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

[Redacted]

Date: **MAR 08 2013** OFFICE: NEBRASKA SERVICE CENTER

FILE: [Redacted]

IN RE: Petitioner:
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:

[Redacted]

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. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. 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 petitioner subsequently filed a motion to reconsider. Although the director determined that the petitioner's submissions met the requirements of a motion to reopen and reconsider and thus warranted a full decision, the denial was affirmed. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss appeal.

The petitioner is a Washington corporation that operates two pizza restaurants and had a reported net income of \$2228 at the time of filing. The petitioner is seeking to employ the beneficiary as its president and chief operating officer (COO). Accordingly, the petitioner endeavors 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).

I. Procedural History

The director based the original denial on two grounds of ineligibility.

First, the director found that the petitioner provided inconsistent documentation regarding the foreign entity's ownership and thus failed to establish that the beneficiary's foreign and proposed employers have a qualifying relationship. In support of her finding, the director pointed to inconsistencies with regard to the ownership of both the foreign and U.S. entities. While the director ultimately determined that the petitioner submitted sufficient information to resolve the inconsistency regarding the foreign entity's ownership, she did not make a similar finding with regard to the petitioner's ownership. Specifically, the director noted that while the petitioner claimed to be a wholly-owned subsidiary of the foreign entity, the petitioner's corporate tax returns identified the beneficiary as owner of all outstanding stock.

The second ground for denial was based on the finding that the petitioner failed to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity.

The petitioner filed a motion. On motion, counsel addressed both grounds of ineligibility and provided additional documentation regarding ownership of the petitioning entity. Counsel also provided information regarding the beneficiary's proposed position with the U.S. entity.

In the ultimate decision, the director granted the motion and affirmed her original decision, adding two additional grounds for denial. Namely, the director determined that the petitioner failed to establish eligibility based on the following statutory grounds: 1) the petitioner failed to resolve inconsistencies regarding its ownership and therefore failed to establish that it has a qualifying relationship with the beneficiary's foreign employer; and 2) the petitioner failed to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity. Additionally, relying on the common law definition of the term "employee," the director determined that the petitioner failed to establish that the beneficiary was an employee of the foreign entity and that he would be an employee of the U.S. petitioner.

On appeal, counsel submits a brief disputing each ground that served as a basis for denial.

II. 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.

III. Discussion

A. Qualifying Relationship

The first ground of eligibility to be addressed is whether the petitioner submitted sufficient documentation to establish that it has a qualifying relationship with the beneficiary's foreign employer as required by 8 C.F.R. § 204.5(j)(3)(i)(C). To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. a U.S. entity with a foreign office) or related as a "parent and subsidiary" or as "affiliates." *See generally* § 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C); *see also* 8 C.F.R. § 204.5(j)(2) (providing definitions of the terms "affiliate" and "subsidiary").

The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part:

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Affiliate means:

- (A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;
- (B) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity;

* * *

Multinational means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States.

Subsidiary means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between the United States and foreign entities. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); see also *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595. As ownership is a critical element of this visa classification, the director may reasonably inquire beyond the issuance of paper stock certificates into the means by which stock ownership was acquired.

In the present matter, the record contains the petitioner's articles of incorporation, a stock certificate, stock ledger, a subscription agreement, and a letter from the president of the beneficiary's foreign employer indicating that the foreign entity is the sole owner of the U.S. petitioner.

On March 11, 2009, the director issued a request for additional evidence (RFE) in which he made note of various anomalies regarding the ownership of both the foreign and petitioning entities. Accordingly, the director instructed the petitioner to provide evidence resolving these anomalies and establishing that the beneficiary's employer abroad and his proposed U.S. employer have a qualifying relationship.

