



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

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

MATTER OF E-L- LLC

DATE: MAR. 10, 2016

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

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

The Petitioner, a hotel operator, seeks to extend the Beneficiary's temporary employment as its managing member 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 it has a qualifying relationship with the Beneficiary's foreign employer. The Petitioner subsequently filed an appeal, which we dismissed. We determined that the evidence of record was insufficient to establish a qualifying relationship between the Petitioner and the foreign entity, and further found that the evidence did not establish that the Beneficiary would be employed in a qualifying managerial or executive capacity.

The matter is now before us again on a combined motion to reopen and reconsider. On motion, the Petitioner submits additional evidence and a brief contesting the findings made in our appellate decision with regard to the qualifying relationship issue. In addition, the Petitioner contends that we concluded in error that the Beneficiary would not act in a qualifying managerial or executive capacity.

Upon review, we will grant the motion in part for the purpose of withdrawing our finding that the Beneficiary would not be employed in a qualifying managerial or executive capacity. However, as the Petitioner has not overcome the finding that it does not have a qualifying relationship with the foreign entity, we will deny the remainder of the motion and affirm our decision to dismiss the appeal.

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 3 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.”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.

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.

These provisions are augmented by the related instruction at Part 3 of the Form I-290B, which states: “**Motion to Reconsider:** The motion must be supported by citations to appropriate statutes, regulations, or precedent decisions.”

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).

Here, the Petitioner provided facts supported by evidence that could be considered “new” in support of its motion to reopen. We will grant the motion in part to address the Petitioner’s evidence and withdraw our finding that the Beneficiary would not be employed in a qualifying managerial or executive capacity. However, as the Petitioner has not overcome the finding that it does not have a qualifying relationship with the foreign entity, we will deny the remainder of the motion and affirm our decision to dismiss the appeal.

II. THE LAW

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) states that a petitioner seeking an extension of a petition that involved a “new office” must submit the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

(b)(6)

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III. QUALIFYING RELATIONSHIP

The first issue to be addressed is whether the Petitioner has established that it has a qualifying relationship with the Beneficiary's foreign employer.

The pertinent regulations at 8 C.F.R. § 214.2(l)(1)(ii) define the term "qualifying organization" and related terms as follows:

(G) *Qualifying organization* means a United States or foreign firm, corporation, or other legal entity which:

(1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section;

.....

(I) *Parent* means a firm, corporation, or other legal entity which has subsidiaries.

.....

(K) *Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

(L) *Affiliate* means

(1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or

(2) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

A. Facts and Procedural History

On the Form I-129, the petitioner stated that it is an affiliate of [REDACTED] located in India, based on common ownership by the Beneficiary (3,300 shares), [REDACTED] (3,300 shares), and [REDACTED] (3,400 shares).

(b)(6)

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As evidence of the foreign entity's ownership, the Petitioner provided a copy of its certificate of incorporation filed in India on [REDACTED] as well as a Memorandum and Articles of Association corroborating the ownership of the foreign entity as stated in the Form I-129. The memorandum includes a chart depicting shares subscribed by the individuals, as listed above. The Petitioner submitted a number of documents relating to the foreign entity, including bank records from 2013 and 2014, a tax return for 2013, and an unaudited balance sheet dated March 31, 2013 with a footnote referencing the aforementioned shareholders.

The Petitioner submitted a copy of its own certificate of formation filed with the State of Texas on January 24, 2013 identifying the foreign employer as its managing member. Further, the Petitioner submitted a copy of the Beneficiary's 2013 IRS Form 1040, U.S. Individual Income Tax Return, including Schedule C, Profit or Loss from Business, naming the Beneficiary as the proprietor/sole member of the petitioning company.

