U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF P-I-, INC.

DATE: MAR. 28, 2017

APPEAL OF VERMONT SERVICE CENTER DECISION

PETITION: FORM I-129, PETITION FOR A NONIMMIGRANT WORKER

The Petitioner, a provider of software and Internet consulting services, seeks to temporarily employ the Beneficiary as its technical manager under the L-1A nonimmigrant classification for intracompany transferees. *See* Immigration and Nationality Act (the Act) section 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L). The L-1A classification allows a corporation or other legal entity (including its affiliate or subsidiary) to transfer a qualifying foreign employee to the United States to work temporarily in a managerial or executive capacity.

The Director of the Vermont Service Center denied the petition, concluding that the Petitioner did not establish that the Beneficiary was employed abroad and will be employed in the United States in a managerial or executive capacity.

On appeal, the Petitioner submits additional evidence and asserts that the Beneficiary's duties in his current and proposed positions with the foreign and U.S. employers, respectively, are primarily managerial in nature.

Upon *de novo* review, we will dismiss the appeal.

I. LEGAL FRAMEWORK

To establish eligibility for the L-1 nonimmigrant visa classification, a qualifying organization must have employed the Beneficiary in a managerial or executive capacity, or in a specialized knowledge capacity, for 1 continuous year within 3 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. Section 101(a)(15)(L) of the Act.

An individual L-1A petition must be accompanied by evidence that: (1) the beneficiary has been employed abroad in a managerial or executive capacity, or a position involving specialized knowledge, for at least 1 continuous year in the 3 years preceding the filing of the petition; (2) the beneficiary is coming to work in the United States for the same employer or a subsidiary or affiliate of the foreign employer; and (3) the beneficiary's U.S. employment will be in a managerial or executive capacity. 8 C.F.R. § 214.2(l)(3).

II. EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY

The Director found that the Petitioner did not establish that the Beneficiary has been employed abroad, or would be employed in the United States, in a managerial capacity. On appeal, the Petitioner does not claim that it will employ the Beneficiary in an executive capacity.[1] Therefore, we restrict our analysis to whether the Beneficiary has been and would be employed in a managerial capacity.

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.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A). If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, U.S. Citizenship and Immigration Services (USCIS) must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. *See* section 101(a)(44)(C) of the Act.

A. Foreign Employment

First, we will address whether the Petitioner provided sufficient evidence to establish that the Beneficiary has been employed abroad in a managerial capacity.

[1] While the Petitioner's response to the Director's request for evidence (RFE) contains references to the Beneficiary's "executive level duties," the Petitioner's supporting evidence and statement on appeal indicate that the Petitioner sought to establish that the Beneficiary has been and would be employed in a managerial capacity.

In denying the petition, the Director found that the Petitioner revised the Beneficiary's job description when responding to a request for evidence (RFE), to include supervisory tasks that were not included in the Beneficiary's initial job description. The Director observed that the Petitioner did state how much time the Beneficiary allocates to the newly submitted list of supervisory job duties. The Director further noted that the Petitioner did not comply with the request for supporting evidence demonstrating that the Beneficiary carried out managerial tasks with respect to his claimed subordinates.

On appeal, the Petitioner restates its original claim, contending that the Beneficiary's employment abroad has been and continues to be in a managerial capacity. The Petitioner also resubmits and asks us to review previously submitted evidence, which it maintains supports the claim that the Beneficiary's job duties are primarily those of a personnel manager.

We agree with the Director's determination that the record does not establish that the Beneficiary was employed abroad in a managerial capacity.

1. Duties

When examining the managerial capacity of the Beneficiary, we will look first to the description of the job duties as the actual duties themselves 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). 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 a managerial or executive capacity. *See* 8 C.F.R. § 214.2(l)(3)(ii).

Here, the Petitioner claims that the Beneficiary has been employed as a personnel manager. 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. Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. 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. 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. Section 101(a)(44)(A)(iii) of the Act.

The Petitioner must show that the Beneficiary performed certain high-level responsibilities described in the statutory definition. *Champion World, Inc. v. INS*, 940 F.2d 1533 (9th Cir. 1991) (unpublished table decision). In addition, the Petitioner must prove that the Beneficiary was *primarily* engaged in managerial duties, as opposed to ordinary operational activities alongside the company's other employees. *See Family Inc. v. USCIS*, 469 F.3d 1313, 1316 (9th Cir. 2006); *Champion World*, 940 F.2d 1533.

