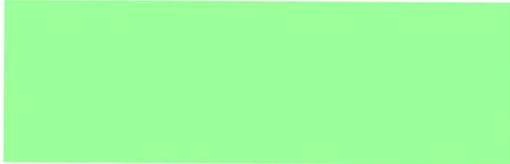




U.S. Citizenship  
and Immigration  
Services

(b)(6)



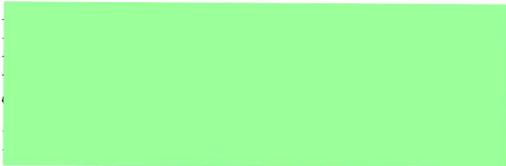
DATE: **DEC 29 2014** Office: VERMONT SERVICE CENTER

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. 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 Director, Vermont Service Center, denied the nonimmigrant 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-129, Petition for a Nonimmigrant Worker, 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 an affiliate of [REDACTED] located in the Dominican Republic. The petitioner states that it operates a [REDACTED] by [REDACTED]. It seeks to employ the beneficiary in the position of president for a period of three years.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary has been and will be employed in a qualifying executive capacity. The director concluded that because the franchiser controls the franchisee in all qualifying managerial or executive duties, the beneficiary will not be employed in an executive position.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, the petitioner asserts that the director failed to understand the difference between contractual provisions negotiated between independently owned companies and corporate management authority. The petitioner further asserts that the director failed to consider the evidence presented regarding the executive functions of the beneficiary. The petitioner submits a brief and duplicate copies of previously submitted evidence in support of the appeal.

#### 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)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as 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.

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. THE ISSUE ON APPEAL

The sole issue addressed by the director is whether the petitioner established that the beneficiary has been and will be employed in a qualifying executive capacity.

### A. Facts

The petitioner filed the Form I-129 on November 6, 2013. The petitioner indicated on the Form I-129 that it operates a [REDACTED] with 19 current employees in the United States and a gross annual income of \$937,859.

On the Form I-129, where asked to describe the beneficiary's duties abroad for the three years preceding the filing of the petition, the petitioner stated the following:

From late 2009 through October 2012, [the beneficiary] was employed by the petitioner on an E-2 visa. The petitioner operates a [REDACTED] which is located in [REDACTED], Florida. The Petitioner began its [sic] association with [REDACTED] as part of a \$25 million dollar renovation of the Resort. The beneficiary was responsible for overseeing the renovation/development of the Spa and then continued the transformation of the existing Spa into a new [REDACTED] – the first in North America. As president he was responsible for overall management of the expansion, renovation and transformation.

In October 2012, the beneficiary was transferred to the affiliate in [REDACTED] Dominican Republic – [the foreign entity]. He negotiated a Spa operating agreement for the [REDACTED] and oversaw the transformation of the Spa into a [REDACTED]. Now that the [REDACTED] operations have been transformed and are operating well the petitioner seeks to transfer him back to the main office in [REDACTED] so that he can oversee the continued expansion of the [REDACTED] spas.

On the same Form I-129, where asked to describe the beneficiary's proposed duties in the United States, the petitioner stated the following:

The duties in the US will be to act as President for the Florida Company which will be responsible for the continued operations of the [REDACTED] and the [REDACTED] Florida. His duties will also include overall management of the expansion of the [REDACTED] locations. This will include the [REDACTED] which is schedule[d] to open in May of 2014 and then later the [REDACTED]. Because of the ease of doing business in Florida and its [sic] role as a travel and communications hub the headquarters of the [REDACTED] will be located in [REDACTED].

In support of the petition, the petitioner submitted a letter describing the beneficiary's position abroad and proposed position in the U.S. exactly as described on the Form I-129. The only additional information provided is that, combined, the two entities employ 42 individuals.

The petitioner also submitted promotional documents, which include the business structure of both entities. The entities are broken down to two departments: sales and marketing and operations. The sales and marketing manager is responsible for "the welcome experience, personalized services, retail, booking procedures, promotions, special events, and overall sales," while the operations manager is responsible for "therapist training, technical assessments, professional stock, orders, therapist planning, and spa management software." The petitioner provided a thorough list of duties for each manager (at both entities) and identified some of the responsibilities of their subordinates.

