



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

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

MATTER OF E-L- LLC

DATE: SEPT. 12, 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) section 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 Petitioner subsequently filed a combined motion to reopen and reconsider. The Petitioner submitted additional evidence and a brief contesting the findings we made in our appellate decision with regard to the qualifying relationship issue and stating that we erred in concluding that the Beneficiary would not act in a qualifying managerial or executive capacity. We granted 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, we denied the remainder of the motion and affirmed our decision to dismiss the appeal based on the finding that the Petitioner did not overcome the finding that it does not have a qualifying relationship with the foreign entity.

The matter is now before us on a motion to reopen. On motion, the Petitioner submits a statement asking us to consider additional evidence with regard to the qualifying relationship issue.

Upon review, we will deny the motion to reopen.

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 United States 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, Notice of Appeal or Motion 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).

Here, the Petitioner provided facts supported by evidence that could be considered "new" in support of its motion to reopen. As will be discussed below, the "new" evidence does not overcome our finding that the Petitioner does not have a qualifying relationship with the foreign entity. Therefore, we will deny the motion and affirm our prior decisions.

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.

II. LEGAL FRAMEWORK

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.

III. QUALIFYING RELATIONSHIP

The sole 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;

.....

(b)(6)

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(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. Evidence of Record

The Petitioner is a Texas limited liability company doing business as a [REDACTED] hotel. 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).

As evidence of the foreign entity's ownership, the Petitioner provided a copy of its certificate of incorporation filed in India on August 18, 2011, 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 also submitted a copy of its own certificate of formation filed with the State of Texas on January 24, 2013, identifying the foreign entity 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.

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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] hotel. In addition, the Director requested the following additional evidence relating to the qualifying relationship: 1) meeting minutes; 2) stock purchase agreements; 3) stock certificates; 4) a stock ledger; 5) proof of stock purchase or capital contribution in exchange for ownership such as wire transfer receipts, bank statements, or canceled checks; 6) documents outlining the details of investment in the company; 7) articles of incorporation or bylaws with names of members and their respective percentages of membership interests; 8) partnership agreement and registration documents with the names of partners and limits of their liability; and 9) 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 separate letter 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 these three members gave authority to the Beneficiary to act on behalf of the foreign entity with regard 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 monetary contributions, which would correspond with each member's indicated participation:

<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 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 stated that he corrected this error and sent the corrected forms to the Petitioner.

The Petitioner provided a copy of its 2013 Form 1065, which was filed with the IRS on October 20, 2014. The Form 1065 indicates at Schedule B, Other Information, line 16, that the Petitioner has a

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single partner and the accompanying Schedule K-1 once again states that the foreign entity is the Petitioner's sole owner.

In addition, the Petitioner submitted a letter explaining that the Beneficiary, [REDACTED] and [REDACTED] each executed the foreign entity's memorandum and articles of association as company members and that they also 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 also relied on the Petitioner's franchise agreement with [REDACTED] in concluding that the Petitioner did not have ownership and control over the company, but rather that [REDACTED] exercises control over the Petitioner. The Petitioner later filed an appeal contesting the Director grounds for denial.

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 and found that the Director did not appropriately focus 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 and its operating agreement similarly indicated that the Petitioner has three members. However, the Petitioner's certificate of formation and its 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. We further noted that the Petitioner did not submit evidence establishing that the asserted members of the company made capital contributions pursuant to the terms of the operating agreement.

On motion, the Petitioner stated that it is an affiliate of the foreign entity by virtue of both entities being owned by the same three individuals – the Beneficiary, [REDACTED] and [REDACTED]. The Petitioner claimed 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 asserted that any perceived inconsistencies between the Certificate of Formation and Operating Agreement were the result of our error in misinterpreting applicable Texas laws regarding Limited Liability Companies. Further, the Petitioner indicated that any inconsistencies were the fault of the attorney whose services it used to draft and file its corporate documentation.

The Petitioner submitted 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

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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 provided what it claimed to be 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. We note that these amounts do not correspond with those indicated in RFE response Exhibit A, which shows that the Beneficiary and [REDACTED] would each contribute \$330.00 consistent with their claimed 33% ownership and that [REDACTED] would contribute \$340.00 consistent with her claimed 34% ownership interest.

Lastly, the Petitioner addressed the inconsistencies in its federal income tax returns, asserting 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 stated that its CPA subsequently filed a revised IRS Form 1065 but that the Internal Revenue Service rejected the filing of this document. The Petitioner’s counsel explained 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 provided a copy of the rejection letter from the IRS which explains the reason for the rejection, and submitted a copy of the Beneficiary’s 2014 IRS Form 1040, including Schedule C in which the Beneficiary again indicated that he owns the Petitioner as its sole member.

