

FUNCTION MANAGER PETITIONS – AD HOC TESTS AND LEGAL AUTHORITIES

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The purpose of this article is to review ad hoc tests and available authorities pertaining to immigrant visa petitions for function managers and suggest a framework that will help practitioners evaluate and maximize the likelihood of success for petitions in this category. The regulatory criteria for function managers are at best vague, leaving much room for discretionary judgment by USCIS adjudicators; however, the often overlooked supplemental authorities reviewed here provide important guideposts for preparing more effective petitions. The regulations have not been amended to keep pace and clarify the criteria for function management positions that have become commonplace within modern multinational corporations since the regulations were adopted. USCIS adjudicators have instead adopted ad hoc tests that are revealed indirectly in requests for evidence and denial decisions in individual cases.

Two relatively recent factors have acted to increase the demand for filing petitions for EB13 function managers:

- Severe backlogs in immigrant visa availability in the labor certification based EB2 and EB3 categories, particularly for employees from India and China;
- The current and continuing scarcity of H-1Bs, which is forcing multinational employers to increase the use of L-1s as a vehicle for importing the needed talent; many of these employees may be approved for L-1A status, but experience has shown that despite the similarity in the regulatory criteria between L-1A multinational managers and EB13 multinational managers, L-1A status does little to assure approval of an EB13 immigrant visa petition for the same employee.

Regulatory Criteria for Function Managers under 8 CFR § 204.5(j)(2) and (j)(4)

- Regulatory criteria found at 8 C.F.R. § 204.5(j)(2) provides a standard definition for managerial capacity comprised of four separate elements:
- Manages the organization, or a department, subdivision, function, or component of the organization;

- Supervises and controls the work of other supervisory, profession, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- 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
- Exercises discretion over the day to day operations of the activity or function for which the employee has authority.

Each element must be met by the employee to qualify as an EB13 function manager. Further, 8 C.F.R. § 204.5(j)(4) emphasizes that first-line supervisors are not considered to be managers unless the employees supervised are professional; and that if staffing levels are used to as a factor in determining whether an individual is acting in a managerial capacity, the reasonable needs of the organization must be taken into account.

Ad Hoc Tests and Supplemental Authorities

A number of ad hoc tests and criteria have been adopted by USCIS adjudicators when evaluating a managerial petition. Their existence is indirectly revealed in requests for evidence (“RFE”) - adjudicators typically do not state specific tests or criteria when issuing RFEs, but choose instead to request information from the petitioner to which the ad hoc tests and criteria will be applied. In order to respond effectively to a request for evidence, it is crucial that attorneys be aware of the likely tests or criteria that will be applied, as well as their origin.

Understanding the underlying authority for the ad hoc tests provides a context for preparing successful function manager petitions as well as responses to RFEs. These tests can usually be traced back to regulatory criteria, and/or a number of interpretive supplemental authorities including: non-binding non-

precedent Administrative Appeals Unit ("AAU")¹ decisions; Federal Court decisions; the Adjudicators Field Manual² ("AFM"); and the Foreign Affairs Manual ("FAM").

USCIS adjudicators commonly rely on the AFM to determine what information to request from petitioners in the context of RFEs. Consequently, the AFM provides the best source of information for what adjudicators are seeking when evaluating EB13 function manager petitions. However, it is particularly important to understand that while regulatory and supplemental authorities generally provide the basis for the AFM - the AFM leaves out key concepts found in these same authorities, which are often the most helpful to a petitioner's case.

As discussed below, the most commonly encountered tests and criteria are:

- Managing vs. Doing;
 - Reasonable Needs of the Organization;
 - Nature of the Function Managed;
 - Level of Authority;
 - Managing Subcontractors vs. Employees; and
 - Salary.
- **Managing vs. Doing**

This test is the essence of any manager petition and is the most common basis for RFEs issued in function manager cases. In the context of EB13 function manager cases, the essential question is, does the employee work through others to manage the function, or are they performing the work themselves? This distinction is implied in regulatory criteria, and more clearly acknowledged and addressed in the FAM, AFM, and relevant case law:

