U.S. Department of Homeland Security
U.S. Citizenship and Immigration Service
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

(b)(6)

DATE: MAY 20 2014 Office: CALIFORNIA SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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.

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.

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center denied the nonimmigrant visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The director's decision will be withdrawn and the matter will be remanded to the director for further review and entry of a new decision.

The petitioner filed this nonimmigrant petition seeking to classify the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a California limited liability company engaged in cross-border transportation and logistics services. It claims to have an affiliate relationship with [redacted] located in Tijuana, Mexico. The petitioner seeks to employ the beneficiary as its director of operations.

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

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO. On appeal, counsel asserts that the director erred in concluding that the petitioner failed to submit sufficient evidence to establish eligibility under this petition. Specifically, counsel asserts that the director failed to consider and weigh all of the evidence the petitioner provided in response to the director's request for evidence (RFE).

I. The Law

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

(i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.

(ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

(iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.

(iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as 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.

II. Employment in a Managerial Capacity

The primary issue addressed by the director is whether the petitioner established that the beneficiary was employed abroad and would be employed in the United States in a qualifying managerial or executive capacity. The petitioner has consistently stated that the beneficiary's role as director of operations is in a managerial capacity, and that he performs essentially the same duties for both entities, which work closely together to coordinate cross-border transportation services between the United States and Mexico.

The director denied the petition concluding that the petitioner failed to provide a specific description of the beneficiary's job duties, and failed to submit evidence of payroll payments to employees in response to a request for evidence issued on August 12, 2013.

On appeal, the petitioner asserts that it did in fact submit a highly detailed description of the beneficiary's job duties in response to the RFE, and emphasizes that the RFE did not expressly require that the petitioner submit payroll documentation with its response. The petitioner submits state and federal quarterly tax returns on appeal as evidence of its payment of wages to employees and asserts that the

totality of the evidence in the record establishes that the beneficiary has been and would be employed in a qualifying managerial capacity.

The term "function manager" applies generally when a beneficiary is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish clearly describe the duties to be performed in managing the essential function, identify the function with specificity, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. *See* 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. 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.

Upon review, the petitioner has established that the beneficiary's role as director of operations for both the foreign and U.S. entities is in a qualifying managerial capacity. While the petitioner's initial evidence was lacking in detail, the petitioner provided a detailed, three-page description of the beneficiary's duties in response to the RFE which delineated his duties within his overall responsibility for managing the operations function for the petitioner, the essential nature of this function, and his direct and indirect supervision of personnel charged with performing the day-to-day operations of the function. The petitioner provided a detailed explanation of the complexity of the petitioner's $5.5 million cross-border transportation operation, and an explanation of the close coordination among the petitioner's management with the management staff other group companies who serve the same U.S. and Mexican customers. The totality of the evidence in the record supports a conclusion that the beneficiary, more likely than not, has been and would be engaged in performing qualifying duties associated with the overall management of the function, exercises discretion over the function, and is relieved from significant involvement in its day-to-day operations.

Therefore, the director's finding that the beneficiary's role as director of operations for the foreign and U.S. companies is not in a qualifying capacity will be withdrawn.

III. One-Year of Qualifying Employment Abroad

Although the director's decision will be withdrawn, the petition will be remanded as the petitioner has not provided evidence that the beneficiary had at least one continuous year of full-time employment abroad with a qualifying organization. *See* 8 C.F.R. § 214.2(l)(3)(iii). Without this evidence, the petition cannot be approved.

The regulation at 8 C.F.R. § 214.2(l)(1)(ii)(A) defines "intracompany transferee" as:

> An alien who, within three years preceding the time of his or her application for admission into the United States, has been employed abroad continuously for one year by a firm or corporation or other legal entity or parent, branch, affiliate or subsidiary thereof,

> and who seeks to enter the United States temporarily in order to render his or her services to a branch of the same employer or a parent, affiliate, or subsidiary thereof in a capacity that is managerial, executive or involves specialized knowledge. *Periods spent in the United States in lawful status for a branch of the same employer or a parent, affiliate, or subsidiary thereof and brief trips to the United States for business or pleasure shall not be interruptive of the one year of continuous employment abroad but such periods shall not be counted toward fulfillment of that requirement.*

(Emphasis added).

Further, as noted above, the statute provides that a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. *See* section 101(a)(14)(L) of the Act.

When read together, the regulatory definition of "intracompany transferee" allows USCIS to expand the "one year of continuous employment abroad" requirement established by statute beyond the three years immediately preceding the filing of the petition. The provision accommodates situations in which a beneficiary had at least one continuous year of qualifying experience with a related foreign entity, but worked or received training with a qualifying U.S. entity in another status for two or more years before seeking to obtain L-1 status.

Here, the petitioner indicates that the beneficiary commenced employment with the foreign entity, in January 2005 and commenced employment with the petitioner as an E-1 nonimmigrant in June 2005, less than one year later.

The director requested that the petitioner provided evidence to establish the beneficiary's one continuous year of full-time employment with the Mexican entity prior to his transfer to the United States.

The petitioner responded that the beneficiary has worked for both the U.S. and foreign entities on a full-time basis since 2005 and that he resides solely in Mexico. The petitioner stated that "since [the beneficiary] has been employed on a full-time basis by both [the foreign entity] and [the U.S. entity], he may count each day of the three years preceding the L-1A petition toward the fulfillment of the one year requirement abroad." The petitioner provided recent pay statements indicating that the beneficiary is being paid by both entities.

The petitioner also asserted that the beneficiary's full-time services may be divided among affiliate companies. *See* 8 C.F.R. § 214.2(l)(3)(iii); *see also*, 9 FAM § 41.54 n.11.1a (noting that several years of part-time employment equaling one year in aggregate cannot be viewed as meeting the one year of full-time employment abroad requirement). However, the requirement that the full-time employment be gained "abroad" precludes the beneficiary from gaining his qualifying one year of experience while employed concurrently by the U.S. entity and the foreign entity. The petitioner indicates that the beneficiary returns to Mexico each day, but it appears to require him to be physical present in the United States on most business days pursuant to his role as the petitioner's director of operations.

Therefore, the record as presently constituted does not contain evidence that the beneficiary has one year of continuous full-time employment abroad with a foreign qualifying organization. Accordingly, the petition will be remanded to the director, who may request additional evidence to address this eligibility requirement.

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). Although the petitioner has overcome the director's original grounds for denying the petition, the current record does not fully establish the beneficiary's eligibility for the benefit sought and will be remanded for further action and entry of a new decision.

ORDER: The decision of the director dated August 26, 2013 is hereby withdrawn. The matter is remanded for further action and consideration consistent with the above discussion and entry of a new decision, which, if adverse, shall be certified to the AAO for review.