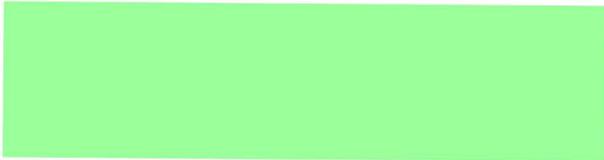




U.S. Citizenship
and Immigration
Services

(b)(6)



DATE:

JUN 17 2013

OFFICE: TEXAS SERVICE CENTER

FILE:



IN RE:

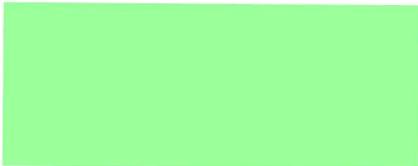
Petitioner:

Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, ("the director") denied the preference visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The U.S. petitioner is a company incorporated in the State of Arkansas in October 2007. The petitioner states on the Form I-140, Immigrant Petition for Alien Worker, that its type of business is "4 Convenience Stores and Gas Stations." The petitioner indicates that it employs 11 personnel. It reported a gross annual income of \$1,907,369 and a net annual income of \$44,738 when the petition was filed. It seeks to employ the beneficiary as its president. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager.

On March 23, 2010, the director denied the petition determining that the petitioner failed to establish that it will employ the beneficiary in a managerial or executive capacity. The director also found that the beneficiary, more likely than not, will not be the petitioner's "employee."

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO. On appeal, counsel asserts that the director's basis for denial of the petition was erroneous and contends that the evidence of record is sufficient to satisfy the petitioner's burden of proof.

I. The Law

To establish eligibility for the employment-based immigrant visa classification, the petitioner must meet the criteria outlined in section 203(b) of the Act. Section 203(b) of the Act states in pertinent part:

(1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

* * *

(C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is

required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement which indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien. The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for a firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and who are coming to the United States to work for the same entity, or its affiliate or subsidiary.

II. The Issues on Appeal

A. *Managerial or Executive Capacity*

The first issue in this proceeding is whether the petitioner submitted sufficient evidence to establish that the beneficiary will be employed in a primarily managerial or executive capacity.

The Law

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily--

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means 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.

Facts and Procedural History

In a letter appended to the petition, counsel for the petitioner noted the petitioner's purpose is: "buying, selling, and operating convenience stores, gas stations, and fast food restaurants" and that "currently it is the owner of four (4) convenience stores and gas stations located in Arkansas." In support of the petitioner's ownership of the convenience stores/gas stations, the petitioner submitted the following:

1. For the [REDACTED] a lease agreement for the operation of the business valid until November 1, 2010 and occupational and business licenses valid until February 28, 2010 (Arkansas Department of Health Food License) and December 31, 2009 (Office of the City Clerk Privilege License).

The lease agreement is between the beneficiary doing business as the petitioner and the lessor. The lease includes options to renew the lease for additional three year terms and a first right of refusal if the property is put up for sale. The sales and use tax permit dated October 30, 2007 although addressed to the petitioner identifies the beneficiary as the owner. The privilege license is granted to the beneficiary doing business as the petitioner.

2. For the [REDACTED] a lease agreement for the operation of business valid until August 31, 2011; a fictitious name registration identifying the petitioner as the registrant on November 6, 2008; and a sales and use tax permit issued by the State of Arkansas on September 9, 2008.

The lease includes an option to purchase valid for 24 months beginning on September 1, 2009. The sales and use tax permit identifies the beneficiary as the owner.

3. For [REDACTED] a bill of sale for the acquisition of inventory; a sublease agreement for the operation of the business; valid until March 14, 2010; and a sales and use tax permit issued by the State of Arkansas on March 31, 2009, identifying the petitioner as the owner of [REDACTED]

The petitioner's sublease does not include a signed copy of the required consent of the original lessor of the physical premises.

