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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**



D7

DATE: JUN 15 2011 Office: VERMONT SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker under Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office ("AAO") on appeal. The AAO will withdraw the director's decision and remand the matter to the service center for further action and entry of a new decision.

The petitioner filed this nonimmigrant visa petition to employ the beneficiary an L-1B intracompany transferee with specialized knowledge pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act ("the Act"), U.S.C. § 1101(a)(15)(L). The petitioner, a liquefied natural gas services company, states that it is an affiliate of [REDACTED] the beneficiary's last foreign employer. The petitioner seeks to employ the beneficiary in the position of Senior International Accountant for a period of three years. The petitioner indicates that it has employed the beneficiary in this capacity pursuant to TN nonimmigrant status since July 2005. The beneficiary was last admitted to the United States as a TN nonimmigrant on August 23, 2008.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary has 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 required by 8 C.F.R. § 214.2(l)(3)(iii).

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO. On appeal, counsel asserts that USCIS "has interpreted Section 101(a)(15)(L) as allowing an alien to meet the one year of qualifying employment requirement by looking at the three-year window preceding his lawful admission to the United States." Counsel asserts that, as the beneficiary was lawfully admitted to the United States in valid TN nonimmigrant status since June 28, 2005, the applicable one-year period of qualifying employment must have occurred between June 29, 2002 and June 28, 2005. Counsel contends that the beneficiary was employed by a qualifying affiliate in Mexico for over one year prior to his transfer to the United States in TN status, and therefore is eligible for L-1 status in accordance with the statute and regulations.

I. The Law

To establish L-1 eligibility under section 101(a)(15)(L) of the Act, the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization. The petitioner must also demonstrate that the beneficiary seeks to enter the United States temporarily in order to continue to render services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge.

The regulation at 8 C.F.R. § 214.2(l)(3) further states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(l)(1)(ii)(A) defines "intracompany transferee" 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.*

(Emphasis added).

II. The Issue on Appeal

The sole issue addressed by the director is whether the beneficiary had at least one continuous year of full-time employment with a qualifying organization within the three years preceding the filing of the petition. Specifically, the issue is whether USCIS should reach over the beneficiary's "admission" into the United States and subsequent three years and eight months stay in TN status in determining whether the beneficiary has been employed abroad for one continuous year within the three years preceding the filing of the petition in a qualifying capacity.

Procedural History

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on May 22, 2009. The petitioner indicated that the beneficiary was employed by its Mexican affiliate from January 15, 2004 until June 14, 2005, a period of 17 months, in the position of international accountant. In a supporting letter dated May 14, 2009, the petitioner stated that the beneficiary was transferred to its Houston, Texas office in June 2005 in TN status as a result of the consolidation of the company's North American natural gas control operations.

The petitioner submitted a copy of the TN visa stamp in the beneficiary's Mexican passport, which was issued by the U.S. Consulate General in Monterrey, authorizing employment with the petitioner as an accountant. The petitioner also provided a copy of the beneficiary's latest Form I-94 arrival and departure record indicating that the beneficiary was admitted to the United States in TN status on August 23, 2008.

The director denied the petition on June 2, 2009 concluding that the petitioner failed to submit evidence that the beneficiary has 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 required by 8 C.F.R. § 214.2(I)(3)(iii). In denying the petition, the director noted that the beneficiary had been employed in the United States for approximately three years and eight months as of the date the petition was filed.

On appeal, counsel asserts:

Since 1994, USCIS (formerly INS) has interpreted Section 101(a)(15)(L) [of the Act] as allowing an alien to meet the one year of qualifying employment requirement by looking at the three-year window preceding his lawful admission into the United States. . . .

Beneficiary was lawfully admitted into the United States on June 28, 2005 . . . in valid TN nonimmigrant status. Beneficiary has remained in valid TN status since that initial entry in June 2005. According to the statute and the USCIS stated position, the applicable three-year window of eligibility for Beneficiary would have run between June 29, 2002 and June 28, 2005.

