



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

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF F-D-, LLC

DATE: APR. 26, 2016

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

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

The Petitioner, a real estate development company, seeks to temporarily employ the Beneficiary as its “Chairman/Chief Executive Officer” 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, Vermont Service Center, denied the petition. The Director concluded that the Petitioner did not establish that: 1) the Beneficiary will be employed in a managerial or executive capacity under the extended petition; 2) the Petitioner has a qualifying relationship with the Beneficiary’s foreign employer; and 3) the Petitioner maintains sufficient physical premises to house the U.S. office. The Petitioner subsequently filed on appeal with this office. We summarily dismissed the appeal based on the lack of a brief or supplemental supporting evidence.

The matter is now before us on a motion to reopen and a motion to reconsider. In its motion, the Petitioner asserts that we erred in our summary dismissal of the appeal and contends that it timely filed a brief in support of its appeal.

Upon review, we will deny the motion to reopen and the motion to reconsider.

I. MOTION REQUIREMENTS

A. Overarching Requirement for Motions by a Petitioner

The provision at 8 C.F.R. § 103.5(a)(1)(i) includes the following statement limiting a USCIS officer’s authority to reopen the proceeding or reconsider the decision to instances where “proper cause” has been shown for such action: “[T]he official having jurisdiction may, for proper cause shown, reopen the proceeding or reconsider the prior decision.”

Thus, to merit reopening or reconsideration, the submission must not only meet the formal requirements for filing (such as, for instance, submission of a Form I-290B that is properly completed and signed, and accompanied by the correct fee), but the Petitioner must also show proper

cause for granting the motion. As stated in the provision at 8 C.F.R. § 103.5(a)(4), “Processing motions in proceedings before the Service,” “[a] motion that does not meet applicable requirements shall be dismissed.”

B. Requirements for Motions to Reopen

The regulation at 8 C.F.R. § 103.5(a)(2), “Requirements for motion to reopen,” states: “A motion to reopen must [(1)] state the new facts to be provided in the reopened proceeding and [(2)] be supported by affidavits or other documentary evidence.”

This provision is supplemented by the related instruction at Part 4 of the Form I-290B, which states: “**Motion to Reopen:** The motion must state new facts and must be supported by affidavits and/or documentary evidence that establish eligibility at the time the underlying petition or application was filed.”¹

Further, the new facts must possess such significance that, “if proceedings . . . were reopened, with all the attendant delays, the new evidence offered would likely change the result in the case.” *Matter of Coelho*, 20 I&N Dec. 464, 473 (BIA 1992); *see also Maatougui v. Holder*, 738 F.3d 1230, 1239-40 (10th Cir. 2013).

C. Requirements for Motions to Reconsider

The regulation at 8 C.F.R. § 103.5(a)(3), “Requirements for motion to reconsider,” states:

A motion to reconsider must [(1)] state the reasons for reconsideration and [(2)] be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must [(3)], [(a)] when filed, also [(b)] establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

These provisions are augmented by the related instruction at Part 4 of the Form I-290B, which states: “**Motion to Reconsider:** The motion must be supported by citations to appropriate statutes, regulations, or precedent decisions and must establish that the decision was based on an incorrect application of law or policy, and that the decision was incorrect based on the evidence of record at the time of decision.”

¹ The regulation at 8 C.F.R. § 103.2(a)(1) states in pertinent part :

Every benefit request or other document submitted to DHS must be executed and filed in accordance with the form instructions, notwithstanding any provision of 8 CFR chapter 1 to the contrary, such instructions are incorporated into the regulations requiring its submission.

A motion to reconsider contests the correctness of the prior decision based on the previous factual record, as opposed to a motion to reopen which seeks a new hearing based on new facts. *Compare* 8 C.F.R. § 103.5(a)(3) and 8 C.F.R. § 103.5(a)(2).

II. MOTION DISCUSSION

The submission constituting the Petitioner's combined motion consists of the following: (1) the Form I-290B, Notice of Appeal or Motion; (2) a brief in support of the motion to reopen; (3) a copy of our October 9, 2015, decision summarily dismissing the Petitioner's appeal; (4) a copy of a brief and additional evidence submitted in support of the appeal, along with evidence that this submission was delivered to the Vermont Service Center on April 23, 2015.

A. Motion to Reopen

The Petitioner claims that the new evidence establishes that it timely filed a brief in support of its appeal and thus overcomes our reasons for summarily dismissing the appeal.