- The AFM confirms that employees may not directly perform the function managed, and provides a useful example to assist with distinguishing between managing the function and directly performing it. Specifically, the AFM confirms, "...it must be clearly demonstrated...that the *essential function being managed is not also being directly performed* by the alien beneficiary". AFM at Chapter 22.2 (i)(E)(1) *Function Managers*. Note the example used by the AFM

involves a specialty chemical company, seeking to hire an employee to direct laboratory research on chemical compounds. The AFM confirms that under these circumstances, "...the employee *cannot also be primarily performing the day to day laboratory research*"; and "...an employee who primarily performs the tasks necessary to produce a product or provide a service is not considered to be employed in a managerial (or executive) capacity". AFM at Chapter 22.2 (i)(E)(1).

- The FAM also expressly confirms that employees must primarily work through others. It states in pertinent part, "...managers and executives plan, organize, direct, and control an organizations major functions and work *through other employees* to achieve the organization's goals". 9 FAM 41.54 N8.2-1
- The Fifth Circuit further clarified *Managing vs. Doing* by stating, "[i]nstead, the factual evidence shows that Chang spent most of his time 'performing audits', not directing others in the preparation of audits...The evidence shows that Chang himself did much of the work in preparing these various reports and in engaging in these various activities. The employees under him helped him make the reports, but did not themselves develop and make such reports...he (Chang) was engaging in production activities himself." *National Hand Tool Corp. v. Pasquarell*, 889 F.2d 1472, n.5 (5th Cir.1989),
- The court in *Q Data Consulting, Inc. v. INS*, 293 F. Supp.2d 25 (D.D.C. 2003), confirmed that in addition to clearly demonstrating that the employee will be primarily managing the function as opposed to performing it - it may be important to address who will relieve the employee from performing non-qualifying activities. The Court stated in pertinent part, "The reasonableness of this conclusion is further bolstered by the absence of evidence that a *sufficient subordinate staff will relieve her from performing managerial non-qualifying duties*. Although Ms. Prinsloo would be supervising five to fourteen professional software consultants, the INS could again reasonably infer that many of the office's responsibilities would gravitate towards Ms. Prinsloo."

Implicit within the "Managing vs. Doing" test are three extremely important tests, which also frequently reveal themselves in the context of RFEs. First, "Specificity" – are the managerial duties described with sufficient specificity for an examiner to evaluate? Second, "Managerial vs. Non-Managerial Activities" – which activities are considered managerial or "qualifying" by the USCIS, and which activities are considered non-managerial or "non-qualifying"? Third, "Proportionality" - what percentage of

¹ The AAU, now known as the Administrative Appeals Office (AAO), is a separate office within the Department of Homeland Security, organizationally separate from U.S. Citizenship and Immigration Services.

² See USCIS memorandum, "AFM Update: Chapter 22: Employment Based Petitions (AD03-01)," September 12, 2006, available online at <http://www.aila.org/Content/default.aspx?docid=22040>.

time is spent by the beneficiary performing managerial versus non-managerial duties? Each of these tests are discussed below.

- **Managing vs. Doing - Specificity**

A common basis for denial of a managerial petition is that the petitioner failed to describe the beneficiary's duties with sufficient specificity; since the burden of proof is on the petitioner to establish eligibility, any petition may be denied on this basis alone, even for the most qualified beneficiary.

The following discussion from a 2005 AAO decision is typical:

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. 204.5(j)(5). 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 either in an executive or managerial capacity. *Id.*

On review, the petitioner's description of the beneficiary's duties is vague, nonspecific and fails to demonstrate the beneficiary's day-to-day duties. The petitioner does not define the petitioner's organizational goals and policies or clarify who carries out the petitioner's operational and administrative tasks. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I. & N. Dec. 190 (Reg. Comm. 1972). 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. *Fedin Bros. Co., Ltd. V. Sava*, 724 F.Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d Cir. 1990).

In addition, the petitioner's general statements paraphrase the statutory definition rather than providing a specific description of the beneficiary's duties. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient to meet the petitioner's burden of proof. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof.