4. For [REDACTED]; a lease agreement for the operation of the business, valid until October 16, 2012; a fictitious name registration identifying the petitioner as the registrant on October 16, 2009; and a sales and use tax permit issued by the State of Arkansas on October 16, 2009.

In a statement appended to the petition, the petitioner noted that the beneficiary is the highest ranking individual in the organization and listed her duties as:

- Direct the management of the organization;
- Establish the business's goals and policies;
- Exercise wide latitude in discretionary decision making; and
- Receive no supervision from anyone else, since there is no one higher than her in the organization.

The petitioner indicated the beneficiary's primary function is to plan, organize, direct and control the organization's major functions through the businesses' employees. The petitioner also provided the following description of the beneficiary's duties and responsibilities:

- She will confer with the managers and assistant managers to plan business objectives, to develop organizational policies, to coordinate functions and operations between divisions and departments, and to establish responsibilities and procedures for attaining objectives;
- She will review activity reports and financial statements to determine progress and status in attaining objectives and revise objectives and plans in accordance with current conditions;
- She will direct and coordinate formulation of financial and sales programs to provide new sources of income, to maximize returns on investments, and to increase sales;
- She will work with suppliers and distributors to obtain the best prices for the products that the business sells; and
- She will hold regular staff meetings to insure that the above goals are realized, and to evaluate staff performance. She is ultimately responsible for the hiring and firing of all employees of the business.

[Bullet points added.]

The petitioner also stated that currently the beneficiary is actively looking for additional investments in the United States. The petitioner indicated that it has plans to open one or two similar businesses and that the beneficiary will expend the majority of her time over the next several months acquiring and integrating the new businesses into the petitioner's overall business plan.

The record included the petitioner's organizational chart depicting the beneficiary as president and another individual as vice-president. The organizational chart showed the beneficiary directly supervising the managers of each of the petitioner's claimed four convenience stores/gas stations. Three of the managers are depicted as supervising a cashier/clerk and one manager is identified as supervising an assistant manager who in turn supervises a cashier/clerk.

The petitioner's third quarter Form 941, Employer's Quarterly Federal Tax Return, for 2009 indicated the petitioner employed eight individuals. The Arkansas Department of Workforce Services (DWS) 209B, Employer's Quarterly Contribution and Wage Report, for the third quarter of 2009 indicates the petitioner employed nine individuals in this quarter; however, in the detailed list of individual employees, the petitioner repeats the beneficiary's name as well as the name of one of the individual's identified on the organizational chart as a manager. The seven named individuals detailed on the DWS 209B correspond to the positions on the organizational chart as follows: president (the beneficiary's position); four manager positions; and one cashier/clerk. One individual listed on the Form 941 is later identified on an updated organizational chart as a cashier/clerk.

Upon review of the limited evidence in the record, the director issued a request for evidence (RFE) instructing the petitioner to submit, among other things, additional evidence establishing that the beneficiary will be employed in a managerial or executive capacity with the U.S. company.

In response, the petitioner submitted the same list of job duties as previously provided but added two additional duties as well as the amount of time the beneficiary would spend on each of the listed duties. The petitioner allocated the beneficiary's time as follows:

- She will confer with the managers and assistant managers to plan business objectives, to develop organizational policies, to coordinate functions and operations between divisions and departments, and to establish responsibilities and procedures for attaining objectives (20%);
- She will review activity reports and financial statements to determine progress and status in attaining objectives and revise objectives and plans in accordance with current conditions (10%);
- She will direct and coordinate formulation of financial and sales programs to provide new sources of income, to maximize returns on investments, and to increase sales (15%);
- She will work with suppliers and distributors to obtain the best prices for the products that the business sells (15%);
- She will hold regular staff meetings to insure that the above goals are realized, and to evaluate staff performance, and is ultimately responsible for the hiring and firing of all employees of the business (10%);
- She reviews correspondence sent to the business and prepares responses thereto (5%); and
- She handles various other miscellaneous matters on behalf of the company (5%).

