U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF A- INC.

DATE: JAN. 12, 2017

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a computer software and hardware developer, seeks to permanently employ the Beneficiary as a software engineering manager, automation, under the first preference immigrant classification for multinational executives or managers. *See* Immigration and Nationality Act (the Act) section 203(b)(1)(C), 8 U.S.C. § 1153(b)(1)(C). This classification allows a U.S. employer to permanently transfer a qualified foreign employee to the United States to work in an executive or managerial capacity.

The Director, Nebraska Service Center, denied the petition, concluding that the evidence of record did not establish that: (1) the Petitioner has a qualifying relationship with the Beneficiary's foreign employer; and (2) the Beneficiary has been employed abroad in a managerial or executive capacity.

The matter is now before us on appeal. In its appeal, the Petitioner asserts that the Director did not fully consider the evidence; drew incorrect conclusions from a prior filing by the Petitioner; and imposed too high a standard of proof. The Petitioner submits a legal brief and copies of documentation that had accompanied a previously filed immigrant petition.

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

I. LEGAL FRAMEWORK

Section 203(b) of the Act states in pertinent part:

> (1) Priority Workers. – Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):
>
> . . . .
>
> (C) *Certain multinational executives and managers.* An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and the alien seeks to

> enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

A United States employer may file Form I-140, Immigrant Petition for Alien Worker, to classify a beneficiary under section 203(b)(1)(C) of the Act as a multinational executive or manager. A labor certification is not required for this classification.

The regulation at 8 C.F.R. § 204.5(j)(3) states:

> (3) Initial evidence—
>
> (i) Required evidence. A petition for a multinational executive or manager must be accompanied by a statement from an authorized official of the petitioning United States employer which demonstrates that:
>
> (A) If the alien is outside the United States, in the three years immediately preceding the filing of the petition the alien has been employed outside the United States for at least one year in a managerial or executive capacity by a firm or corporation, or other legal entity, or by an affiliate or subsidiary of such a firm or corporation or other legal entity; or
>
> (B) If the alien is already in the United States working for the same employer or a subsidiary or affiliate of the firm or corporation, or other legal entity by which the alien was employed overseas, in the three years preceding entry as a nonimmigrant, the alien was employed by the entity abroad for at least one year in a managerial or executive capacity;
>
> (C) The prospective employer in the United States is the same employer or a subsidiary or affiliate of the firm or corporation or other legal entity by which the alien was employed overseas; and
>
> (D) The prospective United States employer has been doing business for at least one year.

II. QUALIFYING RELATIONSHIP

The Director denied the petition based, in part, on a finding that the Petitioner did not establish that it has a qualifying relationship with the Beneficiary's foreign employer.

To establish a "qualifying relationship" under the Act and the regulations, a petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e.

a U.S. entity with a foreign office) or related as a "parent and subsidiary" or as "affiliates." *See generally* section 203(b)(1)(C) of the Act; 8 C.F.R. § 204.5(j)(3)(i)(C).

When the Petitioner filed the Form I-140 petition on September 27, 2013, the Petitioner stated that, before entering the United States, the Beneficiary worked with the Petitioner's wholly-owned subsidiary in Ireland, "as an employee of Throughout this proceeding, the Petitioner has acknowledged that is not an affiliate or subsidiary of the petitioning company. The Petitioner asserts that because the Beneficiary worked exclusively with its subsidiary in Ireland, under the direction of its employees, he was therefore the subsidiary's employee for purposes of this proceeding.

All parties agree that there is a qualifying relationship between the Petitioner and the Petitioner's subsidiary in Ireland; and that there is no qualifying relationship between the Petitioner and Therefore, the threshold issue here is the identity of the Beneficiary's overseas employer.

As indicated above, section 203(b)(1)(C) of the Act requires a given beneficiary to have been "employed" abroad and to be coming to the United States for the purpose of rendering services to the same or a related "employer" in the United States in a managerial or executive capacity. Section 101(a)(44) of the Act defines both managerial and executive capacity as an assignment within an organization in which an "employee" performs certain enumerated qualifying duties. The Supreme Court has determined that where the applicable federal law does not define "employee," the term should be construed as "intend[ing] to describe the conventional master-servant relationship as understood by common-law agency doctrine." *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-323 (1992) ("*Darden*") (quoting *Comty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 739-40 (1989) ("*C.C.N.V.*")).

