



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

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

MATTER OF N-A-B-, INC.

DATE: SEPT. 12, 2016

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

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

The Petitioner, a restaurant operator, seeks to temporarily employ the Beneficiary as its president 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 a managerial or executive capacity.

The Director, Vermont Service Center, denied the petition. The Director determined that the evidence of record did not establish that: (1) the Beneficiary would be employed in a managerial or executive capacity; and (2) the Petitioner has a qualifying relationship with the Beneficiary's foreign employer. We summarily dismissed the Petitioner's subsequent appeal because the record showed that the Petitioner did not submit a brief or otherwise identify an erroneous conclusion of law or statement of fact in the Director's decision.

The matter is now before us on a motion to reopen. On motion, the Petitioner provides evidence that it submitted a timely brief in support of its appeal and asserts that the deficiencies in the record were due to the ineffective assistance of counsel.

We will reopen the matter for the purpose of considering the appellate brief and the merits of the appeal. However, as the Petitioner has not overcome the original grounds for denial, we will deny the motion.

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 U.S. Citizenship and Immigration Services (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).

II. DISCUSSION

We summarily dismissed the Petitioner’s appeal, because the appeal, as presented to us, did not identify any erroneous conclusion of law or statement of fact in the Director’s denial of the petition. See 8 C.F.R. § 103.3(a)(1)(v).²

On motion, the Petitioner submits a copy of an appellate brief with supporting exhibits. The Petitioner provides evidence that it timely submitted these materials to supplement the appeal but, for reasons the record does not reflect, they did not reach the record of proceeding.

Accordingly, we will grant the motion to reopen in part, because the appellate brief and supplemental evidence were not available to us at the time of our prior decision. While the

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, and such instructions are incorporated into the regulations requiring its submission.”

² The Petitioner submitted no brief or evidence with its Form I-290B, Notice of Appeal or Motion, but stated that it would submit those materials in support of its appeal within 30 days. When we reviewed the record of proceeding several months later, it did not include any supplement to the appeal.

Petitioner has not overcome the grounds for denial, the Petitioner's timely submission of substantive appellate materials entitles the Petitioner to a decision on the merits.

III. LEGAL FRAMEWORK

To establish eligibility for the L-1 nonimmigrant visa classification, a qualifying organization must have employed the Beneficiary in a 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. Section 101(a)(15)(L) of the Act. 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. *Id.*

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129, Petition for a Nonimmigrant Worker, 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.

IV. U.S. EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY

The Director denied the petition, in part, based on a finding that the Petitioner did not establish that the Beneficiary will be employed in the United States in a managerial or executive capacity.

The Petitioner does not claim that the Beneficiary will be employed in a managerial capacity. Therefore, we will 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, 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.

A. Evidence of Record

The Petitioner filed the Form I-129 on March 13, 2015. The Petitioner stated that it operates a sushi restaurant, that it employed 23 individuals as of the date of the petition, and that it earned just over \$2.2 million in revenue during 2013. The Petitioner indicated that the Beneficiary would act as president and “plan and direct all restaurant operations,” “maintain high standards of food, service, health and safety,” and ensure “optimal utilization of staff and resources.”

In addition, the Petitioner provided the following duty description for the Beneficiary:

- Oversee and manage all aspects of the company’s goals. Evaluate projected vs. accomplished goals. Evaluate and review the products and services offered by the company to ensure client’s satisfaction and fulfillment of quality standards. (*8 hours per week*).
- Formulate policies and objectives and carry out periodic evaluations regarding the completion of these goals. Establish priorities aimed at strengthening the Company’s long-term strategies, goals and objectives for expansion. Implement changes to policies based on market demands, such as effective pricing, quotations and terms of sale policies and procedures, and price conflict resolution (*10 hours per week*).
- Control and coordination of first line managers in charge of administrative and operations departments in the company. Continuously monitor the productivity of

the employees not only to ensure optimal output, but also to create new procedures or re-organize existing processes. (*8 hours per week*).

