only while present as a nonimmigrant.

The Petitioner states that neither the statute nor the regulations offer any support for "the Director's cramped frame of reference," within which the Beneficiary's September 2014 entry as an H-1B nonimmigrant "marks a point of no return, beyond which the beneficiary can no longer accrue or aggregate [qualifying] employment" abroad.

The Petitioner avers that the Beneficiary's travel during these two periods to India before the petition's filing date in October 2015 should count toward the Beneficiary's employment abroad because the Beneficiary was performing work at the foreign company's location. The Petitioner claims that this period of 105 days abroad in addition to the Beneficiary's employment for 311 days before his September 2014 H-1B entry, "comfortably satisfies the [one-in-three requirement] to the tune of 416 days."

We must consider the context of the phrase "entry as a nonimmigrant." Statutes and regulations must be read as a whole, and interpretations should be consistent with the plain purpose of the Act. *See generally Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). The wrong interpretation could lead to unintended results. *Id.* at 388.

We agree with the Petitioner that the regulatory phrase "entry as a nonimmigrant" does not necessarily refer to a given beneficiary's first-ever nonimmigrant entry, because that might include an irrelevant visit (for example, as a tourist or student) that took place years before a given beneficiary began working for the petitioning U.S. employer. The regulations specify an "entry as a nonimmigrant" under which a beneficiary is "working for" a qualifying entity. *See* 8 C.F.R. § 204.5(j)(3)(i)(B).

But contrary to the Petitioner's assertions, we also cannot rigidly interpret the phrase "entry as a nonimmigrant" to mean a beneficiary's most recent entry before the filing of the immigrant petition. As stated in the preamble to the proposed rule which introduced the regulations governing immigrant petitions for multinational manager and executives, "nonimmigrant managers or executives who have already been transferred to the United States should [not] be excluded from this classification." 56 Fed. Reg. 30703, 30705 (July 5, 1991). The same paragraph included a reference to "the three years preceding admission *as a nonimmigrant manager or executive for a qualifying entity*," further recognizing a distinction between different circumstances of admission.

To calculate experience abroad based on the most recent entry would not be consistent with this intent. A short trip abroad would disqualify a nonimmigrant who had worked more than two continuous years in the United States. Such an individual cannot have accrued at least a year of employment abroad during the three years preceding the re-entry after that trip.

Because "entry as a nonimmigrant" does not necessarily refer to a given beneficiary's first-ever entry, or the last one before the petition's filing date, we must consider the context and purpose of each entry. We agree with the Director that the Beneficiary's initial H-1B entry on September 24, 2014, is the relevant entry for the purposes of this petition. It is the only entry that corresponds to a change in the Beneficiary's employment and nonimmigrant status. The Beneficiary entered the United States three more times before the filing date, but each time the Beneficiary was simply continuing his existing employment.

In the denial notice, the Director emphasized that the foreign subsidiary paid the Beneficiary until September 2014, and the Petitioner has paid the Beneficiary since that time. The Petitioner maintains that this change in circumstances does not disqualify the Beneficiary, because the Beneficiary was unquestionably employed abroad during the periods in question, and the statute permits employment abroad through the Petitioner itself rather than through a related foreign entity.

Viewed in isolation, the Beneficiary's compensation is not a deciding factor in the case. It takes on greater significance when seen in context with the totality of the record. The Beneficiary's entry into the United States on September 24, 2014, was qualitatively different from his other entries before and after that date. On that date, the Beneficiary entered the United States not for a brief visit or to resume an existing and unchanged arrangement, but to commence employment in the United States under a newly-issued, employment-based nonimmigrant visa. The Beneficiary's September 2014 arrival marked his relocation to the United States as his principal place of work and residence and the beginning of a nonimmigrant employment relationship with the Petitioner which continued, unaltered, at the time of filing. The Beneficiary's job title remained the same but his addition to the U.S. Petitioner's payroll coincided with a non-trivial change in his employment.

The Beneficiary's 2015 return visits to India, while sometimes lasting several weeks, marked short-term assignments rather than a resumption of his pre-2015 employment abroad. In contrast, when the Beneficiary re-entered the United States in May and August 2015, he was continuing what was then the existing default arrangement of employment and residence in the United States, with no material change to his prior nonimmigrant status.

The Beneficiary's employment abroad for a qualifying organization took place for less than one year when he entered the United States to work for the petitioning entity. Therefore, the Beneficiary cannot qualify for the classification sought under this petition.[4]

[4] This finding does not preclude eligibility under a new petition at a future time, following further employment abroad.

III. CONCLUSION

The Petitioner did not establish that a qualifying entity employed the Beneficiary abroad for at least one year during the three years preceding the Beneficiary's entry as a nonimmigrant.

ORDER: The appeal is dismissed.

Cite as *Matter of F- Inc*, ID# 714930 (AAO Dec. 21, 2017)