The petitioner submitted the beneficiary's resume describing his professional experience at the foreign entity as follows:

- Oct 2007 to April 2009      Creation and co-owner of a [redacted] in Dominican Republic  
 Creator and Co- owner of a [redacted] Dominican Republic  
 Hired, trained and supervised Spa employees, cleaning and maintenance crews.  
 Responsible for purchasing, administration, overseeing marketing, advertising and overall financial results of the company.
- June 2009 to Feb 2012      Creation of [the petitioner] and owner of a [redacted] massage in Florida, [redacted]
- Feb 2012 to Oct 2012      Opening of a new spa, [redacted] in Florida [redacted]
- Nov 2012 to Present      Creation of [the foreign entity] and owner of [redacted]

The petitioner submitted a copy of its "Spa Operating Agreement" with [redacted] dated December 1, 2011. This agreement establishes that the petitioner will provide spa services on the premises of a [redacted] Florida. The petitioner's operating agreement establishes that the spa operator, the petitioner, "is an independent contractor and not an agent or employee of [redacted]"

The petitioner also submitted a copy of the foreign entity's "Spa Operating Agreement" with [redacted] of [redacted], dated November 1, 2012. This agreement establishes that the foreign entity will provide spa services on the premises of a [redacted] resort in [redacted] Dominican Republic. The foreign entity's operating agreement establishes that the spa operator, the foreign entity, "is an independent contractor and not an agent or employee of [redacted]"

The director issued a request for additional evidence ("RFE") on November 18, 2013, advising the petitioner that the submitted evidence is insufficient to establish that the beneficiary has been and will be employed in a qualifying managerial or executive capacity, or as a function manager. The director advised the petitioner that the statements submitted do not establish that the beneficiary has and will supervise and control the work of other supervisory, professional, or managerial employees, manage an essential function within the organization, authorized to hire and fire personnel, and exercise discretion over the day-to-day operations of the activity or function for which he has authority. The director instructed the petitioner to submit evidence that the beneficiary's position abroad and proposed position in the United States has been and will be managerial or executive in nature.

In response to the RFE, the petitioner provided a letter, dated November 26, 2013, from the Vice President of Operations for [REDACTED] stating that in their dealings with the petitioner, it was clear that the beneficiary was the top executive of the company. The letter further stated that the beneficiary recruited and hired the U.S. company's current employees and was the person [REDACTED] saw responsible for all high level executive decisions regarding the company. The letter states that due to the beneficiary's leadership, the U.S. company was so successful that it expanded into a [REDACTED] and later expanded its business to [REDACTED] other facilities in [REDACTED] Dominican Republic. The letter states that [REDACTED] understanding is that the petitioner wishes to transfer the beneficiary to the United States for the continued expansion of its spa operator business.

The petitioner submitted an undated letter from the foreign entity's sales and marketing manager describing the beneficiary's role at the foreign entity as follows:

[The beneficiary] is the person who hired me and who has the power to hire and fire all persons in the company. He exercises this power to hire and fire the employee of the company with recommendation from me and the other manager . . . .

In our dealings with [the beneficiary], the President of the company it is clear that he is the Senior Executive in the company who reports only to the Board of Directors which includes him and [REDACTED]

With accounting reports prepared for him by staff members and the independent accountant . . . [the beneficiary] develops the overall budget for the entire company and develops the business objectives and directs the operating guidelines and directs the implementation of programs for the entire company.

[The beneficiary] is the person who selects and hires outside advisors to the company which includes the accounting company and the legal advisors.

Under his leadership, [the foreign entity] has taken over the Spa/Wellness business in the [REDACTED] and transformed this into an [REDACTED] – the first in the Carribbean.

[The beneficiary] lead [the foreign entity] for several months prior to our official opening and since our official opening on November 1, 2012. During business hours we always have on site a Manager, Reception Manager, receptionist, retail person, and Spa attendant, event hostel [sic] , driver, a group leader, a cleaning person and 10 to 12 Therapists.

The petitioner also submitted letters from [REDACTED], stating that their services have been obtained by the foreign entity and that, "in [their] dealings with [the beneficiary], the President of the company it is clear that he is the Senior Executive in the company who has the authority to make all top level decisions."

The petitioner submitted an organizational chart for the foreign entity depicting the beneficiary as president, supervising a sales and marketing manager and a spa coordinator, who together supervise an administrator. The sales and marketing manager independently supervises a reception manager who supervises a reception team and events section, who supervise spa attendants and a driver. The spa coordinator independently supervises a group leader who supervises therapists, estheticians, and hairstylists, and cleaning crews. The petitioner submitted its organizational chart depicting the beneficiary as president, supervising a spa manager. The spa manager supervises reception, events, and a group leader. Reception supervises a spa attendant and the group leader supervises therapists, estheticians, and hairstylists. The petitioner also submitted a thorough list of job duties for its spa manager and second tier supervisors.