- Oversee all staff related issues, including the power to hire, promote and fire. Also, coordinate and schedule workloads, as well as upper management staff retention. (*3 hours per week*).
- Control budget-operating expenses, profit & loss, marketing and sales strategies. (*2 hours per week*).
- Develop and implement new systems to make the business overall performance better, according to new technologies and market needs. Study and analyze market patterns on demand/supply for company's products. (*3 hours per week*)
- Establish customers credit policies. (*2 hours per week*).
- Define marketing strategies in order to increase sales. (*1 hour per week*).
- Perform a general supervision of the consulting services. (Legal and accounting). [*3 hours per week*]

The Petitioner provided an organizational chart reflecting that the Beneficiary would oversee a vice president, who in turn would supervise an operations manager and a financial manager. The chart further reflected that the operations manager would oversee six cooks, nine waiters, two dishwashers, and two employees listed as "other."

The Petitioner submitted position descriptions for the Beneficiary's two direct subordinates. The Petitioner stated that the company had a financial and administrative manager tasked with analyzing "financial information to forecast business," "records of financial transactions," and budgets, as well as preparing "balance sheet[s], profit and loss statement[s], amortization and depreciation schedules and other financial reports" and reporting and advising "management about resource utilization, and assumptions underlying budget forecasts." The Petitioner indicated that it also employed an operations manager who would be responsible for directing and coordinating "activities of the department with the pricing, sales, and distribution of products," reviewing "financial statements, sales and activity reports," "determin[ing] areas needing cost reduction and program improvement," "establish[ing] and implement[ing] departmental policies, goals, objectives, and procedures," and overseeing "activities directly related to providing services." Lastly, the Petitioner provided a duty description for "servers and waiters" who are responsible for greeting customers and providing service.

The Petitioner provided a copy of a diploma indicating that the operations manager had received a degree in electrical engineering from an industrial college in China and that the financial manager had earned a bachelor of arts degree in sociology and criminal justice.

The Petitioner submitted an IRS Form 941 Employer's Quarterly Federal Tax Return and a Florida Department of Revenue Quarterly Report for the fourth quarter of 2014 reflecting that it employed 20 individuals during that quarter. The aforementioned state wage report indicated that the vice president earned \$4,500 and the operations manager had been paid \$9,750, but it did not reflect any wages paid to the asserted financial manager for that quarter.

The Director later issued a request for evidence (RFE) emphasizing that the evidence did not demonstrate that the Beneficiary would be sufficiently relieved from performing non-qualifying operational tasks. The Director noted that the Petitioner did not provide a duty description for its asserted vice president. As such, the Director requested that the Petitioner submit a letter detailing the Beneficiary's expected executive decisions and an explanation of how she would direct the management of the organization and establish its goals and policies. Further, the Director asked the Petitioner to provide a complete organizational chart listing all of its employees, including their job titles, duties, education levels, and salaries.

In response, the Petitioner stated that "the unwritten law that an executive must supervise at least two professionals is complied with as to the U.S. company." The Petitioner also submitted a support letter dated April 9, 2015, signed by the Beneficiary. The Beneficiary explained that the former sole owner of the Petitioning company, who holds the title of vice president, "is not active in the day to day operation of the enterprise." The Beneficiary stated that there are "two professional employees among the 17 total employees, the financial manager and the operations manager."

The Beneficiary stated the following with respect to her proposed role in the United States:

In order for [the financial manager] to carry out his work and for me to be aware of all financial information pertaining to the company I have weekly meetings with the person in which we discuss the current financial condition of the company, compliance with the budget, revision of the budget if necessary, cost analysis of purchases made for the restaurant, any new tax issues or regulatory requirements of which I need to be aware. The person submits monthly written reports concerning all issues as well.

I also liaise with the Operations Manager. This person is in charge of among other things the 6 cooks that work at [the restaurant]. I approve for any new cooks after he has first interviewed them. As the restaurant business has high employee turnover, this happens frequently. Also, although he has primary responsibility for both training and oversight of these cooks, I also make sure that their food is properly prepared and on occasion may train a new chef as to how to prepare a particular dish.