In a letter in support of the petition, the Petitioner provided multiple job descriptions for the Beneficiary's position as a technical manager with the foreign entity. In one of the job descriptions, the Petitioner stated that the position involves defining and managing "the organization product strategy," "designing and developing comprehensive next generation continuous development," developing and integrating applications, and providing mobile solutions. The Petitioner also indicated that the Beneficiary "is responsible for initiatives" concerning mobile business and technology, which involves the following: (1) working on product development; (2) identifying and prioritizing development projects and setting timetables for project lifecycles from evaluation through deployment of web and mobile technology services; and (3) taking part in a "product steering group" engaged in creating a roadmap and product support division.

The Petitioner provided two additional sets of job duties. The first set of duties expands on the Beneficiary's role in "direct[ing] development and execution of web/[m]obile enterprise business continuity plan," which involves the following duties:

- Architect, design and develop enterprise integration applications/rich internet applications[.]
- Design comprehensive mobile hybrid and native applications, responsive and SOA based solutions.
- Estimation of Features and requirements in liaison with account manager for any particular customer.
- Review of estimate and validation at the initiation of the project[.]
- Creation of [t]echnical architecture document and [w]eekly task plan in liaison with project/delivery manager and leads[.]

The second set of job duties was supplemented with the following percentage breakdowns:

15% Providing technical direction to senior management on knowledge of web/mobile industry trends and developments to improve service to clients.

40% Designing and recommending the appropriate technology solutions to support the policies and directives issued by shareholders and management.

30% Responsible for defining product road map and strategy in the organization. Responsible to merge the recommended technologies with the strategic business objectives of the organization.

15% Estimation of features and requirements in liaison with technical heads for any particular customer.

While this list accounts for 100 percent of the Beneficiary's time, it does not include many of the other job duties that preceded it, which raises questions regarding whether it is complete and accurate. This lack of clarity is particularly critical given that a number of the job duties listed in the

above job descriptions are indicative of operational rather than managerial-level tasks. In the first of the three job descriptions, the Petitioner indicated that the Beneficiary is responsible for designing, developing, and integrating web applications and providing mobile solutions, all of which are indicative of non-managerial tasks that are generally associated with those performed by IT professionals. It is unclear how much time the Beneficiary allocates to these operational tasks.

Similarly, the second set of job duties also indicates that the Beneficiary designs and develops web and mobile applications and performs other non-managerial duties, including communicating with the client's account manager regarding product features and requirements and collaborating with IT managers and leads regarding weekly task plans. Again, given that the various job descriptions are not entirely consistent with one another and do not include the same job duties as those listed in the percentage breakdown, it is unclear how much of the Beneficiary's time has been allocated to operational tasks that are consistent with providing a product or service. 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 e.g.*, sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties).

The Director subsequently issued a request for evidence (RFE), noting that the Beneficiary's job descriptions do not include supervisory job duties and are therefore inconsistent with the Petitioner's claim that the Beneficiary oversees the work of subordinate software engineers as depicted in an accompanying organizational chart provided for the foreign entity. The Director instructed the Petitioner to provide additional evidence, such as performance evaluations, evidence of personnel actions taken by the Beneficiary, or other evidence to support the claim that the Beneficiary manages a subordinate staff.

In response, the Petitioner provided a letter signed by [redacted] the foreign entity's vice president of delivery. [redacted] restated the above percentage breakdown as well as other portions of the original supporting statement. In addition, he claimed that the Beneficiary "has supervised and monitored others" and provided the following additional duties:

- Provided goals to each team member and monitored the progress or status throughout the year.
- Reviewed the status reports of team members and addressed issues as appropriate.
- Prepared dashboards to measure progress of leads and development engineers.
- Guided the team through the development, testing and implementation and reviewed the completed work effectively.
- Provided technical training to teams when required and served as technical mentor to team members.
- Helped team members in understanding and complying with [the foreign entity's] policies and procedures.
- Collaborated effectively with all team members as well as held regular team meetings.