The petitioner submitted an undated letter from its spa manager describing the beneficiary's role at the U.S. company as follows:

[The beneficiary] is the person who hired me and who has the power to hire and fire all persons in the company. He exercises this power to hire and fire the employee of the company with recommendation from me. He has left me to handle the day to day operations of the business while he has been in the Dominican Republic establishing our sister operations.

\* \* \*

I understand that [the beneficiary] plans to transfer back to this office in the U.S. office to continue to expand the business operations. I understand that after he returns to this office that I will continue to run the day to day operations here and may have additional duties in assisting him with the expansion plans.

The petitioner submitted an undated letter from the beneficiary describing his role at the foreign entity and his proposed role at the U.S. company as follows:

Since it's [sic] incorporation in August 2012 I have been employed full time in the Dominican Republic getting these operations established. I first hired the attorney and the accountants for the business. I then hired and trained the staff which now numbers 28. My management staff includes . . . the Sales and Marketing Manager and . . . the Spa Coordinator. They are assisted by . . . the administrator, . . . the Reception Manager and . . . the group leader. The

Staff on site always includes a Manager, a Reception person, a retail person, a spa attendant, an event hostess, a driver, a group leader, a cleaning person, and 10 to 12 Therapists.

Now that the operations in Dominican Republic are established and running smoothly I wish to transfer back to Florida . . . to use the Florida location as a base of operations to continue expanding the business. The business plan is to open two new [REDACTED] Spas/Wellness Centers in 2014 in [REDACTED] . . .

It is my intent to transfer . . . so that I may oversee the expansion of the business to include two new [REDACTED] Spas/Wellness Centers in 2014. While working on establishing these new operations in 2014, I will be making plans to continue the business expansion for 2015 and 2016.

The director denied the petition on December 23, 2013, concluding that the petitioner failed to establish that the beneficiary has been and will be employed in an executive capacity. In denying the petition, the director observed that the petitioner has a franchise agreement with [REDACTED] who requires the franchisee to agree to specific methods and procedures for operating the franchise, set forth by the franchisor. The director observed that the franchisor may terminate the agreement based on numerous specific terms listed. The director further observed that the franchisor has approval authority and ultimate control regarding the location of the franchise and its lease agreements. The director also noted that the franchisor requires and has sole responsibility for training management personnel and can require these personnel to satisfactorily complete specific tests designed by [REDACTED]. The director found that the franchisor, [REDACTED] controls the franchisee, the petitioning U.S. company and the foreign entity in separate agreements, in all qualifying managerial or executive duties, and therefore, the beneficiary cannot be deemed a temporary intra-company transferee who is coming to work in a position that is primarily executive.

On appeal, the petitioner contends that the director misunderstood the business structure of the petitioner and is confusing contractual provisions with the corporate governance and executive management. The petitioner asserts that the spa operating agreement is more similar to a lease agreement than a franchise agreement. The petitioner points out that the director's observation regarding who is responsible for the training of management personnel is incorrect and that the petitioner is the responsible party for hiring, firing, and training its own personnel. The petitioner also points out that termination terms are present in every agreement and that each party, as an independent company, has rights to terminate the agreement. In terms of training by [REDACTED] the petitioner contends that the petitioner's decision to hire a third party to provide training to its staff on the products they sell is common practice and does not negate the petitioner's control over its staff. The petitioner clearly asserts that each company, including the petitioner, the foreign entity, [REDACTED] are independent companies that are separately owned and managed and have entered into contractual agreements with each other.

The petitioner also discusses the evidence submitted in response to the RFE and asserts that this evidence "clearly shows that [the beneficiary] directs the management of the [the petitioner] which consists of two locations at this time with two additional locations to be opened in 2014." The petitioner further asserts that the beneficiary establishes the goals and policies for the petitioner and exercises wide latitude in discretionary decision-making.

B. Analysis

Upon review, and for the reasons stated herein, the petitioner has not established that the beneficiary has been and will be employed in a qualifying managerial or executive capacity.