I have daily informal meetings with this person and a more formal meeting once a week. He is also delegated responsibility for cost control of food purchases and insuring that such purchases are of the highest quality. I as the President merge

the budget information from the Financial Manager and the information from the Operations manager about costs, pricing of meals, etc. to determine the final budget, which is an ongoing not yearly process. Also as this person has been in the country much longer than I have, I coordinate with him about how to do marketing in South Florida and base publicity etc on his insights. I oversee him as regards to implementation of company policies regarding personnel productivity and quality control and receive his full reports but have final authority in deciding if these matters are being carried out in the correct manner.

The Petitioner did not submit the requested detailed organizational chart identifying all employees by name, position title, salary, and educational qualifications.

In denying the petition, the Director found that the Petitioner had made material changes to the Beneficiary's duty description in response to the RFE. The Director stated that it was not apparent from the evidence submitted who was responsible for the day-to-day non-qualifying operational functions of the business, such as marketing, sales, personnel, and administrative activities. The Director concluded that the Petitioner did not establish that the Beneficiary would be primarily engaged in performing managerial or executive tasks.

In its brief, the Petitioner asserts that the Beneficiary qualifies as an executive, noting that it currently employs 32 individuals and that it had 22 employees as of the date of the petition. The Petitioner states that the Director overemphasized the Beneficiary's focus on sales and marketing activities and points to the fact that she would devote only one hour per week to these tasks. The Petitioner contends that it did not make material changes to the petition in response to the Director's RFE. The Petitioner asserts that the Beneficiary's subordinate managers and other operational employees would relieve her from performing non-qualifying duties.

In support of the motion, the Petitioner provides additional evidence. The Petitioner submits a letter from the Beneficiary, and affidavits from the Beneficiary and the asserted vice president of the company. The Petitioner provides the same organizational chart previously provided on the record. The Petitioner submits an IRS Form 941 from the first quarter of 2015 indicating that it employed 33 employees as of March 12, 2015.³ A corresponding Florida employer's quarterly report reflects that the Petitioner paid its vice president \$4500, its operations manager \$10,350, and its financial manager \$3750 during the first quarter of 2015.

B. Analysis

Upon review of the petition and the evidence of record, including materials submitted in support of the appeal and motion, we conclude that the Petitioner has not established that the Beneficiary would be employed in an executive capacity in the United States.

³ This evidence is inconsistent with the Petitioner's claim that it employed 22 to 23 employees at the time the petition was filed.

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.* As noted, the Petitioner indicates that the Beneficiary will be employed in an executive capacity.

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 (9th Cir. 1991) (unpublished table decision). 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*, 940 F.2d 1533.

In the current matter, the Petitioner has submitted a vague duty description that does not demonstrate that the Beneficiary would devote her time primarily to qualifying executive tasks. Although the Petitioner submits a lengthy duty description for the Beneficiary, the description is so general that the listed tasks and responsibilities could apply to any manager or executive in any company or industry. For instance, the description indicates that the Beneficiary would be responsible for overseeing and managing "all aspects of the company," "implementing the "company's goals," ensuring "client's satisfaction," formulating "policies and objectives," "establish[ing] priorities aimed at strengthening the Company's long-term strategies," "control and coordination of first line managers," "creat[ing] new procedures or re-organiz[ing] existing processes," overseeing "all staff related issues," controlling "budget-operating expenses" and "marketing and sales strategies," developing and implementing "new systems[...]according to new technologies and market needs," establishing "customers credit policies," and supervising "consulting services," amongst several other vague duties.

