



U.S. Citizenship
and Immigration
Services

(b)(6)

Date:

JUN 25 2013

OFFICE: NEBRASKA SERVICE CENTER

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)

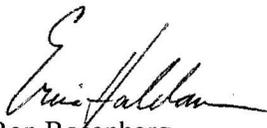
ON BEHALF OF PETITIONER:

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 law was inappropriately applied by us in reaching our 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 request 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 that any motion must 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 preference visa petition was denied by the Director, Nebraska Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss appeal.

The petitioner filed this immigrant petition seeking to classify the beneficiary as a multinational executive or manager pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C). The petitioner, a California corporation, states that it operates a petroleum business with 12 current employees and a gross annual income of \$148,416. The petitioner is seeking to employ the beneficiary as its president.

The director denied the petition on two alternative grounds, concluding that the petitioner failed to establish: (1) that it will employ the beneficiary in a qualifying managerial or executive capacity; (2) that the foreign entity employed the beneficiary in a qualifying managerial or executive capacity; and (3) that the beneficiary will be an "employee" of the petitioning company.

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 for the petitioner asserts that the service erred in its findings and that the petitioner has established that the beneficiary was employed abroad and will be employed in the United States in a managerial capacity. Counsel also asserts that the beneficiary is an employee of the petitioning company, which is wholly-owned by the foreign entity, and is not self-employed. Counsel submits a brief and duplicate copies of evidence already contained in the record in support of the appeal.

I. THE LAW

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.

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.

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.

II. THE ISSUES ON APPEAL

A. Managerial or Executive Capacity

The first issue addressed by the director is whether the petitioner established that it will employ the beneficiary in a qualifying managerial or executive capacity.

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.

The petitioner filed the Form I-140, Immigrant Petition for Alien Worker, on July 25, 2008. In support of the petition, the petitioner submitted a letter describing the beneficiary's position in the United States as follows:

As President, [the beneficiary] is responsible for the supervision and the development of new business opportunities, negotiating contracts with suppliers, and implement[ing] systems to optimize inventory tracking processes, logistics and to control related costs. He has full authority to negotiate and to sign contracts on the Company's behalf. In this role, he will also oversee all aspects of budget control. He also supervises, directs and controls the work of each branch manager. He also sets all corporate policies, guidelines, operational procedures, and makes the decisions regarding hiring, promotion, and firing of all employees.

The petitioner submitted its IRS Form 1120, U.S. Corporation Income Tax Return, for 2007. The Form 1120 indicated that the petitioner paid \$126,064 in salaries and wages for 2007. The beneficiary's 2007 IRS Form W-2, Wage and Tax Statement, indicates that the petitioner paid him \$33,230.88 in wages. The petitioner submitted its IRS Form 941, Employer's Quarterly Federal Tax Return, for the four quarters preceding the filing of the petition. The petitioner employed between eight and twelve employees in each quarter and paid total wages ranging from approximately \$25,000 to \$40,000 on a quarterly basis.

On September 30, 2011, the director issued a request for additional evidence ("RFE") in which he instructed the petitioner to provide additional evidence to establish that the beneficiary will be performing the duties of a manager or executive with the U.S. company.

In response to the RFE, the petitioner submitted a letter signed by the beneficiary detailing his duties as follows:

My job duties during this period, as President and Director of [the petitioner] are classified into four categories: (1) Operational Management of the Contract with [redacted] (2) Financial Management, (3) Corporate Work, (4) New Business Development. . . .

* * *

1. Operational Management of the Contract with [redacted] [5%]
2. Market Analysis for Purchasing and Pricing [15%]
3. Market Analysis: Retail Gasoline - \$1.6 million/month [15%]
4. Market Analysis: Tobacco Sales [5%]
5. Approving and Signing Contracts on Behalf of [redacted] [5%]
6. Environmental Regulatory Compliance [5%]

- 7. Delegation and Performance of Personnel Management [20%]
- 8. Management of Tort Liability Resolution, Including Issues Involving Property Damage and Personal Injury [5%]
- 9. Financial Management [10%]
- 10. Corporate Work [5%]
- 11. New Business Development [10%]

Operational Management of the Contract with [REDACTED]

Two essential functions that determine our success or failure include (a) determining and setting retail price for gasoline and store items and (b) deciding where to shop for your inventory. The management of these duties is critical to the performance of our contract with [REDACTED] which owns the station equipment and petroleum contained in the station tanks.