Counsel asserts that the beneficiary was employed by the petitioner's Mexican affiliate between January 2004 and June 2005, and therefore acquired the one year of continuous full-time employment with a qualifying entity abroad within the three years preceding his lawful admission into the United States in TN status.

In support of his position, counsel cites section 101(a)(15)(L) of the Act and two 1994 letters from [REDACTED] then Chief of the Nonimmigrant Visa Branch , legacy Immigration and Naturalization Service. Counsel provides copies of the referenced letters in support of the appeal, along with a copy of the Form I-94 arrival/departure record issued to the beneficiary upon his admission to the United States in TN status on June 28, 2005.

Discussion

Upon review, counsel's assertions are persuasive. Based on the facts presented, the petitioner has established that the beneficiary has one continuous year of full-time employment with a foreign qualifying organization within the requisite three-year time period.

To review the required one year of continuous employment abroad, USCIS must count back three years from the date that the L-1A petition is filed. The regulation at 8 C.F.R. § 214.2(I)(3)(iii) clearly requires that an individual petition filed on Form I-129 be accompanied by evidence that the beneficiary "has at least one continuous year of full time employment abroad with a qualifying organization within the three years preceding the filing of the petition." The definition of "intracompany transferee" also indicates that, if the beneficiary has been employed abroad continuously for one year by a qualifying organization within three years

preceding the time of the beneficiary's "application for admission into the United States," the beneficiary may be eligible for L-1 classification. 8 C.F.R. § 214.2(l)(1)(ii)(A).

However, when the definition of "intracompany transferee" is construed together with the regulation at 8 C.F.R. § 214.2(l)(3) and section 101(a)(15)(L) of the Act, the phrase "preceding the time of his or her application for admission into the United States" refers to a beneficiary whose admission or admissions pertained to the rendering of services "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." Statutes and regulations must be read as a whole, and interpretations should be consistent with the plain purpose of the Act to avoid absurd results. *See generally Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000).

Therefore, according to the plain purpose of the Act and regulations, USCIS may not reach over *any* admission and subsequent stay, *unless* that admission was "for a branch of the same employer or a parent, affiliate, or subsidiary thereof [or] brief trips to the United States for business or pleasure." 8 C.F.R. § 214.2(l)(1)(ii)(A). Unless the authorized period of stay in the United States is either brief or "on behalf" of the employer, the period of stay will be interruptive of the required one year of continuous employment abroad. *See* 52 Fed. Reg. 5738, 5742 (Feb. 26, 1987) ("Time Spent in the United States Cannot Count Towards Eligibility for L Classification"); *see also Matter of Continental Grain Company*, 14 I&N Dec. 140 (D.D. 1972) (finding that an intervening period of stay is not interruptive when the beneficiary was in the United States as an H-3 trainee on behalf of the employer).

Here, the beneficiary was employed for one continuous year with a qualifying affiliate during the three-year period immediately preceding his initial admission to the United States in TN status. As the beneficiary was admitted to the United States for the purpose of employment with a U.S. affiliate of his foreign employer, and the same employer that now seeks to employ him in L-1B status, the beneficiary's employment in the United States is not interruptive of his one year of continuous employment abroad.

In denying the petition, the director failed to take into account the provisions of 8 C.F.R. § 214.2(l)(1)(ii)(A), which states, in relevant part, that "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." Had the beneficiary been admitted to the United States to work for an unrelated company in TN status for over three years, the director's position would be correct. However, a beneficiary's one year of continuous employment abroad, once established, remains continuous, despite the beneficiary's subsequent stay in the United States for a branch, affiliate, subsidiary, or parent of the foreign entity in an authorized nonimmigrant status. Accordingly, the director's decision was in error and will be withdrawn.