On March 10, 2016, we issued a decision denying the Petitioner’s motion based on the lack of evidence resolving the inconsistent documents submitted to establish that the Petitioner and the Beneficiary’s employer abroad have an affiliate relationship as claimed. We pointed out that the Beneficiary’s 2014 tax return continues to identify the Beneficiary as the Petitioner’s sole owner, despite claiming that the CPA who prepared the Beneficiary’s 2013 and 2014 tax returns actually learned that the Petitioner has three members after completing the Beneficiary’s 2013 tax return.

We further questioned why the Beneficiary’s tax returns were inconsistent with the Petitioner’s tax returns with regard to the Petitioner’s ownership, despite the fact that the same CPA prepared both sets of documents. We further found that while the Petitioner provided evidence to show that the IRS had rejected its 2013 tax return, it did not explain why the tax return identified the foreign entity as the Petitioner’s sole owner when both the Petitioner and the CPA made prior claims elsewhere indicating that the Petitioner is owned by three members.

Finally, we found that the bank statements the Petitioner provided to establish that its three members made capital contributions to the company were insufficient given that neither the fund transfer documents nor the Petitioner’s bank statements for October 2013 show that the wired funds were

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transferred to the Petitioner's account. Furthermore, we found that any fund transfers that the Petitioner claims had taken place in October 2013 would not have been contemporaneous with the January 2013 filing of the Petitioner's certificate of formation and thus would have been contrary to the terms of the operating agreement, even if the Petitioner were shown as the recipient of the transferred funds.

In support of the current motion, the Petitioner provides its Texas Franchise Tax Report for 2016 as well as its completed tax returns for 2013 and 2014, both signed and dated April 22, 2016, identifying the Beneficiary, [REDACTED] and [REDACTED] as the Petitioner's three owners. The Petitioner also provides its tax return for 2015 without either a date or a signature. In a separate cover letter the Petitioner requests that we grant this motion based on the additional supporting evidence.

B. Analysis

Upon review of the evidence submitted on motion, we find that the Petitioner has not provided sufficient evidence to overcome the discrepancies and deficiencies we noted in our two previous decisions. 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 decisions, the Petitioner's certificate of formation indicates that the foreign entity is the sole managing member of the company, while the Beneficiary's IRS Form 1040 identify the Beneficiary as the Petitioner's sole owner. The Petitioner's most recent submissions consist of a current franchise tax report, whose relevance the Petitioner did not expressly state, and three tax returns, which are not accompanied by any evidence of having been filed with the IRS. While the dates indicated on the Petitioner's 2013 and 2014 tax returns indicate that the Petitioner may have recently completed these documents in an attempt to correct or make changes to prior tax returns with regard to the Petitioner's ownership, the lack of evidence to show that the tax returns were actually filed significantly diminishes the probative value of these documents, which, even if filed with the IRS, would not be sufficient to resolve the previously catalogued inconsistencies regarding the Petitioner's ownership. Further, with regard to the Petitioner's submission of its 2015 tax return, this document, even if filed, would be irrelevant for the purpose of establishing the Petitioner's eligibility at the time of filing, as the filing of a 2015 tax return would have taken place after the filing of the instant petition. Despite the Petitioner's burden to maintain its eligibility for the benefit sought through adjudication, the Petitioner must first establish eligibility at the time of filing the nonimmigrant visa petition. 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).

Furthermore, the submitted tax returns do not address the lack of evidence pertaining to the capital contributions that the Petitioner's members are required to make pursuant to the terms of the

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Petitioner's operating agreement. As previously noted, the Petitioner's prior submission of Indian bank statements for each individual named in the Petitioner's operating agreement to show that [REDACTED] and [REDACTED] each made a capital contribution of \$75,000 and the Beneficiary made a capital contribution of \$65,000 gave rise to further doubt the veracity of the Petitioner's claims regarding its ownership, as these amounts do not correspond with those indicated in RFE response Exhibit A, which shows that the Beneficiary and [REDACTED] would each contribute \$330.00 consistent with each individual's claimed 33% ownership and that [REDACTED] would contribute \$340.00 consistent with her claimed 34% ownership interest. It is unclear why the [REDACTED] and [REDACTED] would have contributed \$10,000 more than the Beneficiary if the Beneficiary's claimed ownership interest is equivalent to that of [REDACTED] nor is there any explanation as to why any one member would have contributed \$10,000 more than the other two members if that member had only a 1% greater ownership interest.

Despite being advised of the need to resolve inconsistencies by submitting independent, objective evidence pointing to where the truth lies, the record continues to contain numerous deficiencies and inconsistencies that detract from the credibility of the Petitioner's claim regarding its ownership. *See, Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

In sum, the Petitioner has not shown that the new evidence submitted is sufficient to overcome our previous decision. For these reasons, we will affirm our previous decision denying the motion and affirming the underlying decision to dismiss the appeal based on the lack of evidence that a qualifying relationship existed between the Petitioner and the Beneficiary's employer abroad as of the date this petition was filed.

IV. 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 motion to reopen will be denied, and our previous decision will not be disturbed.

ORDER: The motion to reopen is denied.

Cite as *Matter of E-L- LLC*, ID# 18393 (AAO Sept. 12, 2016)