Regulations at 8 C.F.R. § 103.3(a)(1)(v) state, in pertinent part:

An officer to whom an appeal is taken shall summarily dismiss any appeal when the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal.

The Director denied the petition on February 25, 2015. On March 24, 2015, the Petitioner filed an appeal seeking review and withdrawal of the Director's decision. After reviewing the record, we found that the Petitioner provided no statement addressing or disputing the grounds for denial. The instructions at Part 4 of the I-290B specifically state that the Petitioner must provide a statement regarding the basis for the appeal on a separate sheet of paper, and that such statement should specifically identify an erroneous conclusion of law or fact in the decision being appealed. The Petitioner did not submit such a statement. Further, despite the fact that the Petitioner indicated on the Form I-290B that a brief and/or additional evidence would be submitted within 30 days of the appeal, the record before us contained no brief or supporting evidence at the time we adjudicated the appeal on October 9, 2015.

The Petitioner's supporting evidence on motion establishes that it sent a brief and additional documentation to the Vermont Service Center within 30 days of filing the appeal with our office. However, the regulations at 8 C.F.R. § 103.3(a)(2)(viii) and the instructions to Form I-290B, incorporated into the regulations pursuant to 8 C.F.R. § 103.2(a)(1), require the affected party to submit the brief or evidence directly to this office, not to the Vermont Service Center or any other USCIS office. Because the Petitioner did not follow the regulations or the instructions, we were not in possession of the brief at the time we adjudicated the appeal. Given the lack of a brief or statement specifically identifying an erroneous conclusion of law or fact in the decision being appealed, we properly summarily dismissed the appeal pursuant to 8 C.F.R. § 103.2(a)(1)(v).

The Petitioner has not established that the evidence submitted on motion would change the outcome of this case if the proceeding were reopened. The evidence submitted on motion confirms that the Petitioner did not timely submit a brief to our office within 30 days of filing the appeal, and therefore, the summary dismissal of the appeal was warranted and remains warranted. Accordingly, the motion to reopen will be denied.

B. Motion to Reconsider

A motion to reconsider must state the reasons for reconsideration and be supported by citations to pertinent statutes, regulations, and/or precedent decisions to establish that the decision was based on an incorrect application of law or USCIS policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. *See* 8 C.F.R. § 103.5(a)(3) (detailing the requirements for a motion to reconsider).

We also find that the Petitioner has not met the requirements of a motion to reconsider, despite claiming that our prior decision was made in error. As discussed, the Petitioner sent an appellate brief and other supporting evidence to the Vermont Service Center rather than to this office. Because the Petitioner did not follow the regulations or the Form I-290B instructions, we were not in possession of the appellate brief at the time of our review and therefore we were precluded from considering the supporting evidence on appeal. The appeal before us consisted solely of a Form I-290B with no accompanying statement addressing the basis for the appeal, and therefore, its summary dismissal was required by the regulation at 8 C.F.R. § 103.2(a)(1)(v).

The Petitioner has not identified any incorrect application of law or USCIS policy, or established that our decision was incorrect based on the evidence of record when we issued that decision. Accordingly, we must find that the Petitioner's filing does not meet the requirements of a motion to reconsider. The motion to reconsider must be denied.

III. MERITS DISCUSSION

We further note that even if the appellate brief had been properly filed, we would nevertheless have dismissed the appeal based on the merits, as the Petitioner did not provide sufficient evidence to establish eligibility for the benefit sought.

A. U.S. Employment in a Managerial or Executive Capacity

The Director denied the petition based on a finding that the Petitioner did not establish that the Beneficiary will be employed in a managerial or executive capacity under the extended petition. The Petitioner does not claim that the Beneficiary will be employed in a managerial capacity. Therefore, we restrict our analysis to whether the Beneficiary will be employed in an executive capacity.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term “executive capacity” as an assignment within an organization in which the employee primarily:

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher-level executives, the board of directors, or stockholders of the organization.

If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, U.S. Citizenship and Immigration Services (USCIS) must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. *See* section 101(a)(44)(C) of the Act.

