U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 26409116

Date: APR. 28, 2023

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Alien Workers (Multinational Managers or Executives)

The Petitioner, an engineering services business, seeks to employ the Beneficiary as its head of engineering and operations 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 a managerial or executive capacity.

The Director of the Nebraska Service Center denied the petition, concluding that the record did not establish that the Beneficiary was employed with a qualifying entity abroad for at least one year in the three years preceding his entry to the United States to work for the Petitioner as a nonimmigrant. Specifically, the Director determined that the Beneficiary could not meet this foreign employment requirement because the Petitioner's qualifying relationship with the Beneficiary's foreign employer was formed less than one year prior to the Beneficiary's entry to the United States. The matter is now before us on appeal. 8 C.F.R. § 103.3.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). We review the questions in this matter de novo. *Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, we will withdraw the Director's decision and remand the matter for entry of a new decision consistent with the following analysis.

I. LAW

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.

A U.S. employer may file Form I-140, Immigrant Petition for Alien Worker, to classify a beneficiary as a multinational executive or manager under section 203(b)(1)(C) of the Act. The Form I-140 must include a statement from an authorized official of the petitioning employer which demonstrates that the beneficiary has been employed abroad in a managerial 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)(i). If a beneficiary is already in the United States working for an entity that has a qualifying relationship with their foreign employer, the petitioner must establish that the beneficiary was employed by the entity abroad in a managerial or executive capacity for at least one year in the three years preceding the beneficiary's entry as a nonimmigrant. *See* 8 C.F.R. § 204.5(j)(3)(i)(B).

To establish a "qualifying relationship," a petitioner must demonstrate that a beneficiary's foreign employer and the proposed U.S. employer are the same employer (a U.S. entity with a foreign office) or related as a "parent and subsidiary" or as "affiliates." *See* § 203(b)(1)(C) of the Act; *see also* 8 C.F.R. § 204.5(j)(2) (providing definitions of the terms "affiliate" and "subsidiary").

II. ANALYSIS

At issue on appeal is whether the Beneficiary has the required one year of employment with a qualifying entity abroad in the three years preceding his entry to the United States.

The Petitioner asserts that the Beneficiary was employed by its Indian subsidiary [redacted] in a managerial capacity from October 2018 "until his transfer to the U.S. in October 2021." The record reflects that the Beneficiary was last admitted to the United States in H-1B status on October 24, 2021 pursuant to an approved Form I-129, Petition for a Nonimmigrant Worker, filed by a different U.S. employer [redacted].[1] The Petitioner subsequently filed a Form I-129 on the Beneficiary's behalf and he was granted H-1B status authorizing employment with the Petitioner for a three-year period commencing on November 18, 2021.[2] The Petitioner must therefore establish that the Beneficiary had at least one year of employment abroad with its foreign subsidiary in the three-year period preceding this date, under 8 C.F.R. § 204.5(j)(3)(i)(B).

The Director concluded that the Beneficiary did not possess the required one year of employment with a qualifying entity abroad. In reaching this conclusion, the determined that the Beneficiary's period of qualifying foreign employment did not begin to accrue until the Petitioner formed a qualifying relationship with the Beneficiary's foreign employer.

Specifically, the record reflects that the qualifying parent-subsidiary relationship was formed on or about June 4, 2021, when the Petitioner acquired 765 of the 1500 shares issued by the Indian entity. *See* 8 C.F.R. § 204.5(j)(2) (defining "subsidiary," in relevant part, as a legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity). The Director acknowledged that a qualifying relationship between the two entities existed when this petition was filed in April 2022. However, the Director, noting the Beneficiary's last entry to the United States in October 2021, concluded that "it does not appear plausible that the beneficiary could have garnered the full one year of qualifying managerial or executive experience abroad within the three years preceding the beneficiary's entry, because the multinational relationship between the petitioner and

[1] The Petitioner has neither claimed nor provided evidence that it has a qualifying relationship with this employer.
[2] The record also includes a Form I-797A Approval Notice for a prior H-1B classification petition the Petitioner filed on the Beneficiary's behalf. It was approved in February 2019 and valid from August 25, 2018 until August 24, 2021.

the organization abroad did not exist until June 4, 2021." Based on this reasoning, the Director did not consider any employment experience the Beneficiary gained with the foreign entity prior to June 4, 2021 to accrue towards his employment abroad *with a related entity.* The Director concluded that "the qualifying multinational relationship between the firm, corporation or other legal entity had to have existed during the one-year period."

We conclude, however, that the Director's analysis incorrectly conflates two separate eligibility requirements for this classification. One requirement pertains to the existence of a qualifying relationship, while the other pertains to the Beneficiary's employment abroad, and focuses on the dates and duration of such employment. However, nothing in the statute or regulations suggests that the qualifying relationship between a foreign employer and the prospective employer in the United States must have existed for any specific length of time.

Therefore, while we agree the qualifying relationship between the Petitioner and its Indian subsidiary had existed for less than one year at the time the Beneficiary was last admitted to the United States, this fact is not relevant for the purpose of determining eligibility for this classification. The relevant regulations are sufficiently clear in requiring that the Beneficiary's "prospective employer in the United States is the same employer or a subsidiary or affiliate of the firm or corporation or other legal entity" that employed the Beneficiary abroad. 8 C.F.R. § 204.5(j)(3)(i)(C). The regulation's use of the word "is" indicates that the relationship between the Petitioner and the Beneficiary's foreign employer must exist in the present, i.e., at the time of filing, and that it must continue to exist through adjudication. *See* 8 C.F.R. § 103.2(b)(1). If a qualifying relationship exists at the time of filing the Form I-140, a petitioner may be able to establish eligibility, even if that qualifying relationship did not exist during a beneficiary's period of foreign employment in a managerial or executive capacity.