Matter of [name not provided], WAC 96 148 52178, Administrative Appeals Office, May 6, 2005,

available online at <http://www.uscis.gov/uscis-ext-templating/uscis/jsp/override/errFrameset.jsp>.

Thus, the ability of a petitioner to be specific in describing a beneficiary's managerial duties is itself taken as evidence of a managerial position, and conversely, the absence of such specificity may be interpreted as a sign that the position is in fact not managerial in nature. Simply stating that the beneficiary manages XYZ function (or other similar conclusory statements) will not be sufficient to gain approval, and it is the attorney's duty to elicit that detailed information from the petitioner and the beneficiary.

- **Managing vs. Doing - Managerial vs. Non-Managerial**

Unfortunately, although USCIS Adjudicators frequently seek to distinguish between managerial and non-managerial activities, there is practically no regulatory guidance for which activities should be considered managerial (qualifying), and which activities should not.

In this regard, we turn to the available supplemental authority to help identify qualifying from non-qualifying activities. Based on the "specialty chemical company" example previously noted in the *AFM*, distinguishing between managerial vs. non-managerial activities first requires identification of the product or service being provided. Subsequently, we must distinguish between activities which are in effect, *directly providing* the product or service – e.g., an employee who is conducting the laboratory research themselves; from activities which are a step removed – e.g., an employee who directs or coordinates the work of other individuals who are responsible for conducting the laboratory research.

The AAU further assists us with distinguishing between managerial and non-managerial activities by focusing on the nature of the work performed by individuals to whom the beneficiary delegates. In *Matter of Irish Dairy Board, Ltd.*, A28 845 421 (AAU Nov. 16, 1989) [Schedule A, Group IV case] reported in *Interpreter Releases 1329-30* (Dec. 4, 1989), the AAU distinguished between work which may be considered auxiliary or clerical in nature, from work which is essential for the successful operation of the business (or function). Specifically, the AAU stated in pertinent part, "...The beneficiary does perform any of these functions himself but directs these contractors to take action when he deems appropriate. *It should be noted these duties are not auxiliary or clerical in nature but constitute the essential functions necessary for the successful operation of the business.*" Based on the AAU's analysis, we can infer that when the work performed by contractors (or internal employees) is

professional level, as opposed to auxiliary or clerical, the USCIS is more likely to consider the beneficiary to be a step removed from directly providing the product or service.

Additional examples which may be used to distinguish managerial vs. non-managerial activity may be found in the decisions of federal courts. In *Q Data Consulting, Inc. Id.*, the AAU confirmed that based on the circumstances of the case, the USCIS reasonably inferred that a number of activities engaged in by the beneficiary were non-managerial. The AAU noted, "Among her listed duties that could be designated *non-managerial* are the following: managing client billing, establishing strong client relationships, and managing allocated accounts." The AAU supported this conclusion in noting "The record does not sufficiently demonstrate that the beneficiary will manage a subordinate staff of professional, managerial, or supervisory personnel who will relieve her from performing managerial non-qualifying duties." Based on the AAU's analysis, we can infer that the absence of qualified personnel to relieve the beneficiary from *directly performing* the function for which he or she is responsible, will call into question the managerial nature of all of the activities performed by a beneficiary.

- **Managing vs. Doing - Proportionality**

The proportionality test stems from the word "primarily", which is found in the regulations at 8 C.F.R. 204.5(j)(2), as well as supplemental authority. The test essentially asks for the percentage of the employee's time spent engaging in managerial (qualifying) activities, versus non-managerial (non-qualifying) activities.

The AFM provides the following express instructions to USCIS Adjudicators: "If the beneficiary performs non-managerial administrative or operational duties, the description of the beneficiary's job duties must demonstrate what proportion of the beneficiary's duties is managerial in nature, and what proportion is non-managerial. A beneficiary that primarily performs non-managerial or non-executive duties will not qualify as a manager or executive under the statutory definitions." *AFM* at Chapter 22.2(i)(G) *Evaluating Managerial or Executive Status*.

