



U.S. Citizenship
and Immigration
Services

(b)(6)

Date: **JUN 25 2013**

OFFICE: NEBRASKA SERVICE CENTER

FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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 with the field office or service center that originally decided your case by filing a 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 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 established in March 2002, states that it operates an import and export business with "1-5" current employees and a gross annual income of "approx. \$146,000." The petitioner is seeking to employ the beneficiary as its president/executive manager.

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

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 is and will be employed in both a managerial and an executive capacity. Counsel also asserts that the U.S. petitioner is incorporated and the beneficiary is an employee of the corporation. Counsel submits additional evidence 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.

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.

II. THE ISSUES ON APPEAL

A. U.S. Employment in a Managerial or Executive Capacity

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

The petitioner filed the Form I-140, Immigrant Petition for Alien Worker, on May 1, 2008. The petitioner stated on the Form I-140 that it operates an import-export company established in 2002 which has gross annual income of \$146,000 and currently has "1-5" employees. On the Form I-140, where asked to provide a brief description of the beneficiary's position, the petitioner stated, "[o]versee all aspects of US company, including coordination of activities with Mexican sister companies to maximize growth in light of new contracts with Mexican retailers."

The petitioner submitted a document with the foreign entity's letterhead describing the beneficiary's position as follows:

President and CEO:

Plan, direct and coordinate the operation of the Company. Coordinate the import-export activities between [the petitioner] and [the foreign entity]. Formulates merchandising policies and coordinate merchandising activities in wholesale establishment. Determines [sic] mark-up and mark-down percentages necessary to ensure profit, based on estimated budget, profit goals, and average rate of stock turnover. Directs assembly of and storing of merchandise by worker, filling of orders and distribution to customers according to sale orders. Directs and coordinates activities of workers engaged in wholesaling merchandise. Advises customers concerning current and future market conditions and availability of merchandise. Direct and coordinate activities of businesses concerned with the pricing, sales, or distribution of products.

Locate, examine, select, order, and purchase at the most favorable price merchandise. Negotiate prices, discount terms and transportation arrangements for merchandise. Develop pricing strategy and management control systems. Resolves conflicts and negotiating with other [sic]. Determine staffing requirements, and interview, hire and train new employees. Recommend new points of sales.

The petitioner submitted a business plan, dated "2008-2012." The business plan discusses the U.S. company's management and personnel as follows:

6. Management Summary

The company is founded by [the beneficiary] and [redacted] who have over 20 years of combined experience exporting products from US and selling to retail buyers and wholesalers in Mexico. Additional team will be provided by import/export consultants, a corporate attorney, and an accountant specializing in import and retail.

6.1 Personnel – General

Initially we are being able to handle business needs with [the beneficiary] and Ana Corina, one administrative assistant, and two product delivery/sales personnel. As business continues to grow, we intend to hire additional employees one at a time and pay premium, over market labor rates to attract and retain quality help.

* * *

The Personnel Plan chronicles the growth of the organization to approximately 10 employees in the first 5 years. Each year may require a few additional people besides those indicated, based on the growth of the company in accordance with the Business Plan.

According to the petitioner's business plan, it will have two employees in 2008, the beneficiary and Ana Corina Burgos, with its total payroll expense at \$110,244; three employees in 2009, adding one "seller" and an additional salary of \$18,000; five employees in 2010, adding two "sellers" and an additional salary of \$20,000 each; seven employees in 2011, adding an "office manager" and an "assistant" and an additional salary of \$20,000 each; and ten employees in 2012, adding three "sellers" and an additional salary of \$18,000 each.

The petitioner provided an organizational chart for the U.S. company depicting a "general manager" at the highest position, supervising a "buying department," "selling department," "impo/expo department," and an "account department." The "impo/expo department" includes positions for "transport," "custom agency," and "warehouse." The "account department" includes an "account" position and "H.R." position. None of the positions include the names of the individuals performing the duties related to those positions or departments.

The petitioner submitted its IRS Form 1120-A, U.S. Corporation Short-Form Income Tax Return, for 2006. The Form 1120-A indicated that the petitioner paid \$24,375 in compensation of officers and \$0 in salaries and wages. The petitioner submitted its IRS Form 941, Employer's Quarterly Federal Tax Return, for the fourth quarter of 2007 indicating that the petitioner had one employee and paid \$8,125.00 in wages, tips, and other compensation. The petitioner also submitted its IRS Form 940, Employer's Annual Federal Unemployment Tax Return, for 2007 indicating that the petitioner paid a total of \$8,125.00 in payments to all employees for the full 2007 tax year.