The petitioner indicated that the beneficiary will expend 20 percent of her time over the next several months acquiring and integrating the new businesses into the petitioner's overall business plan.

The petitioner's revised organizational chart added an individual in the position of network administrator/programmer analyst, and noted that the cashier/clerk position reporting to the assistant manager of one of the convenience stores/gas stations was unfilled. The petitioner did not provide updated documentation of the employment of any of the individuals, other than the beneficiary, depicted on the organizational chart.

The petitioner noted that the individual in the position of vice-president operates the company in the absence of the president and provides advice on the legal requirements to operate the businesses in their respective jurisdictions, as well as providing investment advice to the president in securing additional locations for the business.

The petitioner indicated that the individual in the position of network administrator/programmer analyst develops and tests software programs that assist the company in accounting, finance, inventory and quality controls and customer development. The petitioner noted this individual is in the process of networking all the present locations together, which will lower costs of doing business and provide superior customer service. The petitioner stated that the individual in this position held a bachelor of computer applications degree from an Indian university and a post-graduate degree in computer applications also from an Indian university. The petitioner observed that this individual was currently in the United States in H-1B status for the company and that she reported directly to the president.¹

The petitioner noted that each of the individuals in the position of manager is responsible for operating one of the convenience stores/gas stations' business on a day-to-day basis. The stated duties of the "manager" position included preparing weekly work schedules, supervising employees, handling customer inquiries and complaints, resolving minor personnel matters as well as being responsible for store displays, pricing issues, and inventory requirements. The petitioner indicated that each manager coordinated the activities of the store employees engaged in keeping sales and accounting records, collecting and paying accounts, ordering and purchasing supplies and reported directly to the president. The petitioner stated that the assistant manager performed these same duties reporting to the store manager.

The petitioner indicated that the individuals in the position of cashier/clerk receive payment for goods or services and are responsible for end of day reports and cash reconciliation and that they report to the store manager.

Upon review of the totality of the record, the director denied the petition concluding that the petitioner failed to establish that the beneficiary will be employed in a primarily managerial or executive capacity.

¹ United States Citizenship and Immigration Services' records reveal that the network administrator/programmer analyst was approved for H-1B status valid from December 10, 2009 until September 30, 2012. The record does not include evidence of this individual's start date of employment for the petitioner.

On appeal, counsel for the petitioner asserts that the director's decision is in error. Counsel notes that the four convenience stores/gas stations operated by the petitioner are in different cities and sixty miles apart and each location has a manager. Counsel contends that the network administrator/programmer analyst is a professional employee who is linking the various locations together. Counsel avers that the beneficiary is the highest ranking individual within the petitioner's organization and that the evidence submitted clearly establishes that the petitioner will employ her in an executive capacity. Counsel asserts that with the amount of business conducted, the number of employees hired, the beneficiary's oversight of four different business locations, and supervision of five management personnel and one professional employee, it is impossible to imagine how anyone could conclude the beneficiary is not employed in an executive capacity. Counsel also discusses the importance of small businesses in the United States and its economy.

Analysis

The principal issue in this matter is whether the petitioner has provided sufficient probative evidence to establish that the beneficiary will be employed in a primarily managerial or executive capacity.

In examining the executive or managerial capacity of the beneficiary, United States Citizenship and Immigration Services (USCIS) will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). Published case law clearly supports the pivotal role of a clearly defined job description, as the actual duties themselves 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); *see also* 8 C.F.R. § 204.5(j)(5). That being said, however, USCIS reviews the totality of the record, which includes not only the beneficiary's job description, but also takes into account the nature of the petitioner's business, the employment and remuneration of employees, as well as the job descriptions of the beneficiary's subordinates, if any, and any other facts contributing to a complete understanding of a beneficiary's actual role within a given entity.