Market Analysis for Purchasing and Pricing

The market analysis must be performed daily and can be particularly complex during volatile times Performing market analysis is essential to my stations, which are unbranded versus the branded stations, whose prices are set by the company.

Market Analysis: Retail Gasoline - \$1.6 million/month

* * *

In order to purchase and set [REDACTED] retail gas prices, I need to perform a daily market analysis of both the local and competitors' prices along with the suppliers ([REDACTED] prices). I assign the task of doing a market survey of our competition (street survey) within one mile radius for gasoline and diesel at least once a day.

Once I have the street survey results from my managers, I do my own price survey on the internet for each location and do a gasoline pricing analysis and decide if the price needs to change or not. I communicate my decision to the managers and they change the price on the computer.

* * *

Market Analysis: Tobacco Sales

* * *

In determining the vender [sic] selection for the purchase of store inventory, I assign the task of compiling a price comparison table. After a review of this table I communicate my decision to the managers. For the store items, the price change is done once a month based on the results of managers' market survey.

Approving and Signing Contracts on Behalf of [REDACTED]

This task includes review, approval and signing of contracts related to the station equipment and inventory. . . .

Environmental Regulatory Compliance

* * *

. . . Although in 2006, California retail gas stations were required to make upgrades to their existing systems, another upgrade is now required. As the President, I have been making the arrangements for the upgrades to the stations, which will be approximately a \$60,000 to \$70,000 projects.

* * *

It is my responsibility to make sure the station is in compliance for all permit conditions. So, I retain the services of [REDACTED] independent contractors to perform the needed inspection and testing. I monitor their work, submit the test results to appropriate agency and keep the station records up to date.

Delegation and Performance of Personnel Management

As the President, I make the personnel decisions regarding hiring of new employees and firing of employees as well as managing two store managers in the [REDACTED]. I delegate authority and tasks to the degreed managers and perform periodic performance reviews of the managers, including their management of their subordinate employee complaints, these matters are brought to my attention for resolution.

Management of Tort Liability Resolution, Including Issues Involving Property Damage and Personal Injury

As the President, I normally delegate customer complaints to my station managers. In cases where the customer alleges a property damage or personal injury, the case is referred to me. . . .

Financial Management

Duties under this category include budgeting and planning for the performance of the [REDACTED] contract, negotiating [the petitioner's] management fees with the owners of [REDACTED] allocating funds for the new business development function of [the petitioner], controlling costs to stay within budget, and reviewing, signing and filing required tax returns for the Company.

Corporate Work

Duties here are concerned with the usual corporate work of the Company, including: administering the affairs of the Company in accordance with organizational policy, ensuring the maintenance of official record, by-laws, and standing rules according to board of director actions, conducting board meetings, maintaining records and disseminating information to [the foreign entity] and developing the Company policies[.]

New Business Development

New business development includes the development and direction of the corporate investment, including the purchase and sale of individual gas stations. . . .

In summary, for the last 7 years I am managing a large gas station operation for [redacted] with multiple locations and monthly gross revenue exceeding \$1.1 million with a staff of 9 to 20 employees.

The petitioner provided an organizational chart for the U.S. company, dated July 2008, depicting the beneficiary at the highest level, along with [redacted], in the Board of Directors. The chart then shows the beneficiary as the president and as the manager of "new business development & legal work." As the president, the beneficiary has two direct subordinates, [redacted] manager of the San Diego Branch Operation, and [redacted] Branch Operation. [redacted] has seven subordinate employees and [redacted] has five subordinate employees listed on the chart. As the manager of "new business development & legal work," the beneficiary is depicted as overseeing two consultants.

The petitioner also submitted a brief list of job duties for each of the manager for the San Diego branch and [redacted] branch operations, but failed to submit position titles, position descriptions, or job duties for the managers' subordinate employees listed on the organizational chart.

The petitioner also submitted a copy of [redacted] "Independent Contractor Agreement" with [redacted] commencing February 1, 2007, which names her as station manager for the San Diego gas station owned by [redacted] and managed by the petitioner. The petitioner submitted [redacted] IRS Form 1099-MISC, Miscellaneous Income, indicating that [redacted] paid her \$27,680 in 2007.