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 document titled "Description of Duties in Detail." In the document, the petitioner breaks down the beneficiary's duties by time and task for each day of the workweek, beginning at 8:00 am and ending at 5:00 pm.

The petitioner submitted the same organizational chart previously submitted and added names to some of the positions. The general manager, [REDACTED], is at the highest position, supervising a "buying department," "selling department," "import/export department," and an "account department." The "import/export department" includes "transport," named as [REDACTED], "custom agency," named as [REDACTED] and "warehouse," named as [REDACTED]. The "account department" includes an "accountant," named as [REDACTED], and "H.R.," named as [REDACTED]. The petitioner also submitted a brief list of job duties for each of the positions listed on the organizational chart for the U.S. company. The petitioner did not identify any employees or contractors in the buying department or selling department and stated that [REDACTED] performs the buying and selling functions.

The petitioner submitted its IRS Form 941 for the fourth quarter of 2007 with the detailed page listing the names of employees for that quarter, indicating that the petitioner employed only [REDACTED] and paid her \$8,125.00 in wages, tips, and other compensation. The petitioner also submitted its IRS Form W-3, Transmittal of Wage and Tax Statements, indicating that it paid a total of \$8,125 in wages, tips, and other compensation for the 2007 tax year. The petitioner submitted its IRS Forms 941 for the first and second quarters of 2008 indicating that it had only one employee for each quarter, [REDACTED] and paid her \$8,125.00 in the first quarter and \$8,130.59 in the second quarter.

As evidence of its use of contractors, the petitioner provided "cargo receipts" issued by [REDACTED] and invoices for "warehouse fees" issued by [REDACTED]. The petitioner also provided invoices from [REDACTED] for truck rentals. The invoices identified the beneficiary as the intended driver of the rented trucks.

On February 27, 2009, the director denied the petition concluding, in part, that the petitioner failed to establish that it will employ the beneficiary in a qualifying managerial or executive capacity. In denying the petition, the director found that the beneficiary's detailed weekly breakdown of job duties demonstrates that the beneficiary spends the majority of his time performing non-qualifying tasks related to sales, purchasing, inventory, and other functions, along with occasional supervision of nonprofessional employees.

On appeal, counsel for the petitioner asserts that the position description provided establishes that the beneficiary will be employed in a qualifying managerial or executive capacity. The petitioner submits a duplicate copy of the beneficiary's daily breakdown of duties and indicates that the evidence establishes that the beneficiary spends 1,320 minutes, or 53.3%, of his time on executive duties and 1,155 minutes, or 46.7% of his time on managerial duties.

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 primarily managerial or executive capacity. 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 CEO and initially identified his duties as, "plan, direct and coordinate the operations of the company"; "coordinate the import-export activities between [the petitioner] and [the foreign entity]"; "directs assembly of and storing of merchandise by worker"; "advises customers concerning current and future market conditions and availability of merchandise"; and "locate, examine, select, order, and purchase at the most favorable price merchandise." Several of these duties do not fall within the statutory definitions of managerial or executive capacity and instead suggest that the beneficiary is directly involved in performing purchasing duties, research duties related to procurement, customer service duties, import-export functions and supervision of non-professional personnel. Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act.

When asked to submit a comprehensive description of the beneficiary's job duties, the petitioner submitted a breakdown of the beneficiary's daily routine for one week and indicated the tasks he would be performing. The AAO agrees with the director that the detailed breakdown of job duties submitted in response to the RFE reflects that the beneficiary spends a majority of his time performing non-qualifying tasks related to sales, purchasing, inventory, and other functions, along with occasional supervision of nonprofessional employees. For example, the petitioner stated that the beneficiary's duties will include: "visit the warehouse to physically review the merchandise and check the movement of the merchandise into and out of the warehouse"; "call the transport agency to negotiate the price for the transportation arrangement for the merchandise"; "supervise that the transport agency picks up the merchandise to be sent to Cordoba, Veracruz[;] making sure that it goes perfectly packaged and has met all the necessary requirements"; "verify with the transport agency to corroborate the progress of the merchandise sent it"; "review catalogues, and emails from the US branch to examine, select, and purchase the merchandise"; "place the order for merchandise that will be exported[;] send them the payment for the merchandise"; "speak to the transport employees to verify the time the merchandise will be received at the border"; "speak with the warehouse employees to prepare for the merchandise that will arrive[;] verify that everything is in order"; "speak to the customers and clients in Cordoba, Veracruz to inform them that their merchandise was sent and should arrive on time[;] visit the custom agent to verify that the process was correctly completed"; "request new merchandise catalogues and feedback"; "negotiate, locate, select and procure merchandise at the best financial conditions"; and "confer with the present and potential clients to offer the company's products and promote the new and existent [*sic*] products.