The Petitioner did not explain how the new information provided in the RFE response letter corresponds to and supports the job duties listed in the original percentage breakdown, which does not list or allocate time to any personnel management tasks. The Petitioner has not resolved these inconsistencies with independent, objective evidence pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Moreover, the Petitioner has not established that the time the Beneficiary purportedly spends supervising IT professionals constitutes the primary portion of his position with the foreign entity.

In addition, even if the Petitioner were able to reconcile the prior job descriptions with the new ones in the RFE response statement, the new information is vague and lacks sufficient information about actual personnel management tasks that the Beneficiary purportedly carries out as part of his foreign job assignment. For example, the Petitioner did not explain how the Beneficiary guides his team of through development and testing tasks, the nature of his collaboration with team members, or the type of technical training he provides. Without additional explanation, we cannot determine that these are qualifying personnel management duties. Further, [redacted] stopped short of stating that the Beneficiary has the authority to hire or fire employees or to recommend these and other personnel decisions. *See* 8 C.F.R. § 214.2(l)(3)(iii).

In sum, the Petitioner has provided multiple job descriptions with competing claims. The initial job descriptions, including the percentage breakdown in the original supporting statement, indicate that the Beneficiary's time abroad has been primarily allocated to carrying out various IT tasks, including designing technology solutions, merging recommended technologies, and advising senior management on technological trends to improve customer service. The Petitioner has not provided a synthesized job description that fuses the operational and claimed supervisory elements of the Beneficiary's foreign employment such that would clarify how much of the Beneficiary's time has been allocated to managerial tasks and how much time the Beneficiary has devoted to operational tasks that are necessary to produce a product or to provide services for the foreign entity and its clients.

Further, while the Petitioner was given the opportunity to provide additional documentary evidence demonstrating the Beneficiary's role as a personnel manager, it did not do so and continued to rely on inconsistent information regarding his supervisory responsibilities provided in the Beneficiary's various job descriptions. The Petitioner must support its assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

2. Staffing

Beyond the required description of the job duties, we review the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the company's organizational structure, the duties of a beneficiary's subordinate employees, the presence of other employees to relieve a beneficiary from performing operational duties, the nature of the business, and any other factors that will contribute to understanding a beneficiary's actual duties and role in a business. As stated above, personnel managers are required to primarily supervise and control the

work of other supervisory, professional, or managerial employees and must have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. Section 101(a)(44)(A)(iii) of the Act.

The Petitioner initially provided the foreign entity's organizational chart showing that the Beneficiary had a staff of nine subordinates consisting of seven software engineers and two trainee software engineers. The Petitioner provided the job descriptions and salaries for all positions; however, as discussed above, it did not include any supervisory duties in its original description of the Beneficiary's duties. The Beneficiary's placement on the organizational chart alone is insufficient to establish that he has been performing qualifying duties as a personnel manager.

In response to the RFE, the Petitioner provided a similar chart showing the same organizational hierarchy for the organization as a whole and again depicted the Beneficiary with nine subordinates. However, with the exceptions of four subordinates – three software engineers and one trainee software engineer – the remaining five subordinates were different from those named in the original chart. While the original chart depicted the Beneficiary as overseeing seven software engineers and two trainee software engineers, the new chart showed the Beneficiary as overseeing only three software engineers with the six remaining subordinates occupying the trainee positions. Based on the hiring dates shown on the corresponding paystubs that were also part of the RFE response, all five of the new positions were recent hires, who assumed their respective trainee positions in February 2016, just days prior to the filing of the petition. As the Petitioner did not provide paystubs for the five employees who were depicted only in the original organizational chart, it is unclear when they were hired or how long they worked for the foreign entity. Without this information we are unable to determine whether the five subordinates who apparently no longer work for the foreign entity worked there long enough to have been supervised by the Beneficiary for at least 1 continuous year during the relevant 3-year time period that preceded the filing of the instant petition. While the Petitioner acknowledges the staffing changes that took place subsequent to the filing of the petition, the newly submitted evidence does not address the information put forth in the original organizational chart or demonstrate the Beneficiary's eligibility at the time of filing. 8 C.F.R. § 103.2(b)(1).