It is important to note, particularly when representing smaller petitioners, a beneficiary is *not* required to be engaging in managerial activities 100% of the time. The FAM confirms this, and provides examples of activities which should be considered managerial. The FAM states in pertinent part, "...managers and executives *plan, organize, direct, and control* an organizations major functions and work through other employees to achieve the organization's

goals". Further, the FAM states, "The definitions do not exclude activities that are *common to managerial or executive positions such as customer and public relations, lobbying, and contracting.*" Finally, the FAM states, "The duties of a position must *primarily* be of an executive or managerial nature, and a *majority* of the executive's or manager's time must be spent on duties related to policy or operational management. *This does not mean that the executive or manager cannot regularly apply his or her professional expertise to a problem.*"

In *Q Data Consulting, Inc.*, the Fifth Circuit essentially confirmed that the failure to adequately address proportionality resulted in the petitioner's failure to meet its burden of proof. Specifically, the court stated, "...given the plaintiff's failure to provide a detailed projection of how much time Ms. Prinsloo would allocate to the various duties, the plaintiff could not meet its burden of proving that her position is *primarily managerial.*"

Reasonable Needs of the Organization

This test is well established in regulatory criteria, as well as supplemental authority, and provides an important and often overlooked opportunity to serve as a vehicle for presenting information about the organization, and the importance of the particular managerial function to the organization as a whole.

The regulations at 8 CFR § 204.5(j)(4)(ii) state the following: "Staffing levels. If staffing levels are used as a factor in determining whether an individual is acting in a managerial capacity or executive capacity, *the reasonable needs of the organization, component, or function, in light of the overall purpose and stage of development of the organization, component, or function, shall be taken into account.* An individual *shall not be considered to be acting in a managerial or executive capacity merely on the basis of the number of employees that the individual supervises or directs or has directed.*"

The AFM re-states the above regulations, and adds the following: "However, in evaluating reasonable needs, *the adjudicator should not hold a petitioner to his or her undefined and unsupported view of 'common business practice' or 'standard business logic'.* It is the petitioner's burden to demonstrate the company's reasonable needs with respect to staff or the organization's structure See Section 101(a)(44)(C) of the Act." *AFM* at Chapter 22.2(i)(G).

In *Matter of Irish Dairy Board, Matter of Irish Dairy Board, Ltd.*, A28 845 421 (AAU Nov. 16, 1989) reported in *Interpreter Releases 1329-30* (Dec. 4, 1989), the AAU took into consideration the stage of development and level of sophistication of the petitioner in determining whether or not the business

would reasonably support an executive (or managerial) level position. Specifically, the AAU stated in pertinent part, "This determination requires a *careful examination of the petitioning entity to determine if it has reached a stage of organizational development and is of such complexity that it can realistically be concluded that the beneficiary is primarily engaged in performing executive functions.*" The AAU went on to conclude, "It is clear that *in order to generate its volume of business, the petitioner by necessity is a complex business with numerous highly specialized organizational departments.*"

Whenever addressing the reasonable needs of the organization, it is useful for practitioners to be mindful of the fact that U.S. Congress did not intend discriminate against smaller companies in establishing the applicable immigration law. In *National Hand Tool Corp. v. Pasquarelli* 889 F.2d 1472, n.5 (5th Cir.1989), the court confirmed the intent of U.S. Congress in enacting the 1987 amendment to the regulatory definition of "managerial capacity" was, "...to facilitate interchange of managerial personnel between foreign companies and their domestic counterparts...and not impermissibly burden small firms lacking multi-tiered management structures."

Nature of the Function Managed

Similar to the proportionality test, this test appears to be derived from the regulations - likely from the word "essential", and is inextricably linked to the above noted test for Reasonable Needs of the Organization. This test is rather subtle, and provides another opportunity for a practitioner to be creative in describing the function managed, and by possibly pooling together and presenting the "totality of the evidence."

The AFM provides a good summary of some relevant factors which may be considered by USCIS Adjudicators when examining the nature of the function:

Beyond the petitioner's description of the beneficiary's proposed job duties, adjudicators should review the totality of the evidence, including descriptions of the beneficiary's duties and his or her subordinate employees, the nature of the petitioner's business, the employment and remuneration of other employees, and any other facts contributing to a complete understanding of the beneficiary's actual role in the business. The evidence must substantiate that the duties of the beneficiary and his or her subordinates correspond to their placement in an organization's structural hierarchy; in this regard, artificial tiers of subordinate employees and inflated job titles

are not probative. For smaller organizations, it may be helpful to request a description of the overall management and executive staff members of the organization. For organizations that are substantial in size, it may be helpful to request comparable descriptions for the organizational unit where the alien is to be employed...