On appeal, the petitioner identifies each of these and other listed tasks as either managerial or executive and concludes that the beneficiary spends 53% of his time on executive duties and 47% of his time on managerial duties. However, the majority of the duties described in the record, including those described above, which the petitioner states will account for more than half of the beneficiary's time, cannot be classified as managerial or executive. The petitioner indicates that the beneficiary is actually responsible for performing the majority of the day-to-day tasks associated with selecting and purchasing the products to be exported, directly supervising non-professional staff responsible for warehousing and packaging the products, and coordinating the export of products from the United States to Venezuela. 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).

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).

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 employs individuals in the positions of general manager, transport, custom agency, warehouse, accountant, and human resources, the record does not show that anyone other than the general manager is currently employed at the U.S. company. The evidence reflects that the general manager is the petitioner's only payroll employee. While the petitioner has submitted some evidence related to its use of independent contractors such as trucking and freight companies, the petitioner has not established that the beneficiary's oversight of product pick-ups and deliveries amounts to a qualifying managerial or executive responsibility. Additionally, the U.S. petitioner's organizational chart indicates that it has a buying department and a selling department, but there are no specific positions listed for those departments. The petitioner indicated that the general manager currently performs these duties, but the

petitioner's description of the beneficiary's duties reflects that he is directly responsible for sourcing, selecting and purchasing the products the petitioner exports, and directly involved in the marketing and selling process. Therefore, the AAO finds that the U.S. petitioner does not have sufficient staff to relieve the beneficiary from performing non-qualifying operational duties associated with providing the petitioner's products and services.

As previously indicated, the petitioner has failed to establish that the petitioner has reached a stage in its development such that it could relieve the beneficiary from having to primarily carry out non-qualifying tasks. 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. While the petitioner has submitted a five-year business plan outlining the company's anticipated growth, the 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 appeal will be dismissed.

B. Foreign Employment in a Managerial or Executive Capacity

The second issue addressed by the director is whether the petitioner established that the foreign entity employed the beneficiary in a qualifying managerial or executive capacity.

The petitioner's initial evidence did not include a description of the duties the beneficiary performed while employed by the foreign entity. While the initial description for the position of "President and CEO" referenced both the petitioner and the foreign entity, the index of documents accompanying the initial submission identified this description as "a formal description of the position held by the beneficiary in the United States." The petitioner submitted an organizational chart for the Mexican company, but it did not identify any employees by name or include descriptions for any of the listed positions. The chart depicted a president and CEO at the head of the organization, with a buying department, a selling department, an import/export department and an accounting department reporting to the president. The chart depicts three sellers in the selling department, the positions of "transport," "customs agency" and "warehouse" in the import/export department, and "account" and "HR" in the account department.

The petitioner's initial evidence also included the foreign entity's payroll register for 2007. The records indicate wages paid to the following individuals: [REDACTED] (January through March 2007); [REDACTED] (January through September 2007); [REDACTED] (January through September 2007); and [REDACTED] (December 2007). Accompanying paystubs indicate that these employees held the positions of administrative assistant, messenger and secretary, respectively. It is unclear what position [REDACTED] held.

In the RFE, the director requested a detailed description of the beneficiary's role with the foreign entity, and instructed the petitioner to identify the specific tasks he performed and an estimate of the percentage of time he allocated to each specific task. The director also requested a detailed organizational chart for the foreign

employer that corresponds to his period of qualifying employment abroad.¹ The director requested names, position titles and detailed duty descriptions for the beneficiary's subordinates.

In response, the petitioner submitted a single detailed breakdown of how the beneficiary allocates his time on a weekly basis in his current position with the U.S. company. The petitioner did not provide a similar description for the beneficiary's foreign duties.

The petitioner did provide an organizational chart for the foreign entity which identifies the beneficiary as President and CEO and also identifies the names of employees and contractors. Specifically, it identifies three sellers in the selling department (██████████), a warehouse employee, a transport employee (██████████), a customs employee, an accountant and an H.R. employee. The chart does not identify any subordinate department managers or supervisors but rather indicates that the beneficiary directly supervises all staff and is solely responsible for all buying/purchasing functions, as the buying department is not staffed.