However, the Petitioner has not articulated or provided supporting documentation to substantiate the Beneficiary's performance of the above-stated duties. The Petitioner provides no details or documentation to clarify and corroborate goals the Beneficiary will set, policies and objectives she will formulate, priorities she will establish, new procedures or processes she will create, staff she will hire, expenses she will manage or delegate, marketing and sales strategies she will set, new systems of technology that will be utilized, or consulting services she will supervise. It is reasonable to expect that the Petitioner would have provided some detail and documentation regarding the specific qualifying duties the Beneficiary will perform. Indeed, without further elaboration, several of the vague duties appear incongruent with the Petitioner's restaurant business, including overseeing the implementation of new technology, establishing credit policies, and supervising consultants who have not otherwise been identified or documented on the record. Reciting a beneficiary's vague job responsibilities or broadly cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

In fact, to the extent the Petitioner provides detail regarding the Beneficiary's actual day to day tasks, these duties leave question as to whether she will be primarily engaged in qualifying duties. In the letter submitted in response to the Director's RFE, the Beneficiary stated that she will be substantially engaged in non-qualifying tasks related to the daily operation of the business. For instance, the Beneficiary stated that she will be involved in hiring all employees, training cooks, and reviewing daily reports from her subordinates on the business. In contrast, the Beneficiary's letter does not include any examples of the policies, objectives, priorities, procedures, processes or strategies in which she will be engaged. The Beneficiary states that she would delegate responsibility for cost control and food purchases to her operational manager and that she will only receive feedback from this employee with respect to these non-qualifying operational matters. However, the Petitioner provides no supporting evidence to substantiate that the asserted operations and financial managers, along with the vice president, will relieve her from performing non-qualifying duties related to the running of the restaurant. Indeed, the Beneficiary's duty description indicates that she will spend only eight hours per week "controlling and coordinating" her first line managers.

The fact that the Beneficiary will manage or direct a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 101(a)(44) of the Act. By statute, eligibility for this classification requires that the duties of a position be "primarily" of an executive or managerial nature. Sections 101(A)(44)(A) and (B) of the Act. While the Beneficiary may exercise discretion over the Petitioner's day-to-day operations and possess the requisite level of authority with respect to discretionary decision-making, the position descriptions alone are insufficient to establish that her actual duties, as of the date of filing, would be primarily executive in nature.

Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the company's organizational structure, the duties of a beneficiary's subordinate employees, the presence of other employees to relieve a beneficiary from performing operational duties, the nature of the business, and any other factors that will contribute to understanding a beneficiary's actual duties and role in a business.

On motion, the Petitioner contends that the Beneficiary qualifies as an executive. 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. 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 a beneficiary to direct and they 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. A 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.*

The Petitioner claims that the Beneficiary will oversee two subordinate managers who will relieve her from involvement in the day-to-day operations of the restaurant, as well as from supervision of lower-level restaurant personnel. However, the Petitioner has not clearly or consistently identified the duties performed by these subordinate employees. At the time of filing, the Petitioner submitted a duty description for the operations manager reflecting significant overlap with the Beneficiary’s own duties. For instance, the operations manager’s duty description states that he is also responsible for directing and coordinating activities, reviewing financial statements and activity reports, measuring productivity and goal achievement, establishing and implementing departmental policies, goals, objectives and procedures, and setting pricing and credit policies. In a letter submitted in response to the RFE, the Beneficiary asserted that the operations manager is responsible for many of the normal day-to-day operational tasks inherent to running a restaurant, such as buying supplies and food, hiring and training cooks, and supervising its servers. However, none of these tasks were included in the operations manager’s duty description. Given this vagueness, and the apparent discrepancies in the operations manager’s duty description, the record does not establish that the operations would relieve the Beneficiary from performing non-qualifying tasks associated with the restaurant’s daily operations.

Further, as noted, the Beneficiary stated that she would be involved in training employees and checking the quality of food preparation, suggesting that she is engaged in non-qualifying operational duties normal to the running of a restaurant. In contrast, the Petitioner asserts that this is exclusively the realm of the operational manager and that this employee oversees all kitchen and wait staff during all of the company’s operating hours. The Petitioner did not explain how this one employee could be solely responsible for supervising all the restaurant’s dining room and kitchen staff during all of its hours of operation, which likely extend well past a 40 hour work week. In fact, given the lack of other supervisory staff, it seems more likely that the Beneficiary devotes a significant portion of her time to supervising the day-to-day operations of the restaurant, as is reflected in her own affidavit, indicating her involvement in food preparation and training.