The Court stated:

> In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

Darden, 503 U.S. at 323-324 (quoting *C.C.N.V.*, 490 U.S. at 751-52).

the Petitioner's manager for immigration services, initially stated that the Beneficiary was:

> [A]n employee of a company that [the Petitioner's subsidiary] used exclusively to handle localization operations in Ireland. was treated as a hiring company and [the Beneficiary] reported to Group Operations Manager of on human resource matters, approximately once a quarter. Compensation decisions, such as the payment of [the Beneficiary's] bonuses, were made jointly by an [Petitioner's subsidiary] senior manager overseeing localization quality assurance for the European and Middle Eastern markets.

The Petitioner submitted an organizational chart that included the following excerpt:

European Localization Quality Manager, Petitioner's subsidiary
|
Group Operations Manager,
|
The Beneficiary, Lead Localization QA Engineer,
|
Three Localization QA Engineers,

The Petitioner stated that the exact personnel varied from project to project, and the chart submitted related to one such project as a representative example.

In a request for evidence (RFE), the Director asked the Petitioner to establish a qualifying relationship between the Petitioner and In response, the Petitioner stated that no such relationship exists, but that the Petitioner's subsidiary was effectively the Beneficiary's employer overseas. The Petitioner submitted a new letter from who stated that the Petitioner's subsidiary was the Beneficiary's employer for the following reasons:

- [The Beneficiary] performed work exclusively for [the Petitioner's subsidiary] during this period.

  . . . .
- Compensation decisions, such as the payment of [the Beneficiary's] bonuses, were made primarily by . . .
- All of [the Beneficiary's] work was controlled by [the Petitioner's] managers based in the United States. . . . had the right to control the details of how [the Beneficiary's] job duties were to be performed.
- [The Beneficiary] and his team performed all job duties at [the Petitioner's subsidiary] premises.
- [The Beneficiary] was given an [Petitioner's subsidiary] employee badge . . . and given access to [the Petitioner's subsidiary] premises.

- [The Beneficiary's] job performance evaluation was conducted by [redacted]

. . . .

- [The Beneficiary] was required to travel to our [U.S.] headquarters on several occasions to meet with other members of [the Petitioner's] Interactive Media Group and its Localization and Release Engineering organization.
- [The Beneficiary's] supervisors were based at [the Petitioner's U.S.] headquarters.

The Petitioner submitted an organizational chart that largely resembles the version submitted previously, and a printout from the Petitioner's website, identifying [redacted] as one of 22 "Third Party Localization Vendors," with a disclaimer that "under no circumstances will [the Petitioner] have any liability for [customers'] use of such vendors or services."

The Petitioner cited *Defensor v. Meissner*, 201 F.3d 384 (6th Cir. 2000), and a memorandum from Donald Neufeld, Associate Director for Service Center Operations, HQ70/6.2.8, AD 10-24, *Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third-Party Site Placements* (Jan. 8, 2010), http://www.uscis.gov/laws/policy-memoranda. These resources concern a specific definition of "United States employer" found at 8 C.F.R. § 214.2(h)(4)(ii), which applies only to H-1B nonimmigrant petitions. *Darden*, in contrast, addressed instances in which the law provided no purpose-specific definition of the term "employer."

The Petitioner also cited a letter dated December 18, 1995, from Yvonne M. LaFleur, Chief of the Nonimmigrant Branch at the Office of Adjudications, stating: "the Service generally equates the rendering of service with employment for the qualifying L-1 period," and that "the power of control over the employee's activity, rather than salary, is the essential element in the employment relationship."

The Director denied the petition, in part because "the beneficiary was an employee of [redacted] rather than" the Petitioner. The Director also found that "the petitioner has not submitted evidence the beneficiary was a [Petitioner's subsidiary] employee abroad; it is relying only upon its [own] assertions."

On appeal, the Petitioner submits copies of two reference letters from March 2009. [redacted] signed one letter, [redacted] the other, but the two letters are essentially identical. Both letters indicate that the Beneficiary "was employed by [redacted]" and both include the phrase "As his manager, I can confirm" the nature of the Beneficiary's duties.

Applying the factors in *Darden* to the evidence in this matter, we find that the Petitioner has not established that its foreign subsidiary "employed" the Beneficiary. The Petitioner asserts that the Beneficiary answered primarily to manager [redacted] at the Petitioner's subsidiary, which would relate to the hiring party's right to control the manner and means by which the product is accomplished. The Petitioner has not documented the nature or extent of [redacted] oversight over the Beneficiary. The Director, in the denial notice, advised the Petitioner that the U.S. Petitioner's

unsupported statements could not meet the burden of proof with respect to particulars about the Beneficiary's past employment in Ireland.

