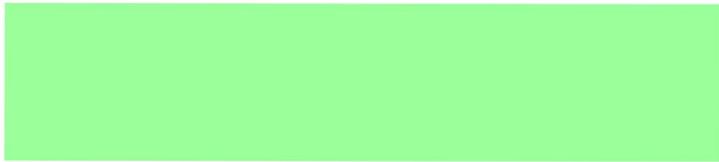
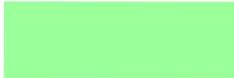




U.S. Citizenship
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Services

(b)(6)

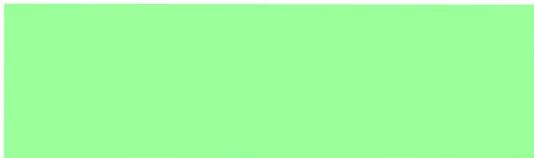


DATE: **DEC 11 2014** OFFICE: NEBRASKA SERVICE CENTER FILE: 

IN RE: Petitioner: 
Beneficiary: 

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

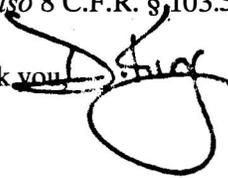
ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. §103.5. Do not file a motion directly with the AAO.**

Thank you 

Ron Rosenberg
Chief, Administrative Appeals Office

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

The petitioner filed this Form I-140, Immigrant Petition for Alien Worker, to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager. The petitioner, a jeweler, claims to be an affiliate of [REDACTED],¹ the beneficiary's former employer, located in India. The petitioner seeks to employ the beneficiary in the position of President.

On March 27, 2014, the director denied the immigrant petition, finding that the petitioner failed to establish that: (1) the beneficiary had been employed abroad within a qualifying managerial or executive capacity; (2) the beneficiary would be employed within a qualifying managerial or executive capacity; and, (3) the beneficiary is an employee.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to us for review. On appeal, counsel submits a brief disputing the director's adverse findings.

I. THE LAW

Section 203(b) of the Act states in pertinent part:

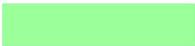
(1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

* * *

(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.

¹ The petitioner refers to itself as [REDACTED] and as [REDACTED].



Additionally, the regulations at 8 C.F.R. § 204.5(j)(3)(i) state that the petitioner must provide the following evidence in support of the petition in order to establish eligibility:

- (A) If the alien is outside the United States, in the three years immediately preceding the filing of the petition the alien has been employed outside the United States for at least one year in a managerial or executive capacity by a firm or corporation, or other legal entity, or by an affiliate or subsidiary of such a firm or corporation or other legal entity; or
- (B) If the alien 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 the alien was employed overseas, in the three years preceding entry as a nonimmigrant, the alien was employed by the entity abroad for at least one year in a managerial or executive capacity;
- (C) The prospective employer in the United States is the same employer or a subsidiary or affiliate of the firm or corporation or other legal entity by which the alien was employed overseas; and
- (D) The prospective United States employer has been doing business for at least one year.

II. THE ISSUES ON APPEAL

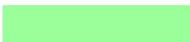
A. Employment Abroad in a Managerial or Executive Capacity

The first issue to be addressed is whether the petitioner established that the beneficiary was employed abroad 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.

Finally, 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. Section 101(a)(44)(C) of the Act.

1. Facts

In a letter dated June 20, 2013, the petitioner explained that the beneficiary was the owner of the foreign company and his duties abroad were as follows:

As the CEO of the company abroad, [the foreign entity], Beneficiary is responsible for the overall direction of the company. He oversees a staff of 12 persons who report to a General Manager who is responsible for the day to day operation of the store.

Beneficiary ensures that the affiliate company complies with all legal and regulatory requirements, product and service deliveries, upholding quality standards and

ensuring the company's financial health. He is the person solely responsible for developing a long term business strategy and oversees its execution in a consistent and timely manner.

Additionally, Beneficiary is responsible for overseeing the recruitment, employment and release of all personnel and maintaining a climate which attracts, retains and motivates the staff. He ensures that job descriptions are developed and that sound human resource practices are in place.

In the area of budget and finance, he is responsible for developing and maintaining sound financial practices and ensuring that adequate funds are available to permit the organization to carry on its work.