1. Evidence of Record

The Petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on December 30, 2014. In a letter dated December 22, 2014, the Petitioner stated that it is engaged in the business of “acquisition and purchase of real estate properties for development with the ultimate goals of selling or renting such properties.” The Petitioner stated that the Beneficiary would carry out the following functions in his role as Chairman and Chief Executive Officer:

1. Plan, develop and establish policies and objectives of the United States company in line with the policies and objectives of the foreign entity;
2. Hire competent executives and managers who will scout and negotiate viable properties for development. [*sic*] [i]n order to implement goals and objectives of the company.
3. Evaluate business performance and institute amendments to business policies and goals should the need arise;
4. Review activity reports and financial statements in order to determine if business goals are being achieved;
5. Direct and coordinate formulation of financial goals and budget allocation;
6. Evaluate performance of company executives once they are placed in the petitioner’s organization;
7. Travel internationally, specifically to and from Egypt, to coordinate business activities of both parent company in Egypt and the United States entity.

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In addition to the Beneficiary, the Petitioner stated that it employs an executive assistant to assist with the daily operations. The Petitioner submitted a paystub showing that it paid \$2700 in wages to [REDACTED] in the month of November 2014. The Petitioner noted that its goal “is to expand its organizational chart by employing United States citizens or permanent residents in executive and managerial levels in order to handle its projected business expansion.”

The Petitioner stated that it invested \$995,323 to acquire four residential properties during its initial year of operation. The Petitioner explained that it had renovated one of the properties and listed it for sale, that two of the properties were being rented, and that the final property was under development, which would involve demolition of the existing structure and construction of two single family homes to be offered for sale. The Petitioner submitted documentation related to the purchase of these properties, evidence that it has tenants for its rental properties, and invoices, bids, and contracts supporting its use of contractors for demolition and remodeling projects.

The Petitioner also submitted its business plan for the years 2015 through 2018. The Petitioner stated that in 2015, it would hire a construction engineer to “relieve the Chief Executive Officer of the responsibility of overseeing the construction projects” so that he can devote his time to overseeing “the overall business operations” of both the U.S. entity and its affiliate in Egypt. The business plan indicates that the positions of construction supervisor, real estate manager, and accountant would be added in 2016, and formal departments for construction engineering, sales and marketing, business administration and accounting would be added by 2018.

The Petitioner provided a “proposed organizational chart” which lists the Beneficiary as Chairman/CEO, the executive assistant position, and the future real estate manager, construction engineer, construction supervisor, accounting manager, and sales and marketing manager positions.

The Director issued a request for evidence (RFE), instructing the Petitioner to submit evidence that the Beneficiary will be employed in a managerial or executive capacity under the extended petition. The Director found that the position description provided for the Beneficiary was overly vague and that the Petitioner’s total staff, which includes the Beneficiary and one other employee, would be insufficient to support the Beneficiary in a position that would primarily consist of managerial or executive tasks. Accordingly, the RFE instructed the Petitioner to address these deficiencies by providing a detailed description of the job duties the Beneficiary would perform under an approved petition, as well as additional evidence related to its staffing levels and organizational structure as of the date of filing.

In response, the Petitioner provided a letter, dated February 12, 2015, in which it restated four of the seven functions that were listed in the original job description and provided additional statements clarifying the significance of each function. First, with regard to planning, developing, and establishing policies and objectives, the Petitioner stated the following:

Objectives are business goals that are commensurate with the financial performance of business organizations. The petitioner’s objectives are to search, find and purchase

real estate properties for development ultimately for sale or for rental purposes. Policies are set to be observed and followed by company personnel which are conducive to the business organization's objectives. The beneficiary has been performing this duty since the inception of the U.S. entity.

With regard to hiring managers and executives to search for and negotiate land development properties the Petitioner explained that it hired an executive assistant in 2014 and plans to continue to execute its hiring plan, which includes hiring a construction engineer in 2015, a real estate manager, sales and marketing manager, and an accounting manager and construction supervisor in 2016. Next, the Petitioner stated that the Beneficiary would evaluate business performance by reviewing financial records and making changes in business goals and policies as needed. The Petitioner explained that it currently uses an independent accountant until it is able to hire an accountant to head its accounting department. Lastly, with regard to directing and coordinating formulation of financial goals and performing budget allocation, the Petitioner stated that the Beneficiary would coordinate with the construction engineer, once hired, to establish budgets for construction projects to ensure profitability.

The Petitioner reiterated that the Beneficiary would continue to travel to Egypt to oversee the foreign entity's business operations and indicated that the Beneficiary would rely on his executive assistant to keep him abreast of the U.S. operations and progress of projects. The Petitioner stated that a construction engineer, once hired, will provide the Beneficiary with construction progress reports.

