

TO EB-1, OR NOT TO EB-1, THAT IS THE QUESTION: 4 WAYS TO TAME THAT SHREW, THE INFAMOUS FUNCTIONAL MANAGER

Insights
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Pursuing a Functional Manager Immigrant Petition does not always have to seem like you're stuck in a Shakespearean tragedy, so this Insight will not be written in iambic pentameter – but will somewhat borrow from the Bard. Our goal is to enlighten and inform the reader of a drama-free manner in which to evaluate whether an EB-1 Immigrant Petition for Alien Worker for a “Functional Manager” is feasible as a quicker and more cost-effective alternative to the PERM labor certification process. This Insight will explore four critical considerations to keep in mind if you decide to consider this alternative path.

The EB-1 Offers an Alternative Option Not Often Chosen

In the world of immigration, not all managers have to manage people. We've witnessed tremendous hesitancy in pursuing an EB-1 classification if the foreign national being sponsored for an employment-based immigrant visa (green card) doesn't fit the “traditional” manager mold.

Usually, the curtain is closed on this option as soon as it's determined that the foreign national has no direct reports, or that any direct reports are not degreed professionals. However, hold off on the curtain call. The plot will surely thicken by looking into four of the most significant considerations to keep in mind.

1. Define the “Essential Function” the Foreign National Will Manage

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It's important to first have a clear understanding of the different issues at play when exploring this concept:

- **Essential** means that the function being managed is critical to the business and/or technical operations of a company, department, division, or unit.
- **Function** means all the activities and tasks involved in fulfilling the objectives and goals of a particular company, department, division, or unit.
- **Manage** means that the foreign national will oversee, coordinate, supervise, or direct the overall activities and team member assignments that comprise the essential function.

One way to determine if the function is essential is to inquire: what's at stake for the company's business, operations, or income if the foreign national cannot fill the management position? Or alternatively, how would the activities of the essential function be carried out if the management position did not exist?

Another way to evaluate the essential nature of a function is to ask whether someone can perform the duties or be trained to oversee or coordinate the required tasks. To answer this question, consider the time, efficiency, productivity, and cost to the company – or even the success or impossibility of the function – if the company had no other choice but to train someone else.

2. Describe how the Foreign National Will Primarily *Manage*, as Opposed to *Perform the Activities of the Essential Function*

Are there any individuals within the same team, department, or company (or beyond) to whom the foreign national will delegate tasks, collaborate with, or work through, so that the foreign national does not have to perform those tasks on their own?

For example, individuals who don't directly report to the foreign national, but perhaps indirectly report to them, could fulfill this function. Individuals in other departments or units, or even plants or facilities, could also be listed as collaborators or contributors to the overall activities over which the foreign national manages. Also, individuals outside the company entirely could be listed, if the foreign

national coordinates, delegates, or assigns tasks. Examples of this final point include contacts at suppliers or customers and outside service providers (such as Accountants, Legal Counsel, Marketing, IT, and related services).

Don't get hung up on "hierarchy"! There is no need for the foreign national to evaluate, hire, fire, or even be "above" or along the same level of other individuals who relieve them from having to perform the tasks themselves (also known as a "Supporting Team"). What matters is that there is collaboration, coordination, delegation, and assignment of tasks from the foreign national to them.

Briefly define the core responsibilities of the Supporting Team and how their responsibilities relate to the foreign national's position and alleviate them from having to perform those duties.

- List Supporting Team job titles (and brief description of core duties – one or two phrases is fine), who perform the actual duties and tasks involved in the day-to-day operations of the foreign national's department. The reviewing officers at USCIS often refer to these as "non-managerial" or "non-qualifying" tasks or duties.
- Explain *how* the foreign national coordinates, delegates, assigns, oversees, or monitors the work of the Supporting Team so that the foreign national is NOT performing those daily duties. This is important to demonstrate that the foreign national works *through* and *in collaboration with* those other team members to manage the essential function, as opposed to performing those daily duties.

3. Demonstrate How the Foreign National will Act at a Senior Level Within the Organizational Hierarchy or With Respect to the Essential Function Managed

An organizational chart is key here – whether to show all the different individuals involved, or to show the complexity of the hierarchy. It can also be used to demonstrate that no one is above the foreign national in relation to that particular essential function.

The chart should demonstrate the hierarchy above, along the same lines, and below the foreign national's position,

including other departments that are involved in the overall activities of the essential function

4. Describe How the Foreign National Will Exercise Control or Discretion over the Essential Function's Day-to-Day Operations

Are there any activities to which the foreign national will commit the organization on a regular basis? Explain how the foreign national has discretionary authority to commit the department or operations unit – or the plant or facility generally – to certain *courses of action*, decisions, or other commitments. For example, signing off on or approving items such as purchase orders, statements of work, contracts, technical schematics, training manuals, business plans, strategic goals, or similar items.

Two other critical questions to consider along these same lines:

- Does the foreign national have budgetary control or spending discretion?
- What is the overall monetary value of the program, project, or department that the foreign national oversees or coordinates?

The End

Don't end the show too soon! By entertaining these ideas and addressing these issues, you can proactively anticipate known challenges from the USCIS. This will allow you to pursue an alternative option to the lengthy PERM labor certification option. Your foreign national talent will be shouting "Bravo" for what is often a preferred and less lengthy option in the employment-based green card process.

Our national immigration practice is available to discuss strategy and feasibility to help you determine if your company is able "to EB-1 or not to EB-1." Don't wait until the 11th hour – and "Break a Leg"!

If you have further questions, contact your Fisher Phillips attorney, the authors of this Insight, or any attorney in our [Immigration Practice Group](#). Make sure you are subscribed to [Fisher Phillips' Insight system](#) to get the most up-to-date information.

