U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

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[redacted]

FILE: EAC 01 233 53846 Office: VERMONT SERVICE CENTER Date: OCT 14 2004

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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DISCUSSION: The director denied the employment-based preference visa petition. The Administrative Appeals Office (AAO) dismissed a subsequent appeal, and affirmed its prior decision in a motion to reopen or reconsider. The matter is again before the AAO on a second motion to reopen or reconsider. The motion will be granted; however, the previous decisions shall be affirmed. The petition will be denied.

The petitioner is a New Jersey partnership that seeks to employ the beneficiary as its vice president of technical services. The petitioner, therefore, endeavors to classify the beneficiary as a multinational executive or manager pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C).

The director denied the petition because the proffered position in the United States is not in an executive or managerial capacity. The AAO also found that the petitioner and a foreign entity did not share a qualifying relationship and, therefore the beneficiary also could not meet the requirements of the regulation at 8 C.F.R. § 204.5(j)(3)(i)(B). The AAO found further that the petitioner did not have the ability to pay the proffered wage.

On this second motion, counsel submits a brief and additional evidence.

Section 203(b) of the Act, 8 U.S.C. § 1153(b), 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 who 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 a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager. 8 C.F.R. § 204.5(j)(1). No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement that indicates that the alien is to be employed in the United States in an executive or managerial capacity. Such a statement must clearly describe the duties to be performed by the alien. 8 C.F.R. § 204.5(j)(5).

The petitioner avers that it: (1) is a subsidiary of Gold Systems of India; (2) engages in computer hardware consulting and communication services; and (3) employs five persons, including the beneficiary who is currently occupying the proffered position as an intracompany transferee (L-1A). The petitioner is seeking to employ the beneficiary permanently at a salary of $40,000 per year.

The first issue to be discussed in this proceeding is whether the beneficiary's proposed employment with the U.S. entity is in a managerial or executive capacity. As the director's and the AAO's prior decisions are included in the record, this decision will address only counsel's statements in this second