With respect to its one current employee, the executive assistant, the Petitioner stated that her duties include "keeping track of the beneficiary's day to day schedules related to the company's real estate projects and ongoing developments"; writing and responding to correspondence on behalf of the Beneficiary; and keeping the Beneficiary informed of daily office activities. The Petitioner stated again that the construction engineer, once hired, would "relieve the beneficiary in the necessary physical presence and involvement in the petitioner's real estate projects."

The Director denied the petition on February 25, 2015, concluding, in part, that the Petitioner did not establish that the Beneficiary will be employed in a managerial or executive capacity under the extended petition. In denying the petition, the Director found that the job description provided in response to the RFE lacked sufficient details about the actual tasks to be performed within the scope of the Petitioner's limited hierarchy. The Director questioned the level of oversight the Petitioner would receive during the Beneficiary's trips abroad, given that the only other employee the Petitioner currently has is an executive assistant.

2. Analysis

Upon review of the petition and the evidence of record, the Petitioner has not established that the Beneficiary will be employed in a managerial or executive capacity under the extended petition.

When examining the managerial or executive capacity of the Beneficiary, we will look first to the Petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The Petitioner's description of the job duties must clearly describe the duties to be performed by the Beneficiary and indicate whether such duties are in a managerial or executive capacity. *Id.*

The definitions of managerial and executive capacity each have two parts. First, the Petitioner must show that the Beneficiary will perform certain high-level responsibilities. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). Second, the Petitioner must prove that the Beneficiary will be *primarily* engaged in managerial or executive duties, as opposed to ordinary operational activities alongside the Petitioner's other employees. *See Family Inc. v. USCIS*, 469 F.3d 1313, 1316 (9th Cir. 2006); *Champion World, Inc. v. INS*, 940 F.2d 1533.

Looking to the job description in the present matter, we find that the Petitioner did not adequately address the deficiencies noted in the denial, where the Director concluded that the Petitioner provided vague job descriptions that did not explain what specific tasks the Beneficiary would carry out within the staffing arrangement that existed at the time the petition was filed. For instance, given that the Petitioner's business goals are to find real estate and negotiate real estate purchases, it is unclear what specific tasks are representative of the Beneficiary's role in planning, developing and establishing policies. Broadly stating that the Beneficiary plans, develops, and establishes policies provides little insight as to the tasks that the Beneficiary actually performs. The Petitioner does not explain who, if not the Beneficiary, actually conducts the underlying market research and real estate projections to determine which properties should be purchased. In fact, the Petitioner stated that during the previous year, the Beneficiary "searched, found and bought real estate properties" and has not identified any employee who would relieve the Beneficiary of performing these activities under the extended petition. Rather, the Petitioner stated that the Beneficiary would have more time "to concentrate on searching and finding prospective real estate acquisitions" once a construction engineer is hired.

The Petitioner was equally vague in stating that the Beneficiary would "evaluate business performance" by reviewing financial records. The Petitioner did not specify what actual data in the records the Beneficiary would review or who would formulate the records. While the Petitioner indicated that it employs the services of an accountant, it is unclear what specific services this individual provides, other than the preparation of tax documents and a financial statement. As such, we are unable to determine that the services provided by the independent accountant are sufficient to provide the Beneficiary with the necessary information that would allow him to determine what changes must be made. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1108. In the present matter, the general nature of the Beneficiary's job description provides only a broad overview of the Beneficiary's role, but does not convey a meaningful understanding of the daily tasks the Beneficiary would carry out on a routine basis.

Furthermore, given that a number of the Beneficiary's job duties include underlying roles for support personnel, such as "competent executives and managers," it is unclear who is currently carrying out the tasks that would eventually be assigned to the vacant positions in the interim, until those vacancies are filled. While the evidence shows that the Petitioner hired an executive assistant to relieve the Beneficiary from various office and clerical tasks, it is unclear who, if not the Beneficiary, is currently performing a number of other operational, non-qualifying job duties, such as design aspects of improving on a property that has been purchased and managing existing rental properties in terms of maintenance, repairs, and rent collection, all of which are inherent to the type of business the Petitioner operates. In fact the Petitioner acknowledges the Beneficiary's current involvement in its real estate projects by noting that the construction engineer, once hired, will relieve the Beneficiary of this responsibility.