Preliminarily, we observe that the record does not clearly support the petitioner's claim that it operates four convenience store/gas stations. As noted above, the [REDACTED] lease agreement is between the beneficiary and the lessor and the beneficiary identifies herself as the owner on the sales and use tax permit and privilege license. Accordingly, the record does not substantiate that the petitioner has an interest in this operation and the beneficiary's duties relating to this location are not relevant to a consideration of her managerial or executive capacity for the petitioner. Similarly, the sublease agreement for the [REDACTED] location does not include a signed copy of the required consent of the original lessor of the physical premises. Thus, the record is insufficient in establishing that the petitioner has a legitimate interest in this property and the beneficiary's duties relating to this location are also not relevant when determining her managerial or executive capacity. We acknowledge that the beneficiary's disregard for the petitioner's incorporation and independence as an entity separate from her may be ameliorated by corrective documents; however, even if the petitioner is truly the operator of each of the four convenience stores/gas stations, the petitioner has not established that the beneficiary will be employed in primarily an executive or managerial capacity.

As the director observed, the definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). The petitioner in this matter identifies the proffered position as primarily an executive position. Counsel on appeal asserts that the beneficiary primarily performs in an executive capacity and suggests that the beneficiary is also a personnel manager.

The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. The petitioner asserts that the beneficiary will perform duties primarily in an executive capacity.

However, referencing broadly-cast business objectives is insufficient to establish the beneficiary's actual role within the organization. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava, supra*. The petitioner noted generally that the beneficiary will confer with managers to plan business objectives and to develop policies and coordinate functions between the divisions and departments as well as hold regular staff meetings to insure that the goals of the organization are realized. However, such general statements do not convey an understanding of what is actually discussed and the record includes no evidence that the beneficiary developed policies or established business objectives or how or what she coordinates between divisions and departments. 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)).

Similarly, vague statements that the beneficiary will review reports and statements to determine progress and will coordinate financial and sales programs do not include the specific tasks the beneficiary performs in carrying out such generic duties. Accordingly, it is not possible to conclude that these tasks are primarily managerial or executive duties rather than the daily operational tasks necessary to operate one or more convenience stores. The few tasks more concretely described by the petitioner suggest that the beneficiary is actively participating in the performance of non-qualifying duties. For example, working with suppliers and distributors is a requisite operational task and is not a duty that is primarily managerial or executive. Likewise looking for additional investments appears to be the duty of an investor, not an individual primarily engaged in current managerial or executive duties.

The petitioner's reiteration of the previously described duties in response to the director's RFE also failed to enlighten as to the specific nature of the beneficiary's duties and her role within the organization. Although the petitioner noted the amount of time the beneficiary spent on each of the generally described duties, the record remains deficient in establishing the beneficiary's actual daily duties for the organization. Adding that the beneficiary handles correspondence and performs miscellaneous duties does not assist in establishing that the beneficiary's role is primarily executive or managerial. Accordingly, we turn to the remainder of the record to review the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of the beneficiary's actual duties and role in the business.

In that regard, we observe first that the petitioner has submitted documentary evidence of the employment of only seven employees. Four of these individuals are identified as managers; each claimed managerial employee is responsible for the operation of a convenience store/gas station. Two of the documented employees perform the cashier/clerk positions for two of the four convenience store/gas stations. Upon review of the general descriptions provided for the position of manager and the nature of operating a convenience store/gas station, the record is insufficient to establish that these employees primarily perform managerial tasks, rather than the everyday operations of stocking the store, interacting with customers, and relieving the one cashier/clerk, if employed, of performing the daily transactions. The petitioner in this matter has not provided sufficient evidence to demonstrate that it has a subordinate level of managerial employees for the beneficiary to direct, thus allowing the beneficiary to focus primarily on the broad goals and policies of the organization rather than the day-to-day operations of the business.