The petitioner responded with information and further documentation in an attempt to resolve the inconsistency regarding the foreign entity's ownership. With regard to inconsistencies in the petitioner's tax returns concerning the petitioner's ownership, the petitioner provided amended tax returns and a letter from

the company accountant, claiming that the petitioner's tax returns from 2004 to 2007, in which the beneficiary was claimed as the petitioner's owner, were incorrect.

In a decision dated February 18, 2010, the director concluded that the petitioner provided adequate supporting evidence to resolve the inconsistencies previously cited with regard to the foreign entity's ownership.¹ However, the director found that the evidence submitted to resolve the discrepancy regarding the petitioner's ownership was not sufficient and denied the petition on the basis of this initial finding. In the subsequent denial, dated June 28, 2010, the director reiterated the previous findings and addressed the evidence that the petitioner previously submitted along with the motion to reopen and reconsider. In his latest decision, the director placed considerable emphasis on the petitioner's failure to provide bank records establishing that the foreign entity paid \$3,600 for the petitioner's stock as was claimed in a document titled "Stock Subscription." Given the fact that the petitioner created considerable inconsistencies regarding its ownership by submitting tax returns in which the beneficiary was identified as the petitioner's sole owner, the AAO finds that the director's decision was justified.

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). Necessarily, independent and objective evidence would be evidence that is contemporaneous with the event to be proven and existent at the time of the director's notice.

The submission of stock certificates, stock ledgers, statements from company officers, and subscription agreements would be sufficient to establish the elements of ownership and control under ordinary circumstances. However, given the evidence that contradicts the petitioner's original ownership claim, the petitioner must submit objective documentation to clarify the actual ownership of the petitioning company. *See id.* As ownership is a critical element of this visa classification, the director may reasonably inquire beyond the issuance of paper stock certificates into the means by which stock ownership was acquired. As noted by the director, evidence of this nature would include documentation of monies, property, or other consideration furnished to the entity in exchange for stock ownership.

On appeal, counsel defends the petitioner's failure to provide bank documents showing the requisite fund transfer, stating that due to the seven years that have passed since the date the relevant bank statement was issued, the petitioner would have to overcome considerable obstacles to obtain evidence showing the foreign entity's payment of funds as consideration for the petitioner's stock. However, counsel provides contradictory statements with regard to the retrieval of the required bank records. On the one hand counsel asserts that any bank records that date back beyond a seven-year period are "unobtainable." However, counsel goes on to state that the passage of seven years' time would require banks to search their archives to produce the outdated bank records. Counsel's latter statement indicates that, while the petitioner would have to go to great lengths

¹ The AAO notes further that the ownership of the foreign entity is not of primary concern in light of the petitioner's claim that it is the subsidiary of the foreign parent entity. The focus in a claimed parent-subsidiary relationship is to determine the ownership of the claimed subsidiary, i.e., the petitioner, which should corroborate the claim that the foreign entity is the petitioner's majority shareholder.

to obtain the required documents, such documents are not, in fact, "unobtainable," but rather would require greater effort on the part of the petitioner.

The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). If a required document does not exist or cannot be obtained, the petitioner must demonstrate this and submit secondary evidence pertinent to the facts at issue. *Id.* Where a record does not exist, the petitioner must submit an original written statement from the relevant government or other authority establishing this as fact. The statement must indicate the reason the record does not exist and indicate whether similar records for the time and place are available. 8 C.F.R. § 103.2(b)(2)(ii).

In reviewing the record, the AAO finds no evidence to suggest that the petitioner made any effort to contact bank officials. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

Additionally, counsel interprets the director's decisions as being inconsistent on the issue of a qualifying relationship, claiming that the director deemed the issue to have been resolved in the February 18, 2010 decision, but later raised the issue again. Counsel's interpretation of the director's statements is incorrect. While the director admittedly used the phrase "this issue appears to have been resolved," in discussing ownership and control, this phrase was used in reference to ownership of the foreign entity. The subsequent paragraph in the director's February 2010 decision went on to discuss the ownership of the U.S. entity, where the director found additional discrepancies. In the director's June 28, 2010 decision, the director did not revisit the issue of the foreign entity's ownership since any anomalies previously discussed in this regard were deemed to have been resolved. The director did, however, maintain her position regarding prior findings concerning the ownership of the U.S. entity.