Overall, several duties assigned to the Beneficiary are prospective and contingent upon hiring that is anticipated to occur later in 2015 and 2016. Accordingly, we cannot conclude that it fully represents the nature and scope of the Beneficiary's actual duties at the end of the Petitioner's initial year of operations. The Petitioner must establish eligibility at the time of filing the nonimmigrant visa petition and must continue to be eligible for the benefit through adjudication. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved based on speculation of future eligibility or after the Petitioner or Beneficiary becomes eligible under a new set of facts. *See, e.g., Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg'l Comm'r 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971).

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Here, while we do not doubt that the Beneficiary has the appropriate level of authority as chief executive officer of the petitioning company, neither the Beneficiary's job description nor the Petitioner's structure at the time of filing establishes that the Beneficiary's time would be primarily allocated to the performance of tasks within an executive capacity. While no beneficiary is required to allocate 100% of his time to managerial- or executive-level tasks, the petitioner must establish that the non-qualifying tasks the beneficiary would perform are only incidental to the proposed position. An employee who "primarily" performs the tasks necessary to produce a product or to provide services, or other non-qualifying duties, is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

Moreover, the statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the

organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct[] the management" and "establish[] the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.*

On review, the Petitioner states that the Beneficiary will hold a level of authority consistent with this definition and serve as the company's senior employee, but the record also shows that he continues to be directly involved in researching viable properties for sale and implementing property development projects, and does not support a finding that he was primarily focused on the policies and goals of the business rather than on its day-to-day operations. These are non-executive duties that the Petitioner states he will allocate in the future; however, the evidence of record does not support a conclusion that his duties were primarily executive in nature as of the date of filing.

The Petitioner asserts that the Director erred by stating that the regulations at 8 C.F.R. § 214.2(l)(14)(ii) mandate the denial of the petition if the Petitioner does not establish that the company is "sufficiently staffed and operational after one year." The Petitioner emphasizes that the cited regulation lists the evidence that must be submitted in support of a new office extension petition, but "does not make reference to the language referred to by the Center Director that if the business is not sufficiently staffed and operational after one year, the petitioner is ineligible for the extension."

Pursuant to section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, USCIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. In the case of a new office petition, the regulations require USCIS to examine the organizational structure and staffing levels of the petitioner. *See* 8 C.F.R. § 214.2(l)(14)(ii)(D).² The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial

² Following the enactment of section 101(a)(44)(C) of the Act in 1990, the former Immigration and Naturalization Service (INS) recognized that that managerial capacity could not be determined based on staffing size alone and deleted reference to "size and staffing levels" at 8 C.F.R. § 214.2(l)(3)(v)(C)(3) (1990), setting out the evidentiary requirements for initial new office petitions. *See* 56 Fed. Reg. 61111, 61114 (Dec. 2, 1991). However, the INS chose to maintain the review of the new office's staffing, among other criteria, at the time that the new office seeks an extension of the visa petition. *See* 8 C.F.R. § 214.2(l)(14)(ii)(D).

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position. There is no provision in USCIS regulations that allows for an extension of this one-year period.

Therefore, while the Petitioner is correct in stating that the regulation at 8 C.F.R. § 214.2(l)(14)(ii) does not expressly require that a petition be denied if the new office is not staffed and operational after one year, it does require the USCIS consider these factors in determining whether the company has reached the point where it can support a managerial or executive position, as defined at section 101(a)(44) of the Act, and whether it meets other eligibility requirements for the L-1 nonimmigrant classification, such as maintaining a qualifying relationship with a foreign entity and doing business as defined in the regulations. Where, as here, the Petitioner does not provide an adequate description of the Beneficiary's actual job duties and the business does not have sufficient staffing after one year to support a position in which the Beneficiary primarily performs executive or managerial duties, the Petitioner has not met its burden to show that the Beneficiary will be employed in an executive capacity, and the request for an extension cannot be approved.

Based on the deficiencies discussed above, the evidence of record does not establish that the Beneficiary would be employed in an executive capacity under the extended petition. If the Petitioner had properly filed the appeal, we would have dismissed the appeal on this basis.

B. Qualifying Relationship

The Director denied the petition, in part, based on a finding that the Petitioner did not submit sufficient evidence to establish that it has a qualifying relationship with the Beneficiary's foreign employer.