In this instance, two nearly identical letters from managers at two different companies cannot suffice to show that the Beneficiary reported to [redacted] while his interaction with [redacted] was minimal and largely involved human resources issues. The Petitioner has not supported its central argument that the Petitioner's subsidiary, rather than [redacted] had ultimate control over the Beneficiary's work (as distinguished from the more general observation that a company that hires a contractor chooses the projects on which the contractor works). While such an assertion is generally consistent with *Darden*, the Petitioner must establish that power of control. A petitioner's unsupported statements are of very limited weight and normally will be insufficient to carry its burden of proof. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of Cal.*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)); *see also Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). The Petitioner must support its assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. at 376.

The Petitioner's foreign subsidiary hired teams from [redacted] to accomplish specific goals, which would entail some degree of communication between the management of the two companies. The Petitioner, however, has not shown that this arrangement was different in form or substance from the relationship that typically exists between a contractor and its client.

The record also indicates that the Petitioner is doing business and that the Beneficiary worked at the Petitioner's subsidiary's location, but the record does not contain any substantial evidence relating to the other *Darden* factors. Because the Beneficiary's subordinates were also [redacted] employees, we conclude that [redacted] rather than the Petitioner's subsidiary, hired and paid those subordinates. The record's silence on this and other points does not translate into a presumption in the Petitioner's favor.

For the reasons explained above, the Petitioner has not established that it has a qualifying relationship with the entity that employed the Beneficiary during the 3 years preceding his entry into the United States. The Director correctly denied the petition on this basis.

III. EMPLOYMENT ABROAD IN A MANAGERIAL OR EXECUTIVE CAPACITY

Even if the Petitioner had overcome its burden to demonstrate that the Beneficiary was employed by a qualifying entity abroad, we agree with the Director that it did not establish that the Beneficiary has been employed abroad in a managerial capacity. The Petitioner does not claim that the Beneficiary had been employed in an executive capacity. Therefore, we restrict our analysis to whether the Beneficiary had been employed in a managerial capacity.

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.

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.

If the Beneficiary is already in the United States working for the foreign employer or its subsidiary or affiliate, then the regulation at 8 C.F.R. § 204.5(j)(3)(i)(B) requires the Petitioner to submit a statement from an authorized official of the petitioning United States employer which demonstrates that, in the 3 years preceding entry as a nonimmigrant, the Beneficiary was employed by the entity abroad for at least 1 year in a managerial or executive capacity.

When examining the executive or managerial capacity of a given beneficiary, we will look first to the petitioner's description of the job duties. 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. § 204.5(j)(5).

In this case, the Petitioner asserts that the Beneficiary was employed abroad 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. 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 written job offer that clearly describes the duties to be performed in managing the essential function, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties

attributed to managing the essential function. *See* 8 C.F.R. § 204.5(j)(5). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 604 (Comm'r 1988).

The Beneficiary entered the United States *circa* March 2008; the record does not show the exact arrival date. In the letter submitted with the present petition, the Petitioner stated that the Beneficiary worked overseas as "a Lead Localization QA Engineer" who "oversaw the engineering team that worked on localization and quality assurance related projects for French and German releases." The Petitioner asserted that the Beneficiary worked in a managerial capacity, and "exercised wide latitude in discretionary decision-making, receiving only general supervision from . . . . [The Beneficiary] served as the most senior individual and held the managerial authority to make final decisions on the localization and quality assurance functions being carried out" at the Petitioner's subsidiary.

The Petitioner asserted that the Beneficiary's job duties overseas included the following elements:

- Overall project design and management, including prioritization and assignment of tasks and ensuring conformance to project schedules;
- Ensuring that processes are in place to effectively manage ongoing projects;
- Maintaining and enforcing best practices guidelines for localization, testing, quality assurance, and testing activities;
- Developing enhancements to protocols and standards with a view to streamlining reporting and documentation operations;
- Designing custom tools for use in localization and testing processes;
- Conducting research, analysis and studies on various software quality assurance and localization topics and identifying opportunities to develop new or revised project management approaches;
- Evaluating the work products of Quality Assurance engineers, providing training and mentoring as appropriate;
- Training Localization QA engineers on high-level problem solving and QA best practices;
- Managing project and technical communications and discussions with . . . ;
- Formulating concepts for the development of new functionalities and overall optimization of successive releases of technology products, extending beyond localization and including high-level system issues, such as software applications and engines used in powering [the Petitioner's] technologies.