The AAO finds no contradiction on the part of the director in bifurcating what are clearly two separate issues—one issue dealing with the ownership of the foreign entity and the other issue dealing with the ownership of the U.S. petitioner—and finding that the anomalies concerning the first issue had been resolved, while those concerning the latter issue were not.

In summary, the record shows that the petitioner provided inconsistent documentation with regard to the ownership of the U.S. entity. While the petitioner has maintained the claim and has provided company-generated documents indicating that the beneficiary's foreign employer is the owner of the U.S. entity, the petitioner's initially submitted tax return identified the beneficiary as the company's sole owner. As discussed above, the petitioner has provided no evidence to show that any effort has been made to obtain the bank documents necessary to resolve the considerable inconsistency and establish the petitioner's ownership. 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Accordingly, in light of the petitioner's failure to provide objective evidence establishing who in fact owns the petitioning U.S. entity, the petitioner has not met the burden of proof to establish a qualifying relationship. *See* 8 C.F.R. § 204.5(j)(3)(i)(C).

B. Managerial or Executive Capacity

The next issue to be addressed is the beneficiary's position with the foreign entity and whether that position was in a primarily 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.

In support of the Form I-140, the beneficiary submitted a letter dated July 10, 2008 in which he discussed his employment with the foreign entity. The beneficiary signed the letter in his capacity as the petitioner's president and COO. The beneficiary explained that from February 1998 until January 2001 he was employed as the foreign entity's president. He further noted that due to an accident he had in the year 2000, he was on sick leave until the spring of 2001 when he acquired a new business and subsequently assumed a position as head of the marketing and development division of the purchased entity.

In the March 11, 2009 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 and depicting an illustration of the foreign entity's organizational hierarchy.

In response, the petitioner described the beneficiary's position as general manager of the foreign entity's pizza restaurant. In a separate submission, the petitioner also provided a description of the beneficiary's position as head of the marketing and development division of the entity that the beneficiary's foreign employer acquired prior to the beneficiary's arrival to work for the U.S. entity. As the director included both job descriptions in the February 2010 and the June 2010 decisions, the AAO need not restate the same information at this time. The petitioner also provided a copy of the foreign entity's organizational hierarchy, which depicts the beneficiary's position as the restaurant's general manager. The chart shows the beneficiary at the top of the hierarchy with a restaurant manager and a supplies and bookkeeping employee as his two immediate subordinates. The remainder of the hierarchy included cooks, food preparation and delivery staff, and one customer care employee. All employees at this level are depicted as being the direct subordinates of the restaurant manager.

After reviewing the petitioner's submissions, the director determined that neither of the beneficiary's positions abroad fit the definition of qualifying managerial or executive capacity. In the February 2010 decision, the director questioned the reliability of one aspect of the beneficiary's job description. Namely, the director found that the petitioner's claim that 40% of the beneficiary's time was allocated to analyzing revenue and income reports lacked credibility. In the June 2010 decision, the director addressed counsel's objection to the adverse finding. The director noted that, while the service's opinion regarding business matters will not serve to substitute for the opinion of the petitioner, the director may use his discretionary authority to weigh the evidentiary value and overall credibility of the petitioner's statements. The director advised the petitioner that U.S. Citizenship and Immigration Services (USCIS) is not obligated to accept the petitioner's statements when they are not corroborated by other evidence on record.

On appeal, counsel again disputes the director's finding by restating, verbatim, the same argument she initially put forth on motion. However, counsel's argument does not address the core of the director's analysis nor does it dispel the director's doubt as to the credibility of the information that was being offered.