The director's analysis focused on the petitioner's operation of a franchise business rather than on the beneficiary's job duties abroad and his proposed job duties in the United States per Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). The petitioner's assertions relating to the spa operating agreement and other contractual terms are persuasive. The director incorrectly focused on the spa operating agreement and the terms therein in finding that the operating agreement grants [REDACTED] executive and managerial rights over the petitioner and the foreign entity. In any operational or contractual agreement, it is reasonable to expect that certain terms and conditions are listed as requirements for each party. Although the director's conclusion will be affirmed, the director's analysis and comments regarding the petitioner's franchise agreement are withdrawn.

When examining the executive or managerial capacity of the beneficiary, U.S. Citizenship and Immigration Services (USCIS) looks first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(1)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are in either an executive or a managerial capacity. *Id.* Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to an understanding of the beneficiary's actual duties and role in a business.

The definitions of executive and managerial capacity each have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must show that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day operational functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). The fact that the beneficiary owns or manages a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of sections 101(a)(15)(L) of the Act. *See* 52 Fed. Reg. 5738, 5739-40 (Feb. 26, 1987) (noting that section 101(a)(15)(L) of the Act does not include any and every type of "manager" or "executive").

The statutory definition of the term "executive capacity" focuses on a person's elevated position within an organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. *See* Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual

will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.* While the definition of "executive capacity" does not require the petitioner to establish that the beneficiary supervises a subordinate staff comprised of managers, supervisors and professionals, it is the petitioner's burden to establish that someone other than the beneficiary carries out the day-to-day, non-executive functions of the organization.

Here, although the petitioner references the beneficiary's positions at the "top executive level," the petitioner failed to demonstrate that the beneficiary's duties abroad and proposed duties in the United States primarily focus on the broad goals and policies of the organization rather than on its day-to-day operations. The petitioner first characterized the beneficiary's role as president of both the foreign entity and the petitioner and provided very vague descriptions of the beneficiary's position that do not establish that he has been or will be primarily an executive at either entity. The petitioner indicated that the beneficiary's duties abroad and continued duties in the U.S. are to "oversee the expansion of the [redacted] spas," but failed to provide an accurate picture of what he does on a daily basis. The letters submitted by the beneficiary's subordinate employees and independent contractors abroad and in the United States simply state that he has been the top executive of each company and that he makes all top level decisions, hires and fires employees, and selects third party accounting and legal advisors. In his own letter, the beneficiary states that he will come to the U.S. to oversee the expansion of the business to two new [redacted] Spas/Wellness Centers in 2014. The petitioner did not include any additional details or specific tasks related to the beneficiary's briefly listed responsibilities, nor did the petitioner indicate how such duties qualify as executive in nature. The petitioner's description of duties fails to provide any detail or explanation of the beneficiary's claimed executive 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. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Id.*

When asked to submit a comprehensive description of the beneficiary's job duties, the petitioner submitted letters simply stating that he is the top level executive/decision maker and that he hires and fires employees. These general statements failed to offer any clarification as to the beneficiary's actual duties abroad and proposed in the United States, and fell considerably short of satisfying the director's request for a "comprehensive description" of the beneficiary's duties. 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. Although afforded a second opportunity to provide the deficient information, the petitioner failed to provide any detail or explanation of the beneficiary's activities in the course of both his current and proposed daily routine. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The vague description of the beneficiary's position abroad and proposed with the petitioner fail to demonstrate that the beneficiary focuses the majority of his time on executive duties rather than the day-to-day operations of the business.

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." See section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that 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)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2). If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. See 8 C.F.R. § 214.2(l)(1)(ii)(B)(3).

Although the beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. See § 101(a)(44)(A)(ii) of the Act.

Here, the petitioner submitted organizational charts illustrating the managerial hierarchy within the foreign and U.S. entities. The petitioner also submitted thorough lists of job duties for the beneficiary's subordinate managers and their second tier supervisors. It can be reasonably expected that the foreign entity and petitioning U.S. company each have managerial and supervisory staff subordinate to the beneficiary's position. However, although the beneficiary is shown to have at least one subordinate with some managerial and supervisory duties, he has not been shown to *primarily* supervise and control the work of other supervisory, professional, or managerial employees. The fact that one of his subordinates may manage a particular function and supervise lower-level employees is not sufficient to elevate the beneficiary to a position that is managerial in nature. The petitioner has failed to demonstrate that the beneficiary's duties will primarily focus on the management of the organization and the supervision of qualifying managerial, professional, or supervisory employees, rather than on producing a product or providing a service of the petitioner. As noted above, the petitioner failed to submit a detailed description of the beneficiary's position to establish that his daily routine will consist of primarily managerial duties.