On December 13, 2013, the director sent a request for additional evidence ("RFE"). In part, the director requested evidence to establish the beneficiary was employed abroad in a managerial or executive capacity.

In a response letter dated February 24, 2014, the petitioner explained that the beneficiary has been the President/CEO of the foreign entity since [REDACTED] which is "an executive position where the Beneficiary is responsible for the overall direction of the company." The petitioner also stated that the foreign entity has a "staff of 12 persons who report to the General Manager, the employee responsible for the day to day operations of the qualifying entity and the General Manager, in turn reports directly to the President of the company." The petitioner further explained the beneficiary's duties abroad as follows:

- In consultation with outside legal and financial specialists, the President ensures that the qualifying company complies with all legal and regulatory requirements (10% of time)[.]
- On a daily basis reviews with the General Manager, all product and service deliveries to ensure that they are satisfactory and meet quality standards. This includes determining the price of gold jewelry, based upon the spot rate of gold for the day. (40% of time)
- On a regular basis, the President consults with the management team and develops a long term business strategy. In a consistent and timely manner, the President oversees the execution of the business strategy (20% of time)[.]
- Consult with accountant and outside Chartered Accounts and Bankers to develop and maintain sound financial practices and ensure that adequate funds are available to permit the entity to carry on its work (20% of time)[.]
- Responsible for overseeing the recruitment, employment and release of all personnel and maintaining a climate which attracts, retains and motivates the staff (5% of time)[.]
- In consultation with the General Manager, ensure that job descriptions are developed and that sound human resource practices are in place (5% of time).

The petitioner also submitted an organizational chart of the foreign entity indicating the beneficiary as President/CEO who in turn supervises a general manger, who in turn supervises the staff of: an Accountant, a Marketing Director, an IT Manager, a Marketing Head, three Sales Associates, a Sales/office Manager, two Office Assistants, a Janitor and a Security Guard. The petitioner also provided a job description for each position in the foreign entity.

The director denied the petition, in part, finding that the petitioner failed to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity.

2. Analysis

When examining the executive or managerial capacity of the beneficiary, we review the totality of the record, starting first with the petitioner's description of the beneficiary's 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). We will then consider this information in light of other relevant factors, including job descriptions of the beneficiary's subordinate employees, the nature of the business that is conducted, the foreign company's subordinate staff, and any other facts contributing to a comprehensive understanding of the beneficiary's actual role within the foreign entity. While an entity with a limited support staff will not be precluded from the immigration benefit sought herein, it is subject to the same burden of proof that applies to a larger entity with a moderate or large subordinate staff. In other words, regardless of an entity's size or support staff, the petitioning entity must be able to provide sufficient evidence showing that it has the capability of maintaining its daily operations such that the beneficiary was relieved from having to primarily perform the operational tasks.

In the present matter, upon review of the totality of the record, the evidence does not support a finding that the beneficiary allocated his time primarily to the performance of tasks that are within a qualifying managerial or executive capacity.

On review, the petitioner provided a vague and nonspecific description of the beneficiary's duties with the foreign company that fails to demonstrate what the beneficiary did on a day-to-day basis. For example, the petitioner stated vague duties such as the beneficiary spent 40 percent of his time reviewing with the "General Manager, all product and service deliveries to ensure that they are satisfactory and meet quality standards. This includes determining the price of gold jewelry, based upon the spot rate of gold for the day." It is not clear what the beneficiary did to ensure the deliveries met the company's quality standards or what steps the beneficiary needed to do in order to determine the price of gold. In addition, the beneficiary spent 20 percent of his time consulting with "the management team and develops a long term business strategy;" and "oversees the execution of the business strategy," but the petitioner did not explain anything about the foreign company's business strategy. This description provides little insight into what the beneficiary primarily did on a day-to-day basis and did not explain the strategy goals and objectives. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a

detailed description of the beneficiary's daily job duties. The petitioner has failed to provide sufficient detail or explanation of the beneficiary's daily activities. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. In addition, the petitioner submitted an organizational chart but did not submit evidence that all of the individuals listed in the organizational were actually employed with the foreign company.

On appeal, the petitioner submits a letter from [REDACTED], Ph.D, Director of Graduate Studies and Senior Lecturer, School of Business, [REDACTED]. The letter evaluated the beneficiary's job duties when he was employed abroad, and the letter concluded by stating that "it is my expert opinion that [the beneficiary] functioned in an Executive position as President/CEO of [the foreign entity]."