Similarly, the record does not demonstrate that the beneficiary will primarily supervise and control the work of supervisory, professional, or managerial employees. The petitioner has not provided the necessary detail to demonstrate that individuals employed as "managers" primarily supervise the one cashier/clerk in two of the convenience stores/gas stations. Other than listing the manager's generic duties, the petitioner does not allocate a specific amount of time to supervising the cashier/clerk employee. Without evidence of the hours of operation of the convenience stores/gas stations and a more concrete description of duties, the petitioner has not established that the managers primarily supervise other employees. Without documentary evidence, the petitioner has not established its burden of proof. *Matter of Soffici, supra*. Similarly, the record does not include evidence that the petitioner employed a network administrator/programmer analyst when the petition was filed. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). Accordingly, the record does not include sufficient evidence to establish that the beneficiary primarily performs in the capacity of a personnel manager as defined in the statute.

Upon review of the totality of the record including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, and the nature of the petitioner's business, the petitioner has not established that the beneficiary's actual duties will be primarily executive or managerial functions.

Although the petitioner may have plans to further expand its business, the record before the director failed to establish that the company currently has a reasonable need for the beneficiary to perform duties that are primarily in a managerial or executive capacity as those terms are defined in the statute. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Katigbak, Id.* The petitioner has not provided sufficient probative, consistent evidence demonstrating the beneficiary's role within the petitioner is primarily managerial or executive. Accordingly, the appeal will be dismissed.

B. Employer-Employee Relationship

The AAO will next address the director's ground for denial focusing on whether or not the beneficiary would serve as an employee of the U.S. petitioner.

In that regard, counsel asserts that the director erred when finding that the petitioner is 100 percent owned by the beneficiary. Counsel notes that the evidence submitted shows that the petitioner's stock was issued to a foreign Indian partnership that is owned 50 percent by the beneficiary and 50 percent by a second individual. Counsel also notes that the petitioner has filed an amended federal tax return for the 2008 year to reflect the petitioner's proper ownership. Accordingly, counsel avers that the beneficiary's 50 percent partner in the foreign entity also has the ability to control and determine the petitioner's business activities. Counsel asserts that the beneficiary is the petitioner's employee.

Although section 101(a)(44) of the Act and the related regulations make use of the terms "employee" and "employer," these terms are not defined either by statute or regulation. As mentioned by the director, the U.S. Supreme Court expects agencies to use common law definitions when certain terms, such as "employee" and "employer," are not expressly defined by Congress via statutory provisions. *See Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 323-324 (1992) (hereinafter "*Darden*"); *see also Restatement (Second) of Agency* § 220(2) (1958); *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003) (hereinafter "*Clackamas*").

However, as a preliminary step, it is critical to first review how these terms are used in the statute and then to determine whether the terms are outcome determinative. Statutory interpretation begins with the language of the statute itself. *Penn. Dept. of Public Welfare v. Davenport*, 495 U.S. 552 (1990).

While the statute uses the term "employee" in the definition of manager or executive, the AAO notes that the key elements of the definitions focus on the duties of the employee and not the person's employment status. *See* section 101(a)(44)(A) and (B) of the Act. The AAO concludes, therefore, that it is most appropriate to examine the beneficiary's eligibility in the context of his or her claimed managerial or executive duties, looking at the statutory definition as a whole.²

² The AAO recognizes that there is some tension between the terms "employee" and "executive." In *Matter of Aphrodite Investments Ltd.*, the INS Commissioner expressed concern that adopting the word "employee" would exclude "some of the very people that the statute intends to benefit: executives." 17 I&N Dec. 530, 531 (Comm'r 1980); *but see Clackamas*, 538 U.S. at 440. This tension would lead the AAO to carefully consider the statutory definitions in their entirety, including the four critical subparagraphs of each definition. If USCIS

Here, the director's use of the employer-employee issue appears to be an attempt to address the marginality of the petitioning business or the use of the corporate forum for immigration purposes. While not irrelevant, the employer-employee issue is not the optimal means of addressing these concerns. Instead, as in the present case, the director should focus on the fundamental eligibility requirements. Marginality is best addressed by the regulation that requires the petitioner to establish its ability to pay. *See* 8 C.F.R. § 204.5(g)(2). The functions of the beneficiary as a manager or executive, however, are best viewed through the prism of the definitions of managerial and/or executive capacity at sections 101(a)(44)(A) and (B) of the Act.