A. Withdrawal of Director's Decision

Based on the foregoing discussion, a petitioner may demonstrate eligibility under the separate qualifying relationship and foreign employment requirements provided that it can demonstrate: (1) a qualifying relationship exists between the U.S. petitioner and the beneficiary's foreign employer at the time of filing; (2) the beneficiary's employment abroad was with an entity that has a qualifying relationship with the petitioner at the time of filing; and (3) the beneficiary's employment with the foreign entity was in a managerial or executive capacity and its duration was at least one year within the prescribed three-year period.

Here, the record establishes that the Petitioner had a qualifying parent-subsidiary relationship with [redacted] at the time of filing. The Petitioner does not need to establish that it had a qualifying relationship with the Indian entity for a full year prior to the Beneficiary's entry to the United States in October 2021. As the Director imposed a requirement that is not supported by the statute or regulations, and denied the petition solely on this basis, the Director's decision is withdrawn.

B. Basis for Remand

Although the Director's decision will be withdrawn, the record as presently constituted does not contain sufficient evidence to establish the Beneficiary's full year of employment abroad with its

foreign subsidiary. Accordingly, we will remand the Director for further review and issuance of a new decision consistent with the following discussion.

As noted, the Petitioner asserts that the Beneficiary was employed by its Indian subsidiary as "Head of Engineering and Operations" from October 2018 until October 2021.[3] In support of its claim, the Petitioner provided copies of monthly earnings statements issued to the Beneficiary between September 2020 and December 2021.[4] This evidence indicates that the foreign entity continued to pay the Beneficiary's salary following his October 2021 entry to the United States. However, the earnings statements for November and December 2021 cannot be considered in calculating whether the Beneficiary has the required one year of employment abroad.

In addition, based on the information provided on the Beneficiary's earnings statements, it appears he began receiving a salary from the foreign entity in August 2020, not in October 2018 as claimed. Specifically, the September 2020 statement indicates that the Beneficiary was paid INR 75,000 for that month with year-to-date earnings of INR 150,000, suggesting that he was likely paid for only one prior month in 2020. The record also lacks evidence establishing when the foreign entity was incorporated in India and when it commenced doing business. If the Petitioner maintains that the foreign entity employed the Beneficiary in a managerial capacity as early as the last quarter of 2018, it should provide evidence that the company was incorporated, staffed, and doing business at that time.

We also note that the submitted earnings statements identify the Beneficiary's title as "Technical Head" for the months of September 2020 through March 2021 and July 2021, while the remaining statements indicate his title as "Head - Vehicle Engineering." However, the Petitioner has indicated that the Beneficiary held only one position for the duration of his employment with the foreign entity. If he did in fact hold two different positions and the Petitioner cannot establish that he held either one for a full year, it would need to provide evidence that both positions were in a managerial capacity.

Finally, we observe that the Beneficiary applied for nonimmigrant visas on multiple occasions in the year preceding his entry to the United States and provided information on his Forms DS-160, Online Nonimmigrant Visa Application, that appears to be inconsistent with the Petitioner's statements and evidence relating to his foreign employment. In November 2020, he submitted an F-1 visa application to the U.S. Consulate in Mumbai on which he claimed to be "not employed" at the time of the application and stated that his last employment was as head of engineering and operations for the Petitioner in Michigan from October 31, 2018 until November 23, 2020. In a subsequent F-1 nonimmigrant visa application he submitted in June 2021, the Beneficiary listed the same dates of employment with the Petitioner and indicated that he had been employed by the Indian subsidiary since January 11, 2021. In his H-1B visa application submitted to the U.S. consulate in August 2021, the Petitioner stated that he had been employed by the Petitioner since October 31, 2018 and did not indicate any period of employment with the Indian subsidiary.

As the Petitioner has not had the opportunity to address the deficiencies and potential inconsistencies discussed above, or to rebut the potentially derogatory information from outside the record of

[3] U.S. Department of Homeland Security records indicate that the Beneficiary was in the United States from January 15, 2018 until November 18, 2018; therefore, he could not have been employed abroad with the Petitioner's foreign subsidiary beginning in October 2018.

[4] The Petitioner did not submit copies of earnings statements for the months of April 2021 and August 2021.

proceedings, the matter will be remanded to the Director for further consideration. The Director should review the evidence of record pertaining to the Beneficiary's foreign employment abroad and issue a new request for evidence or notice of intent to deny. *See* 8 C.F.R. § 103.2(b)(8); *see also* 8 C.F.R. § 103.2(b)(16)(i). The Petitioner should be provided an opportunity to supplement the record with additional explanation and evidence, which may include additional personnel and tax records corroborating the dates of the Beneficiary's employment with the foreign subsidiary and a more detailed explanation of the position(s) he held abroad.

In addition to establishing that the Beneficiary has at least one year of qualifying employment with the Petitioner's foreign subsidiary, the Petitioner must demonstrate that it and the foreign entity continue to have a qualifying relationship and are doing business as defined in the regulations, that it has the continuing ability to pay the Beneficiary's offered wage from the date of filing in April 2022, and that it will employ the Beneficiary in the United States in a managerial or executive capacity. Therefore, prior to issuing an RFE or NOID, the Director should review the record in its totality and determine whether additional or updated evidence is needed to demonstrate that all other eligibility requirements for this classification have been met.

ORDER: The Director's decision is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.