On December 17, 2008, the director denied the petition concluding, in part, that the petitioner failed to establish that the beneficiary will be employed in a primarily managerial or an executive capacity in the United States. In denying the petition, the director observed that [redacted] was not employed by the petitioner and [redacted] was the only full-time subordinate of the beneficiary. The director also observed that the other employees listed on the organizational chart appear to be employed part-time and do not appear to be professional in nature. The director found that the evidence does not establish that the U.S. entity contains the organizational complexity for the classification sought and that the petitioner did not establish that the beneficiary will manage a subordinate staff of professional, managerial, or supervisory personnel who will relieve him from performing the day-to-day duties required to operate the business.

On appeal, counsel for the petitioner asserts that the beneficiary is employed by the petitioner in a managerial capacity. Counsel briefly describes the beneficiary role at the U.S. company as follows:

[The petitioner's] contract with [redacted] is to provide management of [redacted] 2 gas stations. . . . [The beneficiary's] role as President is to manage the essential function of directing and coordinating the terms of [the petitioner], [redacted] contract by both managing his two professional managers and planning, coordinating, and directing the business' activities. . . .

* * *

[The beneficiary's] position as the President of [the petitioner] qualifies for managerial capacity because he manages [the petitioner's] essential function of administering [the petitioner] and Homeland's exclusive management services contract.

* * *

. . . Based on their job descriptions, [redacted] perform day-to-day functions including supervising all [the petitioner's] employees (cashiers/sales clerks) working in their respective branches, printing out daily POS sales and gas inventory reports, and preparing and reconciling daily reports. Because they perform these day-to-day functions, [the beneficiary] is free to primarily perform his duties of managing [the petitioner's] essential function, which is it[s] sole contract with [redacted] ..

As President, [the beneficiary] delegates to the professional managers the day-to-day management of the stations including inventory control and supervising subordinate staff. . . . Therefore, because [the beneficiary] has made this delegation, the two managers with their subordinate staff relieve [the beneficiary] from performing day-to-day duties required to operate the business.

While [the beneficiary] manages [the petitioner's] essential function, [the beneficiary] also manages [the petitioner's] professional managers, [redacted]. As discussed earlier, the Service may only consider the management of professional managers within the organization; however, the regulations do not require that all the managers be employees. Therefore, because [the beneficiary] manages one professional manager who is an [employee of the petitioner], the Service erred in concluding the [the beneficiary] did not manage professional managers.

Upon review, and for the reasons discussed herein, the petitioner has not established that it will employ the beneficiary in a qualifying managerial or executive capacity.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. See 8 C.F.R. § 204.5(j)(5). A detailed job description is crucial, as the duties themselves will reveal the true nature of the beneficiary's foreign and proposed 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).

The AAO will then consider this information in light of other relevant factors, including (but not limited to) job descriptions of the beneficiary's subordinate employees, the nature of the business conducted by the entities in question, the size of the subordinate staff of the entity in question, and any other facts contributing to a comprehensive understanding of the beneficiary's actual role within the petitioning entity.

On review, the petitioner's description of the beneficiary's duties fails to establish that the beneficiary will be employed in a qualifying managerial or executive position. The petitioner has not provided sufficient information detailing the beneficiary's duties at the U.S. company to demonstrate that these duties qualify him as a manager or as an executive. Here, the petitioner characterized the beneficiary's role as president and initially identified his duties as, "responsible for the supervision and the development of new business opportunities"; "negotiating contracts with suppliers"; "implement systems to optimize inventory tracking processes, logistics and to control related costs"; "has full authority to negotiate and to sign contracts on the Company's behalf"; "oversee all aspects of budget control"; "supervises, directs and controls the work of each branch manager"; "sets all corporate policies, guidelines, operational procedures"; and "makes the decisions regarding hiring, promotion, and firing of all employees."

When asked to submit a comprehensive description of the beneficiary's job duties, rather than elaborating on the responsibilities broadly outlined at the time of filing, the petitioner submitted a significantly different list of duties. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). The information provided by the petitioner in its response to the director's request for further evidence did not clarify or provide more specificity to the original duties of the position, but rather added new duties with no accompanying explanation.