The organizational chart includes a description of the beneficiary's overall duties as president and CEO, as well as the duties he performs with respect to each department. However, the AAO notes that neither the chart nor the position descriptions provided appear to correspond to the beneficiary's role with the foreign entity during the relevant time period. The petitioner must establish that the beneficiary was employed in a qualifying managerial or executive position for at least one year during the three years preceding his admission to the United States as a nonimmigrant. *See* 8 C.F.R. § 204.5(j)(3)(i)(A). The record reflects that the beneficiary has resided in the United States since August 2002. The organizational chart for the foreign entity and the beneficiary's accompanying job description appear to reflect the staffing of the company at a much later date. For example, the petitioner's description of the beneficiary's duties indicates that he "coordinates the import/export activities between [the petitioner] and [the foreign entity]." However, the petitioner was incorporated in April 2002, shortly before the beneficiary moved to the United States to start up the company's operations.

Further, the organizational chart identifies employees who were paid wages in 2007, based on the payroll records provided at the time of filing, and the position titles assigned to them do not correspond to the information in the foreign entity's payroll records. The payroll records indicate that ██████████ was an administrative assistant, ██████████ was a messenger and ██████████ was a secretary, but the organizational chart identifies them with different position titles. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Regardless, there is no evidence that these employees were working for the company in 2001 or 2002, prior to the beneficiary's admission to the United States as an E-1 nonimmigrant.

¹ The petitioner did not identify the beneficiary's specific dates of employment with its claimed Mexican affiliate. The beneficiary stated on his Form G-325A, Biographic Information, accompanying his concurrently filed Form I-485, Application to Adjust Status, that he worked for ██████████ from January 2001 until July 2002.

In denying the petition, the director noted that while the foreign entity's organizational chart indicates that there were workers or contractors in the areas of sales, transport, warehousing and accounting, the position description provided was essentially the same as that provided for the beneficiary's position in the U.S. company. The director determined that the description therefore indicated that he spent the majority of his time performing non-qualifying tasks related to sales, purchasing, inventory and other functions, and supervised non-professional employees.

On appeal, counsel asserts that the position descriptions provided for the beneficiary and the foreign entity's other employees establish that he performed primarily managerial and executive duties and that the foreign entity had sufficient staff to relieve him from involvement in non-qualifying tasks. The petitioner re-submits the organizational chart provided in response to the RFE.

Upon review, the petitioner has not established that the foreign entity employed the beneficiary in a primarily managerial or executive capacity.

As noted above, pursuant to 8 C.F.R. § 204.5(j)(3)(i)(A), if the beneficiary is already in the United States working for the same employer or a subsidiary or affiliate of the firm or corporation, or other legal entity by which he was employed overseas, the petitioner must establish that, in the three years preceding entry as a nonimmigrant, the beneficiary was employed abroad for at least one year in a managerial or executive capacity. The beneficiary, an E-1 nonimmigrant, indicates that he has resided in the United States since August 2002, and he indicated on his Form G-325A that he was employed by the petitioner's Mexican affiliate from January 2001 until July 2002. Therefore the petitioner must establish that he was employed in a qualifying managerial or executive capacity during this time period.

The petitioner has not provided a description of the duties the beneficiary performed prior to his relocation to the United States or evidence of the staffing of the foreign entity for the relevant time period. For this reason, the petitioner has not met its burden to establish that the beneficiary was employed in a primarily managerial or executive capacity abroad. 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)).

Further, based on the noted discrepancies between the foreign entity's payroll records and organizational chart, the chart and position descriptions submitted do not appear to provide a credible description of the foreign entity's current staffing. Doubt cast on any aspect of the petitioner's proof may undermine the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

Even if the petitioner had submitted credible evidence of the foreign entity's staffing as of 2001-2002, the only position description provided for the beneficiary closely resembles that provided for his role in the U.S. company and, for the reasons discussed above, the description does not indicate that the role was comprised of primarily qualifying duties.

For these reasons, the petitioner has not established that the foreign entity employed the beneficiary in a qualifying managerial or executive capacity. Accordingly, the appeal will be dismissed.

C. Employer-Employee Relationship

The third and final 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. The director noted that the beneficiary and his wife are co-owners of both companies.

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.²

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.

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 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.

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.

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.