We may, in our discretion, use advisory opinions statements submitted as expert testimony. See *Matter of Caron Int'l.*, 19 I&N Dec. 791, 795 (Comm'r. 1988). However, we are ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. The submission of letters from experts supporting the petition is not presumptive evidence of eligibility. *Id.*; see also *Matter of V-K-*, 24 I&N Dec. 500, n.2 (BIA 2008) (noting that expert opinion testimony does not purport to be evidence as to "fact").

Upon review of the opinion letter, there is no indication that Dr. [REDACTED] possesses any knowledge of the beneficiary's employment abroad and the foreign entity's business operations beyond the information provided by the petitioner. Dr. [REDACTED] does not demonstrate or assert in-depth knowledge of the foreign entity's specific business operations or how the duties of the position were actually performed in the context of the foreign business enterprise. Moreover, Dr. [REDACTED] did not indicate that he visited the foreign business, observed the employees, interviewed them about the nature of their work, or documented the knowledge that they apply on the job. Dr. [REDACTED] also fails to reference and discuss any studies, surveys, industry publications, other authoritative publications, or other sources of empirical information which he may have consulted in the course of whatever evaluative process he may have followed. In short, while there is no standard formula or "bright line" rules for producing a persuasive opinion, a person purporting to provide an expert evaluation of a particular position should establish greater knowledge of the particular position in question than Dr. [REDACTED] has done here.

In summary, we conclude that the opinion letter rendered by Dr. [REDACTED] is not probative evidence to establish the beneficiary was employed abroad in an executive capacity. The conclusion reached by Dr. [REDACTED] lacks the requisite specificity and detail and is not supported by independent, objective evidence demonstrating the manner in which he reached such conclusion.

In light of the foregoing discussion, the petitioner has not established that the beneficiary was employed abroad in a qualifying managerial or executive capacity.

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

The second issue to be addressed is whether the petitioner established that it will employ the beneficiary in a qualifying managerial or executive capacity.

1. Facts

The petitioner has offered the beneficiary the position of president. The petitioner indicated that it is "in the initial stages of searching for an additional retail outlet," and "developing a web based sales portal." The petitioner stated that it employs seven full-time employees and will be hiring an additional seven persons for the new store. In support of the petition, the petitioner provided a job description for the proffered position that states the following:

Beneficiary oversees and reviews expansion objectives[,] taking into account . . . appreciation of capital[,] current income and reducing risk to principal. He assigns risks to each expansion and minimizes it through regular discussions with real estate, legal, accounting, banking and financial advisors.

His primary focus will be to give guidance in the selection and acquisition of previously identified locations which are consistent with Petitioner's growth goals and have the potential of generating a rate of return consistent with established goals.

This area of responsibility is anticipated to take up approximately 40% of his work week.

Additional responsibilities include overseeing business performance, investments, strategy and growth initiatives. Beneficiary provides direction to the General Managers in the development and implementation of operational and financial strategies and systems and reviews the budget, financial analysis, forecasts, marketing plans, cash management systems, procurements, capital expenditures, acquisitions and financing/structuring development projects. This job responsibility is anticipated to take up approximately 45% of his work week.

Also, Beneficiary is responsible for the formation of strategic alliances within the South Asian community, financial institutions, and the media. The scope of this responsibility encompasses reviewing all aspects of quality control and improvement, and the expansion of Petitioner's position in the market through the strategic use of all communication channels. The Beneficiary keeps an eye open to anticipate market trends, and ensures that Petitioner's facilities are set to meet the needs of a growing South Asian population as it develops. This is anticipated to take up approximately 15% of Beneficiary's work week.

The petitioner submitted an organizational chart that indicated the beneficiary as President/CEO who in turn supervises the Accountant and General Manager, who in turn supervises the Marketing Consultant, Administration, IT Manager, Sales Manager, and two Sales Associates.