The Director issued an RFE on July 29, 2014, advising the Petitioner to provide all evidence relating to any franchise agreements necessary for the Petitioner's operation of its [REDACTED]. In addition, the Director requested additional evidence relating to the qualifying relationship such as: meeting minutes; stock purchase agreements; stock certificates; a stock ledger; proof of stock purchase or capital contribution in exchange for ownership such as wire transfer receipts, bank statements, and canceled checks; documents outlining the details of investment in the company; articles of incorporation or bylaws with names of members and percentage of their membership interests; partnership agreement and registration documents with the names of partners and limits of their liability; and the franchise purchase agreement.

In response to the RFE, the Petitioner submitted additional documents including a copy of its franchise agreement with [REDACTED]. The agreement provides the Petitioner with the authority to direct and control the [REDACTED] franchise.

In a letter dated October 23, 2014, the Petitioner explained that the foreign entity is its managing member and identified the foreign entity's members as the Beneficiary, [REDACTED] and [REDACTED]. The Petitioner further explained that the three members listed above gave authority to the Beneficiary to act on behalf of the foreign entity with regards to the Petitioner.

Further, the Petitioner submitted an undated operating agreement signed by the Beneficiary, [REDACTED] and [REDACTED]. The agreement identified the Beneficiary as the initial company manager and defined "member" as any person executing the operating agreement as of the date of the agreement. Section 4.01 "Initial Contribution" indicated that each member would make a capital contribution "contemporaneously" with the execution of the agreement as set forth in Exhibit A. Exhibit A reflected that the asserted members would make the following contributions for the indicated participation:

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<u>Name and Address Each Member</u>	<u>Initial Capital Units of Commitment</u>	<u>Participation</u>
[Beneficiary]	\$330.00	33
[REDACTED]	\$340.00	34
[REDACTED]	\$330.00	33

The Petitioner also submitted a letter from its accountant dated October 22, 2014, acknowledging that he prepared the Petitioner's 2013 tax return as a sole member LLC. The accountant explained that "it was identified" later that the Petitioner "has three members and based on that, the tax return should be prepared as a partnership." The accountant states that he corrected this error and sent the corrected forms to the Petitioner.

The Petitioner provided a copy of its 2013 IRS Form 1065 U.S. Return of Partnership Income filed with the IRS on October 20, 2014. The Form 1065 indicates at Schedule B, Other Information, line 16, that it has a single partner and the accompanying Schedule K-1 states that the foreign entity is the sole owner of the Petitioner.

In addition, the Petitioner submitted a letter dated October 23, 2014, explaining that the Beneficiary, [REDACTED] and [REDACTED] each executed the foreign entity's memorandum and articles of association as company members and executed the Petitioner's operating agreement as members.

The Director denied the petition, finding that the Petitioner had not established that it had a qualifying relationship with the foreign entity. The Director stated that the submitted evidence indicated that the Petitioner did not have ownership and control over the company. The Director emphasized the Petitioner's franchise agreement with [REDACTED] and concluded that this demonstrated that [REDACTED] exercises control over the Petitioner. The Petitioner later filed an appeal contending that the Director had denied the petition in error.

We dismissed the appeal in a decision issued on July 27, 2015. In that decision, we withdrew the Director's analysis and comments with respect to the franchise agreement, finding that the Director had not appropriately focused on the ownership and control of the Petitioner and the foreign entity. However, after reviewing the evidence, we nevertheless concluded that the Petitioner had not demonstrated that it has a qualifying relationship with the foreign entity.

In dismissing the appeal, we found that the record contained conflicting evidence of the Petitioner's ownership. Specifically, we observed that the Petitioner asserted, and its operating agreement indicated, that it has three members. However, the Petitioner's certificate of formation and 2013 IRS Form 1065 indicated that the foreign entity was the sole member of the company, while the Beneficiary's 2013 IRS Form 1040 reflected that the Beneficiary was the sole member and owner of the company. Furthermore, we noted that the Petitioner did not submit evidence to establish that the

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asserted members of the company made capital contributions as specified in the operating agreement.