The one area where the status of the beneficiary as an employee may be critical is the enabling statute at section 203(b)(1)(C) of the Act, which requires that the beneficiary has been "employed for at least one year" by a qualifying entity abroad. In this regard, the beneficiary must be an actual employee of the foreign entity and not a contractor or consultant.

In the present case, the record does not indicate that the beneficiary worked in the capacity of either a contractor or a consultant during her period of employment abroad. Therefore, the beneficiary's employer-employee relationship with the foreign entity is not essential to matters concerning the petitioner's eligibility. The above discussion provides a detailed analysis of the eligibility criteria enumerated at sections 101(a)(44)(A) and (B) of the Act and explains how the petitioner falls short of meeting those requirements.

As the record indicates that the beneficiary was working directly for the foreign entity and now works directly for the petitioning entity, the decision of the director will be withdrawn as it relates to the beneficiary's status as an employee. The AAO finds no need to further explore the issue of an employer-employee relationship between the beneficiary and her foreign and U.S. employers.

C. Prior Approvals

The next issue to discuss is counsel's assertion on appeal that the two previously approved nonimmigrant L-1A petitions that the petitioner filed on the beneficiary's behalf demonstrate her eligibility for this visa classification. Counsel asserts that it is hard to see how the beneficiary qualified as an executive or manager on two previous occasions and does not qualify at this time when the petitioner has added additional locations and employees.

The AAO acknowledges that USCIS previously approved L-1A nonimmigrant petitions filed on behalf of the beneficiary, a classification which also requires the petitioner to establish the beneficiary's duties comprise primarily managerial or executive tasks. It must be noted, however, that many I-140 immigrant petitions are denied after USCIS approves prior nonimmigrant I-129 L-1 petitions. *See, e.g., Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava, supra*. Examining the consequences of an approved petition, there is a significant difference between a

were to focus solely on an employer-employee analysis, without considering the constituent elements of the statutory definitions, the inquiry would be incomplete and could lead to the denial of legitimate executives.

nonimmigrant L-1A visa classification, which allows an alien to enter the United States temporarily, and an immigrant E-13 visa petition, which permits an alien to apply for permanent residence in the United States and, if granted, ultimately apply for naturalization as a United States citizen. *Cf.* §§ 204 and 214 of the Act, 8 U.S.C. §§ 1154 and 1184; see also § 316 of the Act, 8 U.S.C. § 1427. Because USCIS spends less time reviewing I-129 nonimmigrant petitions than I-140 immigrant petitions, some nonimmigrant L-1A petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30; see also 8 C.F.R. § 214.2(l)(14)(i)(requiring no supporting documentation to file a petition to extend an L-1A petition's validity).

Moreover, in making a determination of statutory eligibility, USCIS is limited to the information contained in that individual record of proceeding. See 8 C.F.R. § 103.2(b)(16)(ii). In the present matter, the director reviewed the record of proceeding and concluded that the petitioner had not established the beneficiary would be employed in a primarily managerial or executive position. In both the request for evidence and the final denial, the director articulated the objective statutory and regulatory requirements and applied them to the case at hand. If the previous nonimmigrant petitions were approved based on the same evidence as submitted in this matter, the previous approvals would constitute gross error on the part of the director. Despite any number of previously approved petitions, USCIS does not have any authority to confer an immigration benefit when the petitioner fails to meet its burden of proof in a subsequent petition. See section 291 of the Act.

III. Conclusion

The petition will be denied and the appeal dismissed for the above stated reason. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here the petitioner has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.