Counsel also restates the previously provided description of the beneficiary's foreign employment and asserts that the organizational chart that was submitted in the RFE response clearly identified the beneficiary as the foreign entity's general manager. Counsel points out that the AAO has previously considered the complexity of an entity's organizational hierarchy and the beneficiary's position within that structure in order to determine

whether a position is within a qualifying managerial or executive capacity. Counsel's argument, however, relies heavily on one element without duly taking into account the fact that neither the beneficiary's title nor his elevated position within the foreign entity's organizational hierarchy is sufficient by itself to establish the beneficiary's employment in a managerial or executive capacity. Published case law strongly supports USCIS's analysis of the actual job duties as an indicator of the beneficiary's employment capacity. *See 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).

Additionally, the AAO finds that a comprehensive analysis cannot exclude consideration of the nature of the business that employed the beneficiary. It is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Family Inc. v. USCIS*, 469 F.3d 1313 (9th Cir. 2006); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when USCIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Systronics*, 153 F. Supp. 2d at 15.

Here, the foreign entity was a pizza restaurant in which thirteen out of a claimed sixteen employees, thus an overwhelming majority, were involved in food preparation and delivery. Given the foreign entity's staffing, it is unclear who was providing the beneficiary with the revenue and income reports, which he purportedly analyzed for 16 hours per week, or two full workdays. The petitioner also failed to identify the specific tasks the beneficiary carried out in establishing goals and policies, which consumed 7% of the beneficiary's time, or directing and coordinating sales and pricing, which consumed another 8% of the beneficiary's. Although the petitioner expressly stated that the beneficiary spent a total of 40% of his time conducting market research and carrying out other marketing-related activities, the director properly determined that such job duties cannot be deemed as time spent in a managerial or executive capacity.

When the beneficiary's overly broad and deficient job description is considered in the context of the described retail pizza restaurant operation, the AAO concludes that a favorable finding is not warranted. Counsel's assertion that the beneficiary was managing a 15-person staff and was responsible for "managing" the foreign entity's finances is inconsistent with the organizational chart that was submitted in response to the RFE. That chart clearly separated the beneficiary's position from the remainder of the restaurant staff by placing a restaurant manager squarely between the non-professional staff and the beneficiary.

Moreover, even if the AAO were to assume that counsel's assertions are factually correct, the petitioner would need to establish how supervising a non-managerial and non-professional staff falls within the parameters of the definition for managerial or executive capacity. As previously pointed out by the director, merely establishing that the beneficiary was not engaged in food service and preparation does not establish that the beneficiary primarily performed tasks within a qualifying capacity. *See* sections 101(a)(44)(A) and (B) of the Act. The petitioner failed to explain who, if not the beneficiary, performed the company's various administrative tasks that would have been essential for the foreign entity's continued daily operation.

Furthermore, even if the AAO were to disregard the director's adverse finding concerning the time attributed to analyzing revenue and income reports, the beneficiary's position abroad would still fall short of meeting the criteria for managerial or executive capacity. The record simply does not identify with specificity the

beneficiary's managerial or executive tasks nor does it establish that the beneficiary's time was primarily allocated to the performance of such tasks.

As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, USCIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. To establish that the reasonable needs of the organization justify the beneficiary's job duties, the petitioner must specifically articulate why those needs are reasonable in light of its overall purpose and stage of development. In the present matter, the petitioner has not explained how the reasonable needs of the petitioning enterprise justify the beneficiary's performance of non-managerial or non-executive 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. at 165.

Furthermore, the reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. See sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). 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.

The regulation at 8 C.F.R. § 204.5(j)(3)(i)(B) states that the petitioner must establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity for at least one out of the three years prior to his entry to the United States as a nonimmigrant to work for the same employer. Based on the evidence of record, the AAO cannot conclude that the petitioner satisfied the burden of proof.

C. Employer-Employee Relationship

The AAO will now address the remaining grounds for denial, which focused on whether or not 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.²

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 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.

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

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.

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sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.