AFM at Chapter 22.2(i)(G).

For example, a petitioner in the audio technology industry seeks to employ a beneficiary in the position of Director of Marketing to manage an essential function - the development and implementation of a global marketing campaign for a particular line of new audio technology products. In order to adequately and effectively relate the essential nature of this function, the practitioner must convey a clear explanation as to exactly why the function is essential. Under these circumstances, addressing the significance or importance of the introduction of these particular audio technology products into the market place for the petitioner is critical. This may include an explanation of the evolution and development of these products; the investments made into the global marketing of these products, both in terms of money and people; and the impact of the successful marketing of these products on the financial health of the petitioner.

Level of Authority

This test appears to be derived from the regulations at 8 CFR § 204.5(j)(2) and is closely related to the "whether or not the employee functions at a senior level within the organization, or with respect to the function managed" element of managerial capacity. However, supplemental authority provides a great deal more clarification for how the USCIS practically examines the employee's level of authority.

In this regard, the AFM notes, "An important, although not necessarily determinative, factor in determining whether an individual qualifies as a functional manager is the alien's *authority to commit the company to a course of action, or expenditure of funds.*" *AFM* at Chapter 22.2(i)(E)(1).

AAU non-precedent decisions can provide useful benchmarks for measuring the level of seniority and authority of an employee:

- In *Matter of Irish Dairy Board*, the AAU provides general guidelines by noting, "The beneficiary does not perform any of these functions himself but *directs these contractors to take action when he deems appropriate.*"; "The beneficiary is performing an essential and controlling function with respect to a large and complex business

enterprise requiring *significant decision making*.”; and “The record clearly indicates the beneficiary is primarily and solely responsible for the direction of the petitioning entity with *little or no supervision from the firm’s board of directors...*”.

- The AAU has repeatedly confirmed in non-precedent decisions that in examining the level of authority possessed by the employee, significant consideration is given to the nature of the business. Generally, if the business is specialized, and routinely employs degree holding professionals, it may be considered to require a high degree of sophistication, and therefore, would tend to support a managerial level position. Please refer to *Matter of [Name not provided]*, LIN 95-090-51859 (AAU Apr. 29, 1996), *reprinted in* 16 Immig. Rptr B2-63 (the selling of gemstones); *Matter of [Name not provided]*, WAC 94-242-52091 (AAU Mar. 19, 1996), *reprinted in* 16 Immig. Rptr B2-77 (trade and investment consulting); *Matter of [Name not provided]*, LIN 95-019-50617 (AAU Jan. 31, 1996), *reprinted in* 16 Immig. Rptr B2-29 (providing financial and accounting services); and *Matter of [Name not provided]*, EAC 93-255-50952 (AAU Mar. 21, 1994), *reprinted in* 12 Immig. Rptr B2-192 (managing investment funds).
- Alternatively, other non-precedent decisions issued by the AAU have provided examples of types of businesses which involve functions which are routine, and thereby do not require the services of a manager. Please refer to *Matter of [Name not provided]*, EAC 97-090-50555 (AAU Feb. 27, 1996), *reprinted in* 16 Immig. Rptr B2-89 (a seven person import-export firm); and *Matter of [Name not provided]*, EAC 94-037-520244 (AAU Jan. 25, 1995), *reprinted in* 14 Immig. Rptr B2-59 (a small textile trading company).
- Generally, employee’s who are personally responsible for developing new business ventures, including negotiating contracts worth hundreds of thousands of dollars or more, are more likely to be considered managerial. Please see *Matter of [Name not provided]*, WAC 94-242-52091 (AAU Mar. 19, 1996), *reprinted in* 16 Immig. Rptr B2-77; *Matter of [Name not provided]*, SRC 95-226-51864 (AAU Feb. 29, 1996); *Matter of [Name not provided]*, LIN 95-090-51859 (AAU Apr. 29, 1996), *reprinted in* 16 Immig. Rptr 2-63; *Matter of [Name not provided]*, LIN 95-019-50617 (AAU Jan. 31, 1996).
- Alternatively, employees who negotiate routine contracts within established corporate guidelines may be considered to be functioning as a sales or customer service representative, as opposed to a manager. Please see *Matter of [Name not*