The job description provided in response to the RFE allocated the following percentages the listed duties: (1) "operational management of the contract with [REDACTED] (5%)"; (2) "market analysis for purchasing and pricing (15%)"; (3) market analysis: retail gasoline (15%)"; (4) "market analysis: tobacco sales (5%)"; (5) approving and signing contracts on behalf of [REDACTED] (5%)"; (6) "environmental regulatory compliance (5%)"; (7) "delegation and performance of personnel management (20%)"; (8) management of tort liability resolution, including issues involving property damage and personal injury (5%)"; (9) "financial management (10%)"; (10) "corporate work (5%)"; and (11) "new business development (10%)." The petitioner went on to provide vague descriptions for each of the broad duties described above, but failed to demonstrate how those duties qualify as managerial. It appears that the beneficiary spends the largest portion of his time compiling market research and analysis on behalf of the gas stations, duties which cannot be classified as managerial in nature. The duties also state that the beneficiary spends 10% of his time on new business development; however, the record reflects that the petitioning company has not engaged in any new business in the past seven years. The only endeavor referenced by the petitioner is [REDACTED] potential re-purchase of a gas station that it had previously owned.

While the AAO acknowledges that no beneficiary is required to allocate 100% of his or her time to managerial- or executive-level tasks, the petitioner must establish that the non-qualifying tasks the beneficiary would perform are only incidental to the proposed position. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology*

International, 19 I&N Dec. 593, 604 (Comm. 1988). Merely establishing that the beneficiary performs tasks at a professional level is not sufficient to conclude that those tasks rise to the level of managerial or executive capacity.

A company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. See § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, in reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that USCIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990) (per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)). Although the AAO does not find that the size of the petitioning entity served in any way as an obstacle to establishing eligibility, this factor can and should be considered for the purpose of determining who within the organization would be available to perform the necessary non-qualifying such that the beneficiary is relieved from having to allocate the primary portion of his time to tasks that are not within a qualifying managerial or executive capacity. Neither the petitioner's reasonable needs nor its stage of development can be used to justify a favorable finding when the petitioner is unable to establish that the beneficiary would spend his time primarily performing tasks within a qualifying capacity.

In the instant matter, while the petitioner indicates that it each gas station/convenience store operation has 5-7 additional employees subordinate to the managers, the petitioner fails to provide their job titles, position descriptions, and job duties to establish their role at the U.S. company. 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)). Due to this failure on the part of the petitioner, the AAO cannot determine whether there are, for example, shift leaders or assistant managers to perform the managers' duties in their absence, or whether the beneficiary is at times called on to perform tasks such as opening and closing the stores.

Further, given the nature of the gas station business, it is unclear whether each gas station has sufficient employees to cover the typical hours of operation, particularly as it appears that the petitioner's staffing levels vary based on the petitioner's quarterly tax returns for the four quarters preceding the filing of the petition. The record indicates that one of the gas stations also appears to include a car wash, detailing services, a convenience store and a fast food counter and may require staffing beyond a typical gas station/convenience store operation. Further, it is unclear whether a single full-time manager is able to perform all first-line supervisory and administrative duties required for a business that is traditionally open for significantly longer than 40 hours per week. The AAO notes that the beneficiary's worksite is at one of the gas stations operated by the petitioner and it remains unclear whether the beneficiary is relieved from working on the floor of the gas station assisting in or supervising the duties to be carried out by his subordinate employees. As such, it cannot be determined that the beneficiary is relieved from performing non-qualifying first-line supervisory, operational and administrative duties during hours or days on which the manager is not working. While the AAO acknowledges that the beneficiary oversees two subordinate supervisors, the petitioner indicated that this function occupies only 20% of his time.

Finally, while the petitioner indicates that its entire business is predicated on a management contract with the owner of the two gas stations it manages, it has not provided a copy of this agreement for review. As such, the AAO is unable to determine the exact nature of the services the petitioner is required to provide, which would necessarily have some bearing on the nature of the beneficiary's duties. 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)).

Accordingly, notwithstanding the beneficiary's top placement within the petitioner's hierarchy, the petitioner has not established that the job duties to be performed in the proposed position would be primarily within a managerial or executive capacity. Accordingly, the appeal will be dismissed.

B. Managerial or Executive Capacity Abroad

The next issue addressed by the director is whether the petitioner established that the beneficiary's employment abroad was in a qualifying managerial or executive capacity.