In response to the director's request for evidence, the petitioner provided a letter dated March 5, 2014, that stated the beneficiary "is an expert in all facets of running the company and knows the Indian Jewelry industry inside and out," and he has "oversight over the company's finances, hires managers [and] supervisors and suggest new and creative ways to market and advertise the company's products and services." The petitioner explained his "day to day activities" as follows:

- Activities related to the company's financial picture (15% of work week)
- Sales Forecasting (5% of work week)
- Developing and overseeing implementation of marketing plans (5% of work week)
- Overseeing cash management systems (2% of work week)
- Procurements (15% of work week)
- Authorize capital expenditures and acquisitions (3% of work week)
- Discussions with Real Estate Brokers regarding selection of new store (10% of work week)
- Discussions with attorneys (3% of work week)
- Discussions with Accountants (10% of work week)
- Discussions with Bankers (2% of work week)
- Discussions with Financial Advisors (10% of work week)
- Discussions with Web Developers (10% of work week)
- Community Relations (15% of work week).

The petitioner also submitted a Form DE9 for every quarter in 2013 indicated six employees; however, according to the salaries it appears that several employees were working less than full-time.

The director denied the petition, in part, finding that the petitioner failed to establish that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity.

2. Analysis

When examining the executive or managerial capacity of the beneficiary, we review the totality of the record, starting first with the petitioner's description of the beneficiary's proposed 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 job descriptions of the beneficiary's subordinate employees, the nature of the business that is conducted, the petitioner's subordinate staff, and any other facts contributing to a comprehensive understanding of the beneficiary's actual role within the petitioning entity. While an entity with a limited support staff

will not be precluded from the immigration benefit sought herein, it is subject to the same burden of proof that applies to a larger entity with a moderate or large subordinate staff. In other words, regardless of an entity's size or support staff, the petitioning entity must be able to provide sufficient evidence showing that it has the capability of maintaining its daily operations such that the beneficiary would be relieved from having to primarily perform the operational tasks.

In the present matter, upon review of the totality of the record, the evidence does not support a finding that the beneficiary would allocate his time primarily to the performance of tasks that are within a qualifying managerial or executive capacity.

On review, the petitioner provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary will do on a day-to-day basis. For example, the petitioner stated vague duties such as the beneficiary is responsible for the "long term and short term health of the company," and is responsible for "developing and maintaining sound financial practices and ensuring that adequate funds are available." However, the petitioner did not explain in detail the financial goals and strategies of the company. The petitioner also spends 15 percent of the work week "overseeing all procurements for the company." Thus, it appears the beneficiary will do the purchasing for the company, which is an operational task. This description does not provide sufficient insight into what the beneficiary primarily will do on a day-to-day basis and did not explain the petitioner's strategies, goals and objectives. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

In addition, the beneficiary will spend 66 percent of his work week working with real estate brokers, attorneys, accountants, bankers, financial advisors and web developers. It appears the petitioner hired contractual employees in the areas of accounting, real estate, web development and legal services, the petitioner has neither presented evidence to document the existence of these employees nor identified the services these individuals provide. Additionally, the petitioner has not explained how the services of the contracted employees obviate the need for the beneficiary to primarily conduct the petitioner's business. Without documentary evidence to support its statements, the petitioner does not meet its burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998).

Moreover, the petitioner provided an organizational chart indicating eight employees. However, according to the Form DE9 for each quarter of 2013, it is not clear if all of the employees are working on a full-time schedule. In addition, the petitioner submitted Form 1120, U.S. Corporation Income Tax Return, for 2012 that stated the petitioner paid \$66,020 in salaries and wages for that year. It is not clear how \$66,020 in salaries and wages would adequately compensate eight full-time employees. 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). According

The petitioner has failed to provide a sufficiently detailed explanation, along with credible and probative supporting documentation, establishing the U.S. entity's overall organizational structure, staffing levels, and the scope of its business activities at the time of filing. The record is unclear as to the beneficiary's actual role will be, and as to the petitioner's actual staffing levels. Overall, the record is insufficient to establish that the beneficiary will be employed in a primarily managerial or executive capacity.

On appeal, the petitioner submits a letter from [REDACTED] Ph.D, Director of Graduate Studies and Senior Lecturer, School of Business, [REDACTED]. The letter evaluated the beneficiary's job duties when he was employed abroad, and the letter concluded by stating that "it is my expert opinion that [the beneficiary] functioned in an Executive position as President/CEO of [the foreign entity], and currently functions in an Executive position as President/CEO of [the petitioner], the company's United States subsidiary."