Although the director's decision will be withdrawn, the AAO finds that the record as presently constituted does not establish that the beneficiary possesses specialized knowledge or that he has been or will be employed in a capacity requiring specialized knowledge. 8 C.F.R. §§ 214.2(l)(3)(ii) and (iv). Based on the director's decision, it does not appear that he considered these substantive issues prior to denying the petition based on perceived clear evidence of ineligibility in the record, pursuant to 8 C.F.R. § 103.2(b)(8)(i).

The petitioner indicates that the beneficiary has been and will be employed in the position of Senior International Accountant, in which he would be primarily responsible for accounting for the petitioner's 14 natural gas facilities located in Mexico. The petitioner indicates that the position requires "in-depth knowledge of company's internal accounting and auditing processes utilized to consolidate natural gas operations in Mexico with internal and external reporting requirements." The petitioner further states that the position requires "significant experience using the internal [company] accounting system (SMART)." The petitioner states that its internal accounting processes and practices are complex, and that the beneficiary became expert in these processes and practices while employed by its Mexican affiliate as an International Accountant from January 2004 to June 2005. The petitioner provided no further explanation regarding the beneficiary's qualifications as an employee with specialized knowledge.

Section 214(c)(2)(B) of the Act, 8 U.S.C. § 1184(c)(2)(B), provides the statutory definition of specialized knowledge:

For purposes of section 101(a)(15)(L), an alien is considered to be serving in a capacity involving specialized knowledge with respect to a company if the alien has a special knowledge of the company product and its application in international markets or has an advanced level of knowledge of processes and procedures of the company.

Furthermore, the regulation at 8 C.F.R. § 214.2(l)(1)(ii)(D) defines specialized knowledge as:

[S]pecial knowledge possessed by an individual of the petitioning organization's product, service, research, equipment, techniques, management or other interests and its application in international markets, or an advanced level of knowledge or expertise in the organization's processes and procedures.

Considering the definition of specialized knowledge, it is the petitioner's, not USCIS', burden to articulate and establish by a preponderance of the evidence that the beneficiary possesses "special" or "advanced" knowledge. Section 214(c)(2)(B) of the Act, 8 U.S.C. § 1184(c)(2)(B). USCIS cannot make a factual determination regarding the beneficiary's specialized knowledge if the petitioner does not, at a minimum, articulate with specificity the nature of the claimed specialized knowledge, describe how such knowledge is typically gained within the organization, and explain how and when the beneficiary gained such knowledge.

Once the petitioner articulates the nature of the claimed specialized knowledge, it is the weight and type of evidence which establishes whether or not the beneficiary actually possesses specialized knowledge. A petitioner's assertion that the beneficiary possesses advanced knowledge of the processes and procedures of the company must be supported by evidence describing and distinguishing that knowledge from the elementary or basic knowledge possessed by others. Because "special" and "advanced" are comparative terms, the petitioner should provide evidence that allows USCIS to assess the beneficiary's knowledge relative to others in the petitioner's workforce or relative to similarly employed workers in the petitioner's specific industry.

In this matter, the petitioner has not adequately articulated or documented exactly what constitutes the beneficiary's specialized knowledge. Simply stating that the beneficiary is familiar with internal company

processes or systems alone is insufficient to establish the beneficiary's eligibility for this classification. The petitioner has not provided a description of the position the beneficiary held while employed by the foreign entity, and thus has not established that he was employed in a position that involved specialized knowledge. Accordingly, the matter will be remanded to the director, who is instructed to review the record, request additional evidence that will assist in establishing the beneficiary's specialized knowledge qualifications, and enter a new decision.

At this time, the AAO takes no position on whether the beneficiary qualifies for the classification sought. The director must make the initial determinations on those issues. So far, the director has not done so. By remanding this matter, the AAO does not necessarily find that the beneficiary is ineligible. Rather, we remand the matter because the director based the decision on incorrect grounds.

Therefore, the AAO will remand this matter to the director for a new decision. The director should request any additional evidence deemed warranted and allow the petitioner to submit such evidence within a reasonable period of time. As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision which, if adverse to the petitioner, shall be certified to the Administrative Appeals Office for review.