Furthermore, we note several anomalies and possible inconsistencies pursuant to our review of the educational credentials and pay slips that were provided in response to the RFE. First, we observe that the Petitioner provided educational credentials and paystubs for only three software engineers and one trainee, thereby accounting for only four of the nine subordinates who were designated as the Beneficiary's subordinate staff based on the original organizational chart. We further note that the organizational chart is inconsistent with the paystub for one of the foreign entity's employees. Namely, while the chart identified [redacted] and [redacted] as a software engineer and trainee software engineer, respectively, their respective paystubs identify them as "Executive – Facilities" and "QA Engineer."

We find that the above anomalies and overall lack of supporting evidence demonstrating that the Beneficiary had supervisory review and authority over his claimed subordinates detract from the validity of the claim that the Beneficiary has been employed abroad in a managerial capacity.

B. U.S. Employment

Next, we will address the Beneficiary's proposed employment and determine whether the record is sufficient to establish that the Petitioner would employ the Beneficiary in a managerial capacity.

The Director concluded that the Petitioner did not provide sufficient evidence to establish that the Beneficiary would be employed in a managerial or executive capacity. The Director found that the Petitioner's reference to the Beneficiary's "executive level responsibilities," made in response to the RFE, was indicative of a change in the original claim and determined that the Petitioner did not establish that the Beneficiary would be employed in an executive capacity.

While we concur with the Director's conclusion regarding the Beneficiary's proposed employment, we find that the Director's focus on the Petitioner's reference to the Beneficiary's "executive level duties" was incorrect in that the reference was read out of context. When considered within the totality of the Petitioner's supporting evidence and statements in which the Petitioner indicated that the Beneficiary would manage a "team" of professional subordinates and would have "managerial" and "non-managerial" job duties, it is apparent that the Petitioner sought to establish that the Beneficiary would be employed in a managerial capacity. The Petitioner's reference to "executive level duties" is generally unsupported and it does not appear that the Petitioner intended to claim that the Beneficiary would be employed in an executive capacity, despite its unexplained use of the term "executive" in summarizing its RFE response.

On appeal, the Petitioner restates the regulatory definition of the term "managerial capacity" and contends that 70% of the Beneficiary's time would be spent performing duties of a managerial nature. The Petitioner disputes the Director's conclusion, stating that the previously submitted job descriptions and evidence pertaining to the Petitioner's staffing support its claim.

1. Duties

As previously indicated, when examining whether the Beneficiary will be employed in a managerial capacity, we will look first to the Petitioner's description of the job duties. In its initial support letter, the Petitioner described itself as a "leading IT service company" servicing over 400 customers in the United States and abroad. Despite claiming that the Beneficiary's job duties as a technical manager would be "almost the same or similar" to those he currently performs in India, the Petitioner proceeded to provide multiple different and somewhat inconsistent job descriptions, which listed job duties and responsibilities that were not the same as those included in the multiple foreign job descriptions discussed above.

In the first job description, the Petitioner indicated that the Beneficiary's role would include "act[ing] as primary interpreter of operational technology issues and decisions from the top management" as well as "managing and developing the enterprise[-]wide information security plan and enterprise-wide disaster recovery plan" during the course of which the Beneficiary would be responsible for working with a "Product Manager" to create and oversee an "iteration and release plan"; working with customer companies' technical heads to estimate and review estimates for project features and requirements; "[c]reating metrics" to predict project success and delivery; and consistently reviewing "issues, risks, [and] dependencies" associated with projects "across the organization."

In a continuing discussion of the Beneficiary's job responsibilities in the same letter, the Petitioner stated that the Beneficiary will act as "core adviser" in providing technical direction to the project delivery teams, assisting the sales team in understanding product features and roadmaps, designing and developing comprehensive web communication and interactive and mobility solutions, conducting research and analysis of the "technology landscape," recommending solutions that support clients' policies and directives, and merging technologies with client business objectives. The Petitioner did not indicate what portion of the Beneficiary's job would involve web designing and development to create IT solutions or conducting research and analysis of the technology landscape, which, based on the description provided, appear to be non-managerial tasks.