We may, in our discretion, use advisory opinions statements submitted as expert testimony. *See Matter of Caron Int'l.*, 19 I&N Dec. 791, 795 (Comm'r. 1988). However, we are ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. The submission of letters from experts supporting the petition is not presumptive evidence of eligibility. *Id.*; *see also Matter of V-K-*, 24 I&N Dec. 500, n.2 (BIA 2008) (noting that expert opinion testimony does not purport to be evidence as to "fact").

Upon review of the opinion letter, there is no indication that Dr. [REDACTED] possesses any knowledge of the beneficiary's proffered position and the petitioner's business operations beyond the information provided by the petitioner. Dr. [REDACTED] does not demonstrate or assert in-depth knowledge of the petitioner's specific business operations or how the duties of the position were performed in the context of the business enterprise. Moreover, Dr. [REDACTED] did not indicate that he visited the petitioner, observed the employees, interviewed them about the nature of their work, or documented the knowledge that they apply on the job. Dr. [REDACTED] also fails to reference and discuss any studies, surveys, industry publications, other authoritative publications, or other sources of empirical information which he may have consulted in the course of whatever evaluative process he may have followed. In short, while there is no standard formula or "bright line" rules for producing a persuasive opinion, a person purporting to provide an expert evaluation of a particular position should establish greater knowledge of the particular position in question than Dr. [REDACTED] has done here.

In summary, we conclude that the opinion letter rendered by Dr. [REDACTED] is not probative evidence to establish the beneficiary would be employed in an executive capacity. The conclusion reached by Dr. [REDACTED] lacks the requisite specificity and detail and is not supported by independent, objective evidence demonstrating the manner in which he reached such conclusion.

In light of the foregoing discussion, the petitioner has not established that the beneficiary would be employed in a qualifying managerial or executive capacity.

C. Beneficiary as Employee and Majority Owner

The director denied the petition after concluding that the beneficiary is the majority shareholder of both the foreign company and the petitioner. The director stated that the beneficiary is the "person ultimately in charge and responsible of the two companies." The director stated in the decision that "since the evidence appears to indicate that there is no individual or board that will supervise the beneficiary's work or has the authority to hire or fire the beneficiary, the beneficiary must be considered the employer and not an employee."

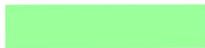
Sections 203(b)(1)(C) and 101(a)(44) of the Act, along with the related regulations at 8 C.F.R. § 204.5(j), all make use of the terms "employed," "employee," and "United States employer." These terms are not defined by statute or the applicable regulations. Accordingly, we must view how these terms are used in the statute and, considering the specific context in which that language is used, examine whether the terms are outcome determinative.

Statutory interpretation begins with the language of the statute itself. *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002). We must "determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Id.* (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997)). The "inquiry must cease if the statutory language is unambiguous and 'the statutory scheme is coherent and consistent.'" *Robinson*, 519 U.S. at 340; see also *United States v. Abuagla*, 336 F.3d 277, 278 (4th Cir. 2003).

While the statute uses the term "employee" in the definition of manager or executive, the key elements of the statutory definitions focus on the duties and responsibilities of the employee and not the person's employment status. Looking at the statutory scheme as a whole, it is most appropriate to review the beneficiary's eligibility by making a determination on his or her claimed managerial or executive employment.

We recognize 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 Gastroenterology Assoc., P.C. v. Wells*, 538 U.S. 440, 448-49 (2003) (examining whether a director-shareholder is an employee under the common-law touchstone of "control"). This tension would generally lead us to carefully consider the statutory definitions in their entirety, including the four critical subparagraphs of each definition. See sec. 101(a)(44)(A) and (B) of the Act. If U.S. Citizenship and Immigration Services were to focus solely on an employer-employee analysis, without considering the constituent elements of the definitions, the inquiry would be incomplete under the statute.²

² The one area where the employment status of the beneficiary 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, based on the plain language of the statute, the beneficiary must be an employee of the foreign entity and not a contractor or consultant.



Upon review, the beneficiary's employer-employee relationship with the petitioner is not the essential issue for consideration when evaluating the petitioner's eligibility. The decision of the director will be withdrawn as it relates to the beneficiary's status as an employee. We find 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 and the appeal dismissed for the above stated reason. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.