In the RFE, the Director instructed the Petitioner to submit a letter from an authorized official of the Beneficiary's foreign employer, describing the Beneficiary's specific daily duties and the percentage of time devoted to each of those duties. The Petitioner's response included a letter containing this information, signed not by an official of the foreign entity but by the Petitioner's manager of immigration services. The list of duties reads, in part:

20% Managing day-to-day work of project teams engaged in localization and quality assurance operations. [The Beneficiary] established work priorities and goals for his team, and provided high-level technical advice to guide their work . . . ;

25% Overall management and design of localization projects, including the coordination and execution of project plans. [The Beneficiary] developed project plans and monitored milestones to ensure that all related projects were completed on schedule. He established system concepts, organized required resources for projects, oversaw requirements analysis and design, reviewed and assigned projects, and used his managerial authority to determine project approaches, priorities, goals, and establish project schedules . . . ;

10% Managing the development of detailed feasibility analysis, testing and integration of the new localized products and functionalities with existing systems . . . ;

10% Evaluating work products and processes to ensure that operations are structured and carried out efficiently. [The beneficiary] maintained and enforced best practices guidelines for localization, testing, quality assurance, and testing activities to ensure the quality and reliability of the end products . . . ;

2% Developing enhancements to engineering protocols, policies, and standards with a view to streamlining reporting and documentation operations;

5% Evaluating the need for custom tools for use in localization and testing processes, and overseeing their design. [The beneficiary] reviewed the engineering operations under his management to assess operational efficiency, and devised ways to optimize work methods and assignments, overseeing the development of automated tools to control the time and cost of routine activities, creating system/hardware/software tuning and testing approaches, and specifying infrastructure requirements.

10% Evaluating the work products of Quality Assurance engineers belonging to his project teams;

3% Training and mentoring Localization QA engineers on high-level problem solving and QA best practices;

5% Managing project and technical communications and discussions with . . . ; and

10% Developing high-level, "macro" recommendations on technology roadmap and development for consideration by the senior management members of [the Petitioner's] Interactive Media Group/Localization and Release Engineering organization.

The Petitioner asserted that the Beneficiary "managed an essential function for [the Petitioner]: localization and quality assurance for [redacted] products for the French and German markets . . . . This function was . . . essential to [the Petitioner's] business performance in Europe."

In denying the petition, the Director noted that, on September 22, 2010, the Petitioner had filed a Form I-140 petition seeking to classify the Beneficiary as a professional or skilled worker under section 203(b)(3) of the Act, 8 U.S.C. § 1153(b)(3). The 2010 petition had included the March 2009 reference letters from [redacted] and [redacted] discussed above. [redacted] stated that the Beneficiary "worked in the capacity of Localisation QA Engineer," while [redacted] stated that the Beneficiary worked "in the capacity of Software Test Engineer." The earlier petition also included ETA Form 9089, Application for Permanent Employment Certification, which the Petitioner filed on June 11, 2009. Both letters, and the ETA Form 9089, all contained the same description of the Beneficiary's job at the Petitioner's subsidiary:

> Act as a lead test engineer for various multimedia applications . . . . Responsible for creating and updating test guidelines; writing feature validation documents; executing test plans, writing defects and conducting bug management. Test applications and perform validation of low-level software . . . that handles the ingest (capture) of HD & SD video, and the manipulation of media through the video pipeline which includes attributes such as correct aperture modes, gamma shifting and color management.

The Form ETA 9089 indicated that [redacted] had employed the Beneficiary as a "Localization QA Engineer" from 2002 to 2008, and it named [redacted] not [redacted] as the Beneficiary's supervisor during that period. The Beneficiary signed the form, thereby attesting to its accuracy.

In denying the petition, the Director found discrepancies regarding the Beneficiary's duties, noting that the job descriptions submitted with the earlier petition did not refer to any managerial duties.

On appeal, the Petitioner asserts: "The USCIS has selectively picked information pertaining to the previous work experience from the ETA F[or]m 9089 to point out a nonexistent discrepancy." The Petitioner states that the Director "failed to raise [this issue] in an RFE" as required by 8 C.F.R. § 103.2(b)(16)(i), and that, by relying on this information from a previous petition, "the Service has required a much higher standard of proof."

8 C.F.R. § 103.2(b)(16)(i) refers to "derogatory information . . . of which the . . . petitioner is unaware . . . ." The Petitioner cannot have been unaware of its own earlier petition (which was filed through the same law firm that represents the Petitioner in the present matter). Also, the Petitioner has offered a response to this information, albeit on appeal rather than in response to a pre-decision notice. This response will receive the same consideration on appeal that it would have received in response to an RFE or a notice of intent to deny the petition. Furthermore, this issue was not the sole

ground for denial, and therefore a prior notice based on this issue would not have prevented the denial of the petition.