The Petitioner went on to discuss the Beneficiary's role as team leader and coordinator, which would entail making plans to accomplish goals and integrate technical activities, developing and recommending policies and procedures, training employees, working with the product manager to lead initiatives, engaging in communications with industry stakeholders to identify clients' needs, determining what technology to use, and developing standards and protocols in compliance with federal requirements and industry standards. The Petitioner continued, stating that the Beneficiary will develop and evaluate technology support and applications, "develop[] an IT strategy, architecture, applications design/support, [i]nfrastructure, processes and organizational changes" in line with strategies and business goals, advise "senior management," provide "upward representation" to the "technology community" throughout the organization "at the proper levels," and direct product development. The Petitioner did not focus on or indicate which, if any of the above job duties are indicative of the Beneficiary's claimed role as a personnel manger

In another job description, the Petitioner provided a list of what it categorized as the Beneficiary's "managerial skills," which included, in part, the following:

- Prepare roadmaps and technology solution strategies that cater to the needs of multiple customers[.]
- Review the status of a project against the project plan and assess the status . . . .
- Validate the status reported by subordinates[.]
- Perform technical risk assessment in project execution[.]
- Review the project adherence to compliance of the organization's best practices and industry best practices.

- Assign each team member specific tasks and oversees their performance[.]
- Schedule work and break hours by ensuring that there is enough task coverage[.]
- Arrange technical sessions and trainings to ensure that the team is current on their technical certifications[.]
- Conduct regular meetings with the teams, as a whole and through one-on-one discussions[.]
- Provide each team member an objective or goal and monitor progress or status on throughout the year[.]
- Conduct performance reviews of team members and give them feedback, and also make promotion recommendations or salary increases if or when applicable[.]
- . . . the [B]eneficiary is expected to be actively involved in [employee] recruitment. [He] understands the organization's policies and processes . . . to make correct decisions in recruiting resources.
- Meet with senior management regularly and give them monthly and annual reports, which include team's performance, budgets and project status[.]
- Manage the escalations raised by customer[.]
- As a response to any help requested from the account teams.

The Petitioner also provided a list of what it categorized as the Beneficiary's "technical skills," indicating that the Beneficiary would use his technical knowledge to analyze industry standards and provide technical direction to the organization's teams, make recommendations and "prepare technology best practices," review project deliverables, "[r]e-engineer new applications" and "create new opportunities for the organization," "implement hardware standardization," oversee data center equipment, evaluate different technology platforms and strategies, "[p]erform all levels of tasks such as troubleshooting and resolving technical problems," ensure that technical procedures and standard policies are implemented and regularly reviewed, provide necessary training, implement "product line features" to increase product desirability and applicability, create and execute development plans and alter as needed, and manage technical risks throughout the project development cycle.

The Petitioner submitted yet another job description for the Beneficiary's proposed position, assigning 70% of the Beneficiary's time to a list of 10 job duties categorized as "managerial" and 30% of his time to two job duties categorized as "non-managerial." This time distribution and the activities listed therein correspond partially, but not entirely, with several of the above discussed job descriptions. For instance, the 30% of the Beneficiary's time that was allocated to "non-managerial" job duties indicates that the Beneficiary would be directly involved in selling the Petitioner's services to prospective clients and "interacting with clients" concerning issues that arise. We note that neither of these job duties was included in the above-referenced job descriptions.

In the RFE, the Director instructed the Petitioner to clearly designate the Beneficiary as a manager or executive and to provide a detailed job description specifying the Beneficiary's daily job duties and the percentage of time he would allocate to each duty.

The Petitioner's response includes a statement indicating that the Beneficiary's "primary responsibility" will be to manage and guide the product delivery teams, which will involve defining and managing product strategy "while designing and building the next generation [redacted] applications," and recommending a roadmap and technology solutions in line with customer policies and requirements. The Petitioner claimed that the Beneficiary's job will involve communicating with senior management and supervising professional team members by providing status reports, measuring progress, guiding IT development and implementation and reviewing the work of team members, providing technical training when needed and mentoring subordinates, ensuring that subordinates comply with the organization's policies and procedures, and holding regular meetings with team members. The Petitioner reiterated that the Beneficiary would assume a participatory role in recruiting additional employees.