In support of the Form I-140, the beneficiary submitted a letter dated July 14, 2008 in which he discussed his employment with the foreign entity. The beneficiary signed the letter in his capacity as the petitioner's president. The beneficiary explained that from January 2000 through August 2001 he was employed as the foreign entity's managing director. As the managing director, the beneficiary "oversaw the [foreign entity's] operations involving the management and performance of contracts for cement and other raw materials." He also states that he was responsible for establishing the foreign entity's subsidiary in the United States, the petitioner.

In the RFE, the director instructed the petitioner to provide a detailed description of the beneficiary's employment abroad, specifying the beneficiary's duties and assigning a percentage of time to each one. The petitioner was also asked to submit the foreign entity's organizational chart corresponding with the beneficiary's employment abroad, including all departments, teams, and employees that reported to the beneficiary.

In response, the petitioner described the beneficiary's position as managing director of the foreign entity. The petitioner indicated that the beneficiary's duties could be grouped into three broad categories: (1) "formulation and implementation of new company policies (35%)"; (2) "management of subordinate staff (40%)"; and (3) "function management of contracts and new business development in the U.S. (25%)." The petitioner went on to provide additional details within each broad category. The petitioner also provided a description of the beneficiary's direct subordinates demonstrating that they perform the duties required for the day-to-day operations of the business. In addition, the petitioner submitted a copy of the foreign entity's organizational hierarchy, which depicts the beneficiary's position as the managing director and manager of new business development in the United States. The chart shows the beneficiary at the top of the hierarchy with a transport operations manager and assistant manager and a marketing manager and assistant manager. The remainder of the hierarchy includes an office administrator, contract administrator and accountant, a dispatcher, and independent truck operators (drivers). All employees at this level are depicted as being the direct subordinates of the transport operations manager and assistant manager.

The director denied the petition concluding, in part, that the petitioner failed to establish that the beneficiary's employment abroad was in a primarily managerial or an executive capacity. In denying the petition, the director failed to provide any discussion of the beneficiary's duties abroad or why those duties do not qualify as primarily managerial or executive.

On appeal, counsel asserts that the beneficiary's position at the foreign entity was at the highest level of authority and that he was employed in a managerial capacity.

Upon review, the evidence in the record is persuasive. The AAO finds sufficient evidence to establish that the beneficiary's employment abroad was in a primarily managerial capacity.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). A detailed job description is crucial, as the duties themselves will reveal the true nature of the beneficiary's foreign and proposed 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). The AAO will then consider this information in light of other relevant factors, including (but not limited to) job descriptions of the beneficiary's subordinate employees, the nature of the business conducted by the entities in question, the size of the subordinate staff of the entity in question, and any other facts contributing to a comprehensive understanding of the beneficiary's actual role within the petitioning entity.

In the present matter, the petitioner has provided sufficient information about the beneficiary's duties at the foreign entity to determine that he was employed in a managerial capacity. The petitioner included information about his subordinates' duties and demonstrated that they relieved the beneficiary from performing non-qualifying operational duties, such as managing low-level staff, customer service, transportation services, accounting services, and marketing services, among others. The petitioner's descriptions are sufficient to establish that the beneficiary did not directly perform the services carried out by the foreign entity's business. The AAO is satisfied that the beneficiary exercised discretion over the day-to-day operations of the foreign entity's business, as required by section 101(a)(44)(A)(iv) of the Act.

The reasonable needs of the petitioner may justify a beneficiary who allocates 51 percent of his duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of his or her time on non-qualifying duties. Here, the petitioner has established that, at a minimum, the beneficiary primarily managed and directed the corporation in addition to several managerial or supervisory employees. The AAO is persuaded that the beneficiary's subordinates at the foreign entity carried out the majority of the day-to-day non-managerial tasks required to operate the business. The petitioner need only establish that the beneficiary devoted more than half of his time to executive or managerial duties. The petitioner has met that burden. Accordingly, the director's finding that the petitioner failed to establish that the foreign entity employed the beneficiary in a qualifying managerial or executive capacity will be withdrawn.

C. Employer-Employee Relationship

The third issue addressed by the director is whether the beneficiary was an employee of the foreign entity and whether he would serve as an employee of the U.S. petitioner.

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 sec. 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.¹

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 his 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 8 C.F.R. § 204.5(j)(3)(i) 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 its foreign and U.S. employers.

¹ 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 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.

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III. CONCLUSION

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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, that burden has not been met.

ORDER: The appeal is dismissed.