The petitioner has not established, in the alternative, that the beneficiary is employed primarily as a "function manager." The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead 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 a position description that describes the duties to be performed in managing the essential function, i.e. identifies the function with specificity, articulates the essential nature of the function, and establishes 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. Here, the petitioner did not indicate that the beneficiary qualifies as a function manager. The petitioner did not articulate the beneficiary's duties at the foreign entity as a function manager and did not provide a breakdown indicating the amount of time the beneficiary devotes to duties that would clearly demonstrate that he manages an essential function of the foreign entity.

Based on the deficiencies discussed above, the petitioner has not established that the beneficiary was employed by the foreign entity or will be employed by the petitioner in a qualifying managerial or executive capacity. Accordingly, the appeal will be dismissed.

### III. EMPLOYMENT ABROAD FOR ONE YEAR

Beyond the decision of the director, the petitioner failed to establish that the beneficiary had at least one continuous year of full-time employment with a qualifying foreign entity within the three-year period preceding the filing of the petition, as required by 8 C.F.R. § 214.2(l)(3)(iii).

On the Form I-129, the petitioner stated that the beneficiary commenced employment with the foreign entity on November 1, 2012. During the adjudication of the appeal, we discovered that USCIS records indicate that the beneficiary traveled to the United States at least nine times during the commencement of his employment with the foreign entity on November 1, 2012 to the date of filing the petition on November 6, 2013, totaling approximately 59 days, as follows:

- 3 Days: Arrived in the U.S. on 11/25/2012; Departed the U.S. on 11/28/2012
- 12 Days: Arrived in the U.S. on 01/08/2013; Departed the U.S. on 01/20/2013
- 7 Days: Arrived in the U.S. on 03/23/2013; Departed the U.S. on 03/30/2013
- 1 Day: Arrived in the U.S. on 04/30/2013; Departed the U.S. on 05/01/2013
- 1 Day: Arrived in the U.S. on 05/28/2013; Departed the U.S. on 05/29/2013
- 9 Days: Arrived in the U.S. on 07/09/2013; Departed the U.S. on 07/18/2013
- 6 Days: Arrived in the U.S. on 08/09/2013; Departed the U.S. on 08/15/2013
- 9 Days: Arrived in the U.S. on 09/06/2013; Departed the U.S. on 09/15/2013
- 6 Days: Arrived in the U.S. on 10/02/2013; Departed the U.S. on 10/08/2013

On October 22, 2014, we issued a Notice of Derogatory Information and Intent to Dismiss ("Notice"), advising the petitioner of the USCIS records detailed above and allowed it an opportunity to provide additional evidence to show that the beneficiary had been employed full-time for one continuous year within the three-year period preceding the filing of the petition.

In response to the Notice, the petitioner contends that the cut-off date for the beneficiary's one year of employment abroad should be January 1, 2014 and not November 6, 2013 because, as noted on the original Form I-129, the petitioner is specifically requesting that the beneficiary's employment commence on January 1, 2014. The petitioner further states that after the filing of the petition, on November 6, 2013, the beneficiary traveled to the United States from November 17 to November 21, 2013, from December 8 to December 19, 2013, and from January 7 to January 8, 2014. The petitioner contends that the beneficiary "did not come to the U.S. for any significant time until January 23, 2014. This means that he accrued additional time of foreign employment which exceeds the one year requirement."

The petitioner submits additional copies of the beneficiary's passport.

Upon review, the petitioner's contentions are not persuasive. The petitioner has failed to establish that the beneficiary had at least one continuous year of full-time employment with a qualifying foreign entity within the three-year period preceding the filing of the petition, as required by 8 C.F.R. § 214.2(l)(3)(iii).

The regulation at 8 C.F.R. § 214.2(l)(1)(ii)(A) states, in part:

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.

In the instant matter, beneficiary does not meet the "one continuous year of full-time employment abroad within the three-year period *preceding the filing of the petition*" requirement at 8 C.F.R. § 214.2(l)(3)(iii). In response to the Notice, the petitioner contends that the requested employment commencement date is January 1, 2014 and thus should be the cut-off date for the beneficiary to meet his one year of full-time employment abroad requirement. However, the regulation clearly states that this requirement must be met at the time of filing the petition. Therefore, based on information in the record, the petitioner has failed to establish that the beneficiary has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of this petition. For this additional reason, the petition may not be approved.

The AAO maintains discretionary authority to review each appeal on a de novo basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

#### IV. CONCLUSION

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

**ORDER:** The appeal is dismissed.