The Petitioner went on to provide two additional job descriptions one of which contained the following percentage breakdown of the Beneficiary's proposed job duties:

- Weekly status review with the teams, offering high level guidance to the teams for successful execution and help with technical risk management and mitigation[.] 15%
- Providing technical direction and recommending the appropriate technology solutions to executive management . . . to improve services to clients[.] 15%
- Project initiation activities like allocation of resources to projects, review and validation of the project plans for technical correctness[.] 10%
- Managing a team that develops and implements policies, standards, and procedures for engineering and technical work performed in the organization. 10%
- Creation, overlook and tracking of [i]teration and [r]elease plan in liaison with Customer and Product Manager. 10%
- Review of resource performance and send dashboard status reports to executive management[.] 10%
- Assesses the hiring projections . . . and recruitments to be done with prior discussions with other members of the executive management[.] 10%
- Participate in sales activities in convincing the client about the technical capabilities of the organization and products of the organization. 10%
- Interacting with clients in deescalating issues when reported[.] 10%

While the above job description is similar to the percentage breakdown that was provided in the Petitioner's initial supporting statement, certain elements are inconsistent. Namely, the original job description indicated that 30% of the Beneficiary's time would be allocated to assisting in the sales of the company's products and services and directly engaging with clients in resolving issues. This time allocation is inconsistent with the more recent percentage breakdown that was provided in the RFE response, where the Petitioner indicated that the Beneficiary would allocate only 20% of his time to these non-managerial job duties. Also, the original job description, which did not assign a percentage of time to each duty, indicated that the Beneficiary's managerial job duties would include

designing and recommending technology solutions. We note that the percentage breakdown that the Petitioner provided in response to the RFE does not include this job duty. Moreover, we find that designing a technology solution is characteristic of an operational task and is not consistent with the role of a personnel manager.

The Petitioner went on to list the following additional job duties:

- Ensuring the team member [*sic*] are adequately given tasks & estimates[.]
- Establishing clear action items, tracking the items and following up.
- Conducting the internal meetings and documenting the meeting minutes.
- Analyzing impact of changes and adapting project deliverables & scheduling as necessary.
- Conducting peer reviews and providing feedback.
- Reviewing the developer reports and resolving their blockers when required.
- Providing direction and technical expertise in design, development and systems integration.
- Reviewing the technical or design documents prepared by leads or development engineers.
- Conducting project risk identification and mitigation action planning.
- Reviewing the code and providing the feedback.

As the Petitioner did not incorporate these additional job duties into the job description containing a percentage breakdown, it is unclear how they correspond to the previously provided job description or how much time the Beneficiary would allocate to the above listed activities, several of which are not readily classified as managerial tasks.

Overall, we find that the Petitioner did not provide a comprehensive and consistent account of the Beneficiary's proposed job duties. Rather, the Petitioner's varying job descriptions, some of which were accompanied by allocations of time while others were not, contribute to a disconnected and incomplete understanding of the actual tasks the Beneficiary would carry out and the amount of time he would spend performing managerial versus non-managerial tasks. While we have reviewed the two lists of job duties that contain time allocations, as previously noted, the job duties and time constraints that were assigned in the original percentage breakdown were ultimately inconsistent with the job duties and time constraints that were provided in response to the RFE. The record does not contain independent, objective evidence resolved these inconsistencies and pointing to where the truth lies. *See Ho*, 19 I&N Dec. at 591-92. In addition, there are a number of job duties attributed to the position, some of which were non-managerial, that were left out of the two breakdowns that included percentages. Accordingly, we cannot consider either of those breakdowns to fully and accurately convey the expected percentage of time the Beneficiary would allocate to qualifying managerial versus non-qualifying operational tasks associated with providing the company's products and services.

Moreover, the Petitioner does not clarify how the Beneficiary's U.S. job duties are "almost the same or similar" to those he performed for the foreign entity. Given that the foreign job description contains a number of non-managerial tasks that are akin to those typically performed by IT professionals rather than managers, it is critical for the Petitioner to clarify what elements the two positions have in common and to explain how the Beneficiary's performance of non-managerial tasks qualifies him for the classification sought.