provided], EAC 97-090-50555 (AAU Feb. 27, 1996); *Matter of [Name not provided]*, EAC 95-250-51157 (AAU Apr. 18, 1996); *Matter of [Name not provided]*, EAC 94-037-520244 (AAU Jan. 25, 1995).

Managing Subcontractors vs. Employees

Regulatory criteria clearly require that first-line supervisors must supervise professional level employees to be considered managerial. However, it is also well established in U.S. immigration law that control and supervision of independent contractors may be considered in determining managerial capacity. Unfortunately, USCIS examiners routinely attempt to discredit the work of an employee responsible for managing sub-contractors, and have even attempted to distinguish between the *type* of independent contractors – those who work solely for a petitioner, and those who spend their days working for a number of different people.

The AAU in *Matter of Irish Dairy Board* confirmed that independent contractors may be considered in determining the executive the nature of work performed by an alien. Specifically, the AAU stated, in pertinent part: “...*Further, the regulation and operating instruction do not restrict or limit the employees to individuals on the firm’s payroll.*”

In this regard, the FAM also expressly confirms that independent contractors as well as company employees can be considered in determining whether an alien supervises others. Specifically, the FAM states in pertinent part: “...In determining whether an alien supervises others, independent contractors as well as company employees can be considered.” 9 FAM 41.54 N8.2-1

As previously noted, the regulations at 8 CFR § 204.5(j)(4)(ii) state in pertinent part: “If staffing levels are used as a factor in determining whether an individual is acting in a managerial capacity, the reasonable needs of the organization, component, or function, in light of the overall purpose or stage of development of the organization, component, or function, shall be taken into account.” As such, if a company does not use the type of sub-contractor who is solely dedicated to that company, a practitioner may wish to explain why - perhaps it is a standard business practice in the industry?

Salary

This test is not articulated by the USCIS in requests for evidence or denial decisions, and is not rooted in any regulatory or supplemental authorities. However, in close cases a beneficiary’s salary can serve as persuasive evidence of the senior level nature of the position; conversely, a low salary may serve as

a red flag that suggests that the employee is not functioning at a senior or managerial level.

Supporting Documentation for Function Manager Petitions

The provision of effective supporting documentation is crucial to the success or failure of an EB 13 function manager case. Not only should assertions found in employer letters be supported by detailed explanations, but supporting documentary evidence should be provided whenever possible. Note the following language included in federal court and Board of Immigration Appeals ("BIA") decisions:

- "Conclusory assertions regarding the beneficiary's employment are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof." *Fedin Bros. co., Ltd. v. Sava*, 724 F. Supp, 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2nd Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 U.S. Dist. LEXIS *13 (S.D.N.Y. 1997).
- "Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence." *Matter of Obaigbena*, 19 I. & N. Dec. 533, 534 (BIA 1998); *Matter of Laureano*, 19 I. & N. Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I. & N. Dec. 503, 506 (BIA 1980).

Organization Charts

Organization charts provide an opportunity for the company and employee to visually demonstrate the managerial nature of a position. As described in a recent online article by Gary Endelman,³ a well prepared chart will serve as an invaluable tool. Since function managers often do not have direct internal reports, where the employee directs or co-ordinates the work of others in some capacity, these charts should include dotted line reports leading to sub-contractors, professional or managerial employees from other departments, and employees with greater levels of responsibility.

The most effective charts send the message most beneficial to your client's case – which is that the beneficiary relies on work generated from other professional and managerial level individuals to fulfill his or her responsibility. The purpose of the charts is to provide a

visual demonstration of the beneficiary's managerial role and responsibilities. A USCIS Adjudicator should be able to easily see how work flows from the beneficiary to the various individuals (subcontractors or employees) responsible for supporting him/her, as well as where the beneficiary is located with respect to entire function.