Otherwise, the Petitioner provides little detail and evidence indicating that the financial manager or the vice president would relieve the Beneficiary from significant involvement in the operational aspects of the business. With respect to the vice president, the Petitioner has not set forth any duties and the Beneficiary states on the record that the vice president is “not active in the day to day operation of the enterprise.” Further, in the case of the financial manager, the Petitioner again provides vague duties and responsibilities for this asserted subordinate which are not indicative of an employee working for a restaurant. In addition, the financial manager’s duties, which include analyzing financial information, financial transactions, budget forecasts and financial reports, also overlap significantly with the Beneficiary’s and operations manager’s duties. The Petitioner has not established that it would need three employees so significantly focused on financial matters given the scope and nature of the business.

In the Form I-129, the Petitioner indicated that the company had 22 employees. In response to the RFE, the Beneficiary stated that the Petitioner has “two professional employees among the 17 total employees.” Further, the Petitioner’s IRS Form 941 and Florida Employer’s Quarterly Report for the first quarter of 2015 both indicate that the company had 33 employees. However, the Petitioner submitted in response to the RFE, and submits on appeal, the same organizational chart, which does not reflect the apparent changes in the company’s staffing levels indicated in its statements and tax documentation. These discrepancies between the number of employees and the organizational chart leave question as to whether the Petitioner was employing, and continues to employ, its asserted employees, including the claimed managers subordinate to the Beneficiary. The Petitioner has not resolved these inconsistencies with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Therefore, in sum, the Petitioner has not provided sufficient evidence to demonstrate that the Beneficiary acts in an executive capacity. The Petitioner has not established that the Beneficiary operates within a complex organizational hierarchy or that she oversees major components of the organization. Indeed, the Beneficiary’s duties and the duties of her subordinates, appear to indicate that she would work side by side with her subordinates on all matters involving the day-to-day operation of the business. Further, the evidence does not indicate that she will primarily direct the management or that she will establish the goals and policies of the organization. In fact, as mentioned, the Petitioner did not articulate or document any detailed qualifying tasks the Beneficiary would perform. As noted, 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 Petitioner must demonstrate with clear and objective evidence that the Beneficiary will be primarily engaged in the performance of executive level tasks, and here, the Petitioner has not submitted sufficient evidence to demonstrate this.

Based on the deficiencies and inconsistencies discussed above, the Petitioner has not established that the Beneficiary will be employed in an executive capacity.

V. QUALIFYING RELATIONSHIP

The Director also denied the petition based on a finding that the Petitioner did not establish that it had a qualifying relationship with the Beneficiary’s foreign employer.

To establish a “qualifying relationship” under the Act and the regulations, the 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).

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

(b)(6)

Matter of N-A-B-, Inc.

(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 (1)(1)(ii) of this section;

.....

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

(J) *Branch* means an operating division or office of the same organization housed in a different location.

(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. 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. The Petitioner further indicated in the Form I-129 that the foreign entity owned 50% of the Petitioner.

In a support letter written provided along with the petition, the Petitioner's former counsel stated that "the beneficiary owns 50% of the U.S. company and 60% of the foreign company." However, in another support letter from the Petitioner, it stated that it was 50% owned by [REDACTED]

The Petitioner submitted articles of incorporation dated October 15, 2012, indicating in Article VII that "the initial board of Directors shall consist of one person" listed as [REDACTED] acting as

(b)(6)

Matter of N-A-B-, Inc.

director, president, secretary, and treasurer. The Petitioner provided a share certificate no. 1, dated December 8, 2014, reflecting that the Beneficiary holds 50 shares of the company. There was no indication that the original shareholder, [REDACTED] had transferred the shares. The Petitioner submitted share certificate no. 2, also dated December 8, 2014, specifying that [REDACTED] owns 50 company shares. Further, the Petitioner provided a 2014 IRS Form 1120S, U.S. Income Tax Return for an S Corporation, which indicates at Schedule K-1 that 100% of its stock was owned by [REDACTED] as of December 31, 2014.