Finally, in reviewing the percentage breakdown that was provided in response to the RFE, we find that a number of the items did not provide enough detail to show that the Beneficiary's duties would be primarily managerial in nature. The Petitioner indicated that the Beneficiary would conduct weekly status reviews of his team members and that he would manage a team that develops and implements policies and procedures for engineering and technical work. However, the Petitioner did not clarify how conducting weekly status reviews is distinguished from managing a subordinate team or conducting reviews "of resource performance," which are all listed as a separate job duties. The Petitioner also did not clarify whether the team for which the Beneficiary would conduct a weekly status review is separate from the team that develops and implements policies and procedures and whether the "resource" is a reference to the Beneficiary's subordinates. Similarly, the Petitioner did not distinguish between "allocation of resources to projects" and making "hiring projections," as both phrases seemingly pertain to the Beneficiary's authority to determine the number of software engineers that would be required based on project specifications. We find that the job description is repetitive and vague and thus lacks sufficient meaningful content that would provide a comprehensive understanding of the specific tasks the Beneficiary would perform. 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.*, 724 F. Supp. at 1108, *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

2. Staffing

As noted, we review the totality of the record when examining whether a beneficiary will be employed in a managerial capacity.

In addition to providing several job descriptions to address the Beneficiary's managerial activities, the Petitioner also provided a list of the Beneficiary's required technical skills, claiming that the Beneficiary would use such skills to evaluate a project's progress and ensure its successful completion without getting "deeply" involved with the Petitioner's daily operations. The Petitioner listed the Beneficiary's five proposed subordinates and provided their position titles, educational credentials, and respective salaries. One of the subordinates, a technical lead, receives a salary that is higher than the Beneficiary's proffered salary.

In reviewing the supporting evidence, it is unclear whether the Beneficiary's proposed subordinates would work for a common client or as part of the same team, notwithstanding the suggestion in the Beneficiary's job description that these employees work on the same project. As the Beneficiary's

subordinates are not physically stationed at the Beneficiary's worksite,[2] additional information is necessary to determine how he would carry out his management responsibilities, such as holding weekly meetings with subordinates, monitoring their work, and providing work-related training. In addition, based on the submitted evidence, it is not clear that the claimed subordinates are working at the same client site or as part of the same project or team. According to the addresses listed on their pay slips, the Beneficiary's proposed subordinates reside in Massachusetts, New Jersey, California, and Michigan. We further note that the paystub for one of the claimed U.S.-based subordinates – – indicates that this individual's employment with the Petitioner did not commence until April 2016. Therefore, despite the fact that this employee was included in the Petitioner's initial list of subordinates, the record does not establish that the Petitioner actually employed this individual at the time of filing and thus his employment cannot be considered in determining the Petitioner's eligibility at the time the petition was filed in February 2016.

On appeal, the Petitioner provides previously submitted evidence to support the assertion that the Beneficiary would oversee professional employees and therefore meets the criteria as someone who would be employed in a managerial capacity. While the record contains pay stubs of the employees the Beneficiary would purportedly manage in his proposed position, such evidence is not sufficient to remedy the deficiencies in the submitted job descriptions, discussed above. These deficiencies preclude us from being able to make an affirmative finding as the portion of time that the Beneficiary would allocate to managing professional subordinate employees versus time he would allocate to the Petitioner's operational tasks. We cannot determine that the Beneficiary would primarily supervise a subordinate staff of professionals.

While the Beneficiary is not required to allocate 100% of his time to managerial-level tasks, the Petitioner must establish that the non-managerial tasks he would perform would only be incidental to the proposed position. 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); *see also Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). Here, the record does not contain sufficient evidence to establish that the Beneficiary's tasks would be primarily those of a managerial nature.

III. CONCLUSION

Based on our analysis of the Beneficiary's foreign and proposed job duties and the staffing of the Beneficiary's foreign and U.S. employers, we find that the Petitioner has not provided sufficient evidence to establish that the Beneficiary was employed abroad and that he would be employed in the United States in a managerial capacity.

[2] Based on information that was provided in a sworn statement following a January 26, 2017, site visit to the Petitioner's office at NY, the Beneficiary would have five subordinates who would work onsite at a client's location.

ORDER: The appeal is dismissed.

Cite as *Matter of P-I-, Inc.*, ID# 72876 (AAO Mar. 28, 2017)