On motion, the Petitioner states that “the individual owners of both the foreign entity and U.S. entity are [the Beneficiary], [REDACTED] and [REDACTED]” The Petitioner contends that it “complied with the filing and name requirements set forth under the [Texas Business Organization Code (TBOC)] by registering with the Secretary of State” and by listing the foreign business entity, [REDACTED] as its managing member. The Petitioner further asserts that any perceived inconsistencies between the Certificate of Formation and Operating Agreement “are a misconstruction by the AAO of applicable Texas laws relating to Limited Liability Companies.” Further, the Petitioner states that it reasonably relied on a licensed Texas attorney to interpret Texas law and to draft and file its corporate documentation. The Petitioner asserts that we should take issue with that attorney, and not the Petitioner, with respect to any perceived errors in these documents.

The Petitioner submits Title 3, Chapter 101 of Texas Code relevant to limited liability companies as evidence of these applicable laws. Section 101.052(2)(d) “Company Agreement” of the aforementioned section of Texas code states “the company agreement may contain any provisions for the regulation and management of the affairs of the limited liability company not inconsistent with law or the certificate of formation.”

The Petitioner also provides what it states is evidence of capital contributions made by its members in the form of Indian bank statements for each individual named in the Petitioner’s operating agreement. However, none of the submitted statements clearly shows a transfer of funds from the claimed members to the Petitioning company. The statements reflect that [REDACTED] had an outgoing transfer of \$75,000 on October 9, 2013; the Beneficiary had an outgoing transfer of \$65,000 on October 7, 2013; and [REDACTED] had an outgoing funds transfer of \$75,000 on October 7, 2013.

Lastly, the Petitioner addresses the inconsistencies in its federal income tax returns. The Petitioner asserts that the Beneficiary’s IRS Form 1040C, which identified him as the sole owner of the company, was due to “an error in the Petitioner’s professional CPA’s understanding of the Petitioner’s business entity documentation.” The Petitioner states that its CPA subsequently filed a revised IRS Form 1065 “upon realizing that the company had three members,” but that the Internal Revenue Service did not accept the filing of this document. The Petitioner’s counsel explains that “it is unclear to the undersigned counsel what is required for filing a partnership tax return, and why the IRS rejected the filing.”

The Petitioner provides a copy of the rejection letter from the IRS which explains the reason for the rejection, and submits a copy of the Beneficiary’s 2014 IRS Form 1040 which indicates at Schedule C that he owns the Petitioner as the sole member of the limited liability company.

B. Analysis

Upon review of the evidence submitted on motion, we find that the Petitioner has not provided sufficient evidence to overcome the discrepancies we noted in our previous decision. We will not disturb our previous finding as the evidence does not establish that the Petitioner has a qualifying relationship with the foreign entity.

The Petitioner asserts that it is owned by the same three individuals who own the foreign entity. However, as we noted in our previous decision, the Petitioner's certificate of formation indicates that the foreign entity is the sole managing member of the company. The Petitioner now asserts that Texas law applicable to limited liability companies accounts for the discrepancy between the Petitioner's undated operating agreement and its certificate of formation. We do not find this assertion persuasive. In fact, pertinent sections of the cited chapter of Texas code indicate otherwise. For instance, Section 101.052(2)(d) "Company Agreement" states that "the company agreement may contain any provisions for the regulation and management of the affairs of the limited liability company not inconsistent with law or the certificate of formation," suggesting that applicable law would not allow for a discrepancy in stated ownership between the certificate of formation and the operating agreement. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The Petitioner also asserts that if there were any errors in the preparation of its formation documents, they must be attributed to the licensed Texas attorney who drafted and filed those documents and not to the Petitioner. However, we note that it is the Petitioner's burden to establish eligibility for the classification sought and the Petitioner cannot expect us to overlook discrepancies in evidence simply because it relied upon an attorney to prepare the documentation. The Petitioner has not provided a statement from the attorney who prepared the documents or indicated that it has sought to prepare or file any amendments. 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) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)). In fact, the Petitioner appears to claim that its formation documents were prepared correctly under Texas law while simultaneously conceding that they may contain errors or inconsistencies.