To establish a "qualifying relationship" under the Act and the regulations, a petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." *See generally* section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l).

1. Evidence of Record

On the L Classification Supplement to Form I-129, the Petitioner identified the Beneficiary's last foreign employer as [REDACTED] and stated that the U.S. company is an affiliate of the foreign entity based on the following description of the stock ownership and control of each company: [REDACTED] – 51% stock ownership."

In its letter dated December 22, 2014, the Petitioner stated that the Beneficiary established the foreign entity, [REDACTED] in Egypt in 2006, and that the U.S. and Egyptian entities are affiliates.

In support of this claim, the Petitioner provided a document titled "Action of the Members and Managers of [the Petitioner] Taken by Written Consent in Lieu of a Meeting," dated September 19,

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2013, which contained a stock distribution section where it was stated that the Beneficiary is owner of 96% of the foreign entity's stock and 51 of the U.S. entity's 100 shares of stock, with [REDACTED] each owning 10 shares and [REDACTED] owning the remaining 29 shares. This document identifies the Petitioner as a New Jersey limited liability company and was accompanied by a photocopied share certificate showing the Beneficiary's ownership of 51 shares of the Petitioner's stock. The Petitioner did not submit any additional evidence of ownership of either company.

In the RFE, the Director noted, in part, that additional evidence was required to establish who owns and controls the U.S. and foreign entities. The Director provided a list of documentation that could be submitted to meet this eligibility requirement, such as annual reports, meeting minutes, membership or share certificates, proof of stock purchase or capital contribution, articles of organization or incorporation, and by-laws, operating agreements or partnership agreements.

In response to the RFE, the Petitioner did not provide any additional direct evidence of its ownership. However, it provided a copy of its 2013 IRS Form 1065, U.S. Return of Partnership Income, with Schedules K-1, Partner's Share of Income, Deductions, Credits, etc. These documents indicate that the Beneficiary owns a 90% interest in the petitioning company and [REDACTED] owns a 10% interest.

With respect to the foreign entity, the Petitioner provided a copy of its financial statements and auditor's report, which included the distribution of the foreign entity's nominal shares at page 14. The breakdown shows that of the 323,843 issued shares, the Beneficiary owns 311,423, while two other named individuals each own 6210 shares.

The Petitioner also submitted "An Extraction for the Commercial Register No. [REDACTED] from the Egyptian Ministry of Foreign Affairs, [REDACTED] dated January 26, 2015. The photocopy did not capture the entire document and does not include a company name. The extract shows that the referenced company issued 323,843 shares, is involved in the real estate investment business, and names the Beneficiary as the member and chief of the board of directors with the right "to sell, borrow and drag, deposit and purchase, solo."

Finally, the Petitioner submitted a letter from the foreign entity, signed by the Beneficiary, stating that he is the majority owner of both the U.S. and foreign entities.

The Director denied the petition concluding, in part, that the Petitioner did not establish that it had a qualifying relationship with the Beneficiary's foreign employer. In denying the petition, the Director stated:

In the initial petition you stated that the U.S. entity is an affiliate of the foreign entity and that the U.S. entity owns 51%. However, you only submitted a stock certificate for the U.S. entity, which does not establish sufficient evidence that the foreign entity owns the U.S. entity. In response to the RFE, you submitted financial statements and

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auditor's report for the foreign entity; however, after evaluating the evidence, there was no evidence establishing an affiliate relationship between the foreign and U.S. entities or that the foreign entity owns the U.S. entity.

B. Analysis

Upon review of the petition and the evidence of record, we conclude that the Petitioner has not established that it has a qualifying affiliate relationship with the foreign entity.

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *See Matter of Church Scientology Int'l*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Med. Syss., Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm'r. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology Int'l*, 19 I&N Dec. at 595.

While we disagree with the Director's finding that there is "no evidence" supporting an affiliate relationship, there are deficiencies and omissions in the submitted evidence which prevent us from reaching a favorable finding.

The Petitioner is a limited liability company. As general evidence of a petitioner's claimed qualifying relationship, a certificate of formation or organization of a limited liability company (LLC) alone is not sufficient to establish ownership or control of an LLC. LLCs are generally obligated by the jurisdiction of formation to maintain records identifying members by name, address, and percentage of ownership and written statements of the contributions made by each member, the times at which additional contributions are to be made, events requiring the dissolution of the limited liability company, and the dates on which each member became a member. These membership records, along with the LLC's operating agreement, certificates of membership interest, and minutes of membership and management meetings, must be examined to determine the total number of members, the percentage of each member's ownership interest, the appointment of managers, and the degree of control ceded to the managers by the members. Additionally, a petitioning company must disclose all agreements relating to the voting of interests, the distribution of profit, the management and direction of the entity, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986). Without full disclosure of all relevant documents, USCIS is unable to determine the elements of ownership and control.