With respect to the foreign entity, the Petitioner submitted several corporate documents indicating changes in ownership in the foreign entity. The most recent document, dated August 5, 2014, indicated that 10,000 shares in the company were owned by [REDACTED] and 10,000 by the Beneficiary. In a separate support letter from the foreign entity written by the Beneficiary, she stated “in 2014, a capital increase of the company was approved, where I remained in charge of 60% of the shares and thus the majority shareholder of [the foreign entity].”

In the RFE, the Director noted the apparent discrepancy in the Petitioner’s ownership between the submitted share certificates and Schedule K-1 in the company’s 2014 IRS 1120S. As such, the Director requested additional evidence to substantiate the company’s ownership, including meeting minutes, stock purchase agreements, stock certificates that had been issued to date, a stock ledger, and/or proof of consideration paid for any stock.

In response, the Petitioner stated that “50% of the [Petitioner’s] shares were transferred to [the Beneficiary] at the very end of 2014,” pointing to the share certificates dated in December 2014, which were previously submitted on the record. Further, the Beneficiary submitted a response letter stating “the Vice President [listed as [REDACTED] in submitted organizational charts] is the former 100% shareholder of the enterprise before I purchased 50% of the stock on behalf of [REDACTED].”

In denying the petition, the Director pointed to discrepancies between the Petitioner’s share certificates and its assertions regarding its stated ownership. Specifically, the Director stated that the Petitioner’s 2014 IRS Form 1120S indicated that the company was wholly owned by one individual, that its assertions and stock certificates reflected that it was 50% owned by the Beneficiary, whereas the petition and other documentation stated that the company was 50% owned by the foreign employer.

On motion, the Petitioner submits a brief in which it states that it is a subsidiary of the foreign entity. The Petitioner asserts that due to the ineffective assistance of former counsel, it mistakenly communicated that the Beneficiary owns 50% of the company’s shares and that the two entities are affiliates. The Petitioner submits a support letter from the foreign entity stating that it purchased 50% of the common stock of the Petitioner from [REDACTED] on December 8, 2014.

The Petitioner submits an “Agreement for Sale and Purchase of Stock” dated December 8, 2014 reflecting the foreign entity’s purchase of 50 shares, or 50% of the company’s outstanding stock at

Matter of N-A-B-, Inc.

that time, from [REDACTED] for \$33,888.⁴ The foreign entity states in a letter, and the Beneficiary in an affidavit, that it did not submit this document previously due to the error of former counsel. Further, both parties state that former counsel asked the Beneficiary to issue stock certificates, and through a clerical error on the part of the Beneficiary, she put her own name, rather than the foreign entity's name, on the share certificate. The Beneficiary indicates that former counsel did not inform the Petitioner of this error and stated she believed that "since [s]he purchased it for [the foreign entity], the stock certificate should be fine." In addition, the Petitioner provides an affidavit from [REDACTED] confirming that the foreign entity purchased 50 shares from her on December 8, 2014 for \$33,888. Further, the Petitioner, Beneficiary, and [REDACTED] all indicate that the foreign entity's 50% ownership interest in the Petitioner as of December 8, 2014, was not reflected in its 2014 IRS Form 1120S because no distribution of dividends to the foreign entity had taken place during that year.

The Petitioner also submits additional documentation meant to substantiate the foreign entity's purchase of 50 shares in December 2014. For instance, it provides a check for \$33,888 made out to [REDACTED] and remitted by the Beneficiary on December 8, 2014. The Petitioner also submits a stock transfer ledger indicating that it has issued five certificates. The first share certificate reflects the issuance of 50 shares to the Beneficiary on December 8, 2014, and is identified as cancelled on the same date due to a "clerical error." The second share certificate reflects the transfer of 50 shares to [REDACTED] on December 8, 2014 and notes that she "originally owned 100 shares [but] sold 50 shares to [the foreign entity] on 12/8/14." In addition, the third share certificate indicates the issuance of 50 shares to the foreign entity on December 8, 2014 and the stock ledger states that "[the foreign entity] obtained 50 shares on 12/8/14, but due to clerical errors, the certificate was issued to [the Beneficiary]." Further, the ledger indicates that "on 8/27/2015 a new certificate was issued to the [foreign entity] to reflect the corrections."