The Petitioner also asserts that the discrepancies in its ownership as reported in its tax returns were made by its CPA. As noted previously, the Petitioner submitted a copy of the Beneficiary's 2013 IRS Form 1040 naming the Beneficiary as the Petitioner's sole owner and a 2013 IRS Form 1065 reflecting that the foreign entity was the sole owner of the Petitioner.

The Petitioner provided a letter from its CPA in which he states that he learned after preparing the Beneficiary's Form 1040 that the Petitioner has three members, but there is no explanation as to why he would then prepare and file a Form 1065 identifying the foreign entity as the sole member of the

Petitioning company. The Petitioner also did not provide evidence that the Beneficiary filed an amended Form 1040 for 2013.

The Petitioner now submits evidence that its 2013 Form 1065 was ultimately rejected, along with a letter of explanation from the IRS. However, the Petitioner again does not explain why the rejected 2013 tax return identified the foreign entity as its sole owner when both the Petitioner and its CPA have stated elsewhere that the Petitioner is owned by three individuals. In fact, on motion, it provides evidence that for the 2014 tax year, the Beneficiary once again filed a Form 1040 with a Schedule C which identifies him as the Petitioner's sole owner.

Again, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92. None of the Petitioner's submitted tax returns show that it is owned by the same three individuals who own the foreign entity.

Lastly, we also determined in our previous decision that the Petitioner did not submit evidence to substantiate that its three asserted members had made capital contributions to the company as necessary to establish their membership. On motion, the Petitioner submits bank statements of the members in support of its assertion that they made capital contributions to the company. While each of the submitted bank statements shows a wire transfer of \$65,000 to \$75,000 made in U.S. currency, they do not show that the funds were transferred to the Petitioner, and the Petitioner's October 2013 bank statement does not show incoming wire transfers in these amounts. In addition, these claimed capital contributions occurred more than eight months after the certificate of formation was filed in January 2013, contrary to the terms of the operating agreement which indicates that the initial contributions were to be made contemporaneously with the execution of the agreement. In sum, the Petitioner's additional evidence meant to document the capital contributions of its three claimed members does not demonstrate their membership in the company.

In sum, the Petitioner has not shown that this portion of our decision was incorrect based on the evidence before us at the time we dismissed the appeal, nor has it shown that it was based on an incorrect application of law or policy. Further, the new evidence submitted does not overcome our previous decision. For these reasons, we will affirm our previous decision.

IV. MANAGERIAL OR EXECUTIVE CAPACITY

The remaining issue to be addressed is whether the Petitioner established that the Beneficiary would be employed in a qualifying managerial or executive capacity. Although the issue was not addressed in the Director's decision, we found on appeal that the position description provided for the Beneficiary did not adequately describe his day-to-day duties. Further, we noted discrepancies in the Petitioner's quarterly wage and tax documentation with respect to the number of employees working at the time of filing. Finally, we found that, given the scope and nature of the business, the totality

of the evidence did not establish that the Beneficiary would be free to engage in primarily managerial or executive duties.

On motion, the Petitioner asserts that we erred in reaching this conclusion and provides an explanation for the noted discrepancy in the quarterly wage and tax documents. The Petitioner provides a more specific description of the Beneficiary's day-to-day duties and also points to the Beneficiary's subordinate supervisors and contends that they, and their subordinates, relieve the Beneficiary from first line supervision and the need to spend a significant portion of his time on non-qualifying duties.

In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). Upon reviewing the entire record of proceedings, including the information provided on motion, we conclude that the Petitioner has established by a preponderance of the evidence that the Beneficiary would more likely than not be employed in a qualifying managerial capacity. As such, our previous conclusion to the contrary is hereby withdrawn.

V. CONCLUSION

In visa petition proceedings, it is the Petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Accordingly, the combined motion will be denied in part and granted in part, and our previous decision will not be disturbed.

ORDER: The motion to reopen is denied in part and granted in part.

FURTHER ORDER: The motion to reconsider is denied.

Cite as *Matter of E-L- LLC*, ID# 15811 (AAO Mar. 10, 2016)