The Petitioner's written consent of managers refers to the company's "stock" and "shares," and the Petitioner has submitted a single "share certificate" in lieu of providing copies of membership certificates issued to all of its claimed members. The Petitioner has not explained why a limited liability company would issue shares as if it were a stock corporation. The Petitioner states on

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appeal that its operating agreement was also submitted, but this document is not part of the record of proceedings before us. Overall, the statement of “stock distribution” found in the written consent of the members and managers, and the single share certificate issued to the Beneficiary, provide insufficient evidence of the ownership of the petitioning limited liability company.

Moreover, the written consent of members and managers states that the Petitioner has a total of four owners, and that the Beneficiary owns 51 percent of its “shares.” However, the Petitioner’s 2013 IRS Form 1065 states that the company has only two owners and that the Beneficiary owns a 90 percent interest in the company. While both documents suggest that the Beneficiary is the majority owner, the Petitioner has not resolved the inconsistencies in the record with independent, objective evidence pointing to where the truth lies. *See, Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

With respect to the foreign entity, the Petitioner provided only a breakdown of ownership from the company’s 2014 financial statement and an extract of a commercial registry that does not include the foreign entity’s company name.

As general evidence of a petitioner's claimed qualifying relationship, even stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. For this reason, the ownership information contained in the foreign entity’s financial statement is not sufficient to meet the Petitioner’s burden of proof. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a Petitioner must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362. Again, without full disclosure of all relevant documents, USCIS is unable to determine the elements of ownership and control. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm’r 1998) (quoting *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg’l Comm’r 1972)).

Based on the deficiencies and inconsistencies discussed above, the Petitioner has not established that it has a qualifying relationship with the foreign entity. If the Petitioner had properly filed the appeal, we would have dismissed the appeal based on this finding.

C. Sufficient Physical Premises

As the third and final ground for denial, the Director determined that the Petitioner did not establish that it has sufficient physical premises to conduct its operations.

Specifically, the Director found that the lease that the Petitioner provided in response to the RFE did not indicate how much square footage was included in the leased premises, thus precluding an

assessment of whether the leased premises would accommodate additional employees. The Director further found that the photographs of the leased premises interior, depicting the Beneficiary and one other employee, were not sufficient to show that the leased premises was adequate to enable the Petitioner to continue doing business.

On appeal, the Petitioner disputed the Director's finding and submitted a statement from the landlord of its leased property, indicating that the Petitioner's office includes 400 square feet of space.

Upon review, we find that the Director's adverse finding with regard to the Petitioner's physical premises was not warranted.

The "physical premises" requirement that applies to new offices serves as a safeguard to ensure that a newly established business immediately commence doing business so that it will support a managerial or executive position within one year. *See* 52 FR 5738, 5740 (February 26, 1987). After one year, USCIS "will determine, in [its] discretion, whether the new office is 'doing business' when an extension of the petition is adjudicated." *Id.*; *see also* 8 C.F.R. § 214.2(l)(14)(ii). A petitioner is not absolved of the requirement to maintain "sufficient physical premises" simply because it has been in existence for more than one year. In order to be considered a qualifying organization, a petitioner must be doing business in a regular, systematic and continuous manner. *See* 8 C.F.R. §§ 214.2(l)(1)(ii)(G) and (H). Inherent to that requirement, the petitioner must possess sufficient physical premises to conduct business.

Here, the Petitioner submitted evidence that it has been doing business and provided evidence of a valid lease and color photographs showing that it is occupying the leased premises. Given the nature of the business and its staffing levels at the time of filing, the premises appears to be sufficient to accommodate the employees and allow for the company's continued operations. Accordingly, had this been a properly filed appeal, we would have withdrawn the Director's finding with respect to this single issue.

IV. CONCLUSION

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The motion to reopen is denied.

FURTHER ORDER: The motion to reconsider is denied.

Cite as *Matter of F-D-, LLC*, ID# 16399 (AAO Apr. 26, 2016)