B. Analysis

Upon review of the petition and the evidence of record, including materials submitted in support of the appeal, we conclude that the Petitioner has not established that it has a qualifying 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. Sys., 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

⁴ The Petitioner further submits another stock purchase agreement indicating that [REDACTED] agreed to sell another five shares to the foreign entity on August 7, 2015, for \$3388 resulting in the foreign entity's ownership of 55% of the company's stock. However, given that this claimed transaction took place after the filing of the petition, it cannot establish the Petitioner's eligibility and we will not discuss it further. 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 at a future date after the Petitioner or Beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg'l Comm'r 1978).

(b)(6)

Matter of N-A-B-, Inc.

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.

The Petitioner has not sufficiently explained the discrepancies in the record pertaining to its ownership. On motion, the Petitioner provides a stock purchase agreement supporting its assertion that the foreign entity purchased 50 shares in the company in December 2014. However, although the Petitioner provides a copy of a check made out to [REDACTED] in the amount of \$33,888 from the Beneficiary, there is no supporting evidence that [REDACTED] received this payment or that these funds originated from the foreign entity. 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 Cal.*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

Further, the provided stock ledger itself includes inconsistencies that leave further question as to whether this transaction took place. For instance, the ledger reflects that the first share certificate issued 50 shares to the Beneficiary on December 8, 2014. However, the Petitioner also asserts that [REDACTED] originally owned all of its 100 shares, presumably dating back to its original formation in 2012. The stock ledger indicates no original issuance of 100 shares to [REDACTED] and the Petitioner provided no stock certificates reflecting this issuance.

In addition, the Petitioner did not sufficiently explain why the foreign entity's claimed ownership in the company is not reflected in its 2014 IRS Form 1120S. On motion, the Petitioner states that the foreign entity's ownership was not reflected in its 2014 IRS Form 1120S because no distribution of dividends to the foreign entity had taken place during that year. However, the Schedule K-1 requires that all shareholders holding an interest in the company at any time during that year be included.⁵ Otherwise, the Petitioner has not offered any explanation as to why [REDACTED] would continue to be listed as the sole shareholder of the company if there were in fact two shareholders at the end of the fiscal year ended on December 31, 2014.

We acknowledge the Petitioner's claim that former counsel provided poor guidance with respect to the issuance of stock certificates and failed to submit the stock purchase agreement which is now provided for the first time on motion. However, any appeal or motion based upon a claim of ineffective assistance of counsel requires: (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard, (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary

⁵ The IRS form instructions for Form 1120S, Schedule K-1 state: "Generally, the corporation is required to prepare and give a Schedule K-1 to each person who was a shareholder in the corporation at any time during the tax year." See Shareholder's Instructions for Schedule K-1 (Form 1120S), <https://www.irs.gov/pub/irs-pdf/i1120ssk.pdf>.

authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988). Here, the Petitioner has not taken any of the steps above to substantiate its assertion of ineffective assistance, which would in turn, support its assertions that shares were issued in error and that relevant documentation, such as the stock purchase agreement, was mistakenly omitted.

Therefore, in sum, the record before the Director included various discrepancies which undermined the Petitioner's assertion that it was 50% owned and controlled by the foreign entity. While the Petitioner has attempted to remedy these discrepancies, the evidence submitted on motion raises additional questions regarding the Petitioner's actual ownership at the time the petition was filed. The Petitioner has not resolved these inconsistencies with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Based on the deficiencies and inconsistencies discussed above, the Petitioner has not established that it has a qualifying relationship with the foreign entity.

VI. 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). Here, that burden has not been met.

ORDER: The motion to reopen is denied.

Cite as *Matter of N-A-B-, Inc.*, ID# 7892 (AAO Sept. 12, 2016)