In general, when examining the executive or managerial capacity of a given position, we review the totality of the record, starting first with the description of the beneficiary's proposed job duties with the petitioning entity. *See* 8 C.F.R. § 204.5(j)(5). Published case law has determined that the duties themselves will reveal the true nature of the beneficiary's 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). We then consider the beneficiary's job description in the context of the petitioner's organizational structure, the duties of the beneficiary's subordinates, and any other relevant factors that may contribute to a comprehensive understanding of the beneficiary's actual duties and role within the petitioning entity.

In addition, while performing non-qualifying tasks necessary to produce a product or service will not automatically disqualify the beneficiary as long as those tasks are not the majority of the beneficiary's duties, the petitioner still has the burden of establishing that the beneficiary is "primarily" performing managerial or executive duties. *See* Section 101(a)(44) of the Act.

On appeal, the Petitioner asserts that the Director incorrectly relied on "perceived inconsistencies" and "a nonexistent discrepancy" between two Form I-140 filings. Regarding the change in job title from "Localization QA Engineer" to "Lead Localization QA Engineer," the Petitioner states that there is only a "slight variation" between two "similar titles," and that the word "lead" does appear in the job description on Form 9089, if not in the actual title. Specifically, the Petitioner states: "The job description contained on page 13 of the Form states that he 'Acted as a lead . . . .'" The Petitioner, here, quotes the first four words of the phrase "[a]cted as a lead test engineer." The same job description stated that one of the Beneficiary's duties was to "[t]est applications and perform validation of low-level software." To conduct such tests is to perform, not manage or oversee, an essential function.

The Petitioner downplays any differences between the job descriptions written to support the present petition and the earlier description that [redacted] and [redacted] provided in 2009 to support the earlier petition. It is true that the two petitions sought different immigrant classifications for the Beneficiary, but both of the job descriptions concern the same position that the Beneficiary held from 2002 to 2008. Therefore, it is reasonable to expect the two descriptions to be essentially in agreement, with any differences being changes of emphasis rather than substance.

In their March 2009 letters, [redacted] and [redacted] stated that the Beneficiary served "as a lead test engineer for various multimedia applications," but they did not indicate that the Beneficiary served in a managerial capacity. Rather, they described functional activities such as "writing feature validation documents, executing test plans, writing defects and conducting bug management," and stated that the beneficiary "gained experience with multimedia applications . . . ; pro-video workflow incl[uding] capturing, editing, and processing to multi-formats; verification of video correctness in areas such as color, gamma and aperture modes." These duties are consistent with those of an engineer, working directly with the Petitioner's products. The duties are also consistent with the

titles cited in the 2009 letters from [redacted] and [redacted] and the other documentation that accompanied the 2010 petition.

The Petitioner asserts that the materials submitted in support of the present petition are sufficient to establish eligibility by a preponderance of evidence, and that, by going outside the record, the Director incorrectly imposed a higher standard of proof. Regarding the "preponderance of evidence" standard of proof, if a petitioner submits relevant, probative, and credible evidence that leads USCIS to believe that the claim is "more likely than not" or "probably" true, the petitioner has satisfied the standard of proof. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010), citing *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987). The submission of conflicting job descriptions for the same position necessarily raises questions regarding the accuracy of the new job description, and we do not accept the assertion that the new job description would have been sufficient if USCIS had not seen the earlier job description. Unresolved material inconsistencies may lead us to reevaluate the reliability and sufficiency of other evidence submitted in support of the requested immigration benefit. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

Furthermore, we note that the Director, in the RFE, had requested a job description "from an authorized official of the foreign organization," the clear implication being that such an official would be personally familiar with the Beneficiary's duties and, therefore, able to describe them. The Petitioner, in response, submitted a job description not from any authorized official of the foreign organization, but rather from its own manager of immigration services, based in California. All things being equal, a nearly-contemporaneous job description provided by someone in the Beneficiary's on-site management chain would tend to be more reliable than a description prepared several years after the fact by an official based elsewhere, who claims no expertise in the type of work that the Beneficiary performed. The Petitioner does not explain why the job description in the 2009 letters from [redacted] and [redacted] is less reliable than a description prepared several years after the fact by an individual who does not appear to have witnessed or overseen the work.

The available evidence supports a finding that, from 2002 to 2008, the Beneficiary worked as an engineer, contracted through [redacted] performing essential functions (with some collateral supervisory responsibilities) for the petitioning organization. However, the Petitioner has not established that the Beneficiary was employed in a managerial capacity abroad.

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, the burden of proving eligibility for the benefit sought remains with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of A- Inc.*, ID# 96181 (AAO Jan.12, 2017)