Another useful practice for the beneficiary who utilizes subcontractors is to include the name, title, company name, and educational background of the contact person for each subcontractor who is directed by the beneficiary. In addition, practitioners may wish to indicate if this contact person manages others within their own organization - to demonstrate the overall number of people under the employee's control.

Content of Employer Letters

Despite the vague nature of the regulatory criteria, EB13 function manager letters should clearly address each of the regulatory elements and factors noted in 8 CFR § 204.5(j)(2) and (j)(4). In addition, the practitioner should be mindful of, if not directly address, the underlying ad hoc tests when addressing the four regulatory elements.

While the regulations and supplemental authorities commonly distinguish between "people" and "function" managers, the duties and responsibilities of both types commonly overlap. As such, when drafting letters, be mindful that just because a beneficiary manages a function, it doesn't absolve the petitioner from the burden of proving that the beneficiary spends the majority of his time working through others.

The following basic outline may provide a helpful framework for employer letters:

- I. Introduction – Provides summary of eligibility
- II. U.S. and Foreign company Information – Includes information related to reasonable needs of the organization
- III. Qualifying Relationship
- IV. Reason for the Transfer – May be used to confirm, clarify, or justify the impact of the employee's position in the U.S.
- V. U.S. Position
 - (a) Summarize basic information including Title offered to the employee, what Group or Team he or she will be a part of (usually for larger companies), where the employee will be working out of in the U.S.
 - (b) Summary of responsibility – Include clear and concise explanation of the employee's responsibility (in layman's terms! no corporate lingo), as well as a brief summary of the essential nature of position, with corresponding monetary impact (i.e. budgets controlled, revenue streams influenced, etc.)

³ See Gary Endelman, "How to Win a Function Manager Case," available online at <http://www.visalaw.com/03sep3/12sep303.html> (with sample charts), and <http://www.ilw.com/articles/2007,1206-endelman.shtm> (no sample charts).

- (c) Summary of People Management Responsibility – Should clearly describe how the employee spends the majority of his/her time working through others, and include any individuals utilized by the employee to fulfill his or her responsibility
 - (d) Summary of Non-People Management Responsibility - Should focus on describing activities which are common for managers or executives
 - (e) Summary of Level of Authority – This section should address how the employee functions at a senior level within the organization of with respect to the function managed, and especially focus on the nature and impact of his or her decisions on the function managed, and the business as a whole.
 - (f) Proportionality (optional) – Frequently requested in RFE's, this information could be provided at the time of filing in close cases. This section would provide a percentage breakdown of the employee's time spent engaging in managerial or qualifying activities (which should be more than 51%, i.e. "primarily"). You may also wish to distinguish between activities involving working through others, activities common to managerial positions, and "hands-on" activities which are clerical or auxiliary.
 - (g) Salary – Definitely include the salary where it is indicative of a senior level position.
- Beware of RFEs stating criteria or requirements that have no foundation in law, regulation, or other authority; restate the proper criteria according to established law, regulation, or other authority, then show how your petition meets those criteria;
 - Despite your best efforts, there will always be room for judgment and reasonable minds may disagree; prudent in doubtful cases to explain the risks and have a backup strategy, e.g., a PERM application on file.

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VI. Qualifying foreign position

- (a) Repeat Section V.(a) through (g)

VII. Summary - Provides summary of eligibility, which hits the four requirements, and neatly summarizes the arguments under each.

Bottom Line: Let Common Sense Be Your Guide

The Adjudicator's Field Manual (AFM) and the underlying authorities described in this article provide the best framework for preparing effective and successful function manager petitions. Within this framework, practitioners should keep the following points in mind:

- Develop specific facts that serve to paint a picture of the beneficiary's managerial level job – some positions are obvious and speak for themselves, but more often some skill and creativity will be needed to present the position in the best possible light;
- Put yourself in the position of a skeptical adjudicator who sees many managerial petitions every day and can easily spot a weak or stretch case – if you are not convinced by the evidence you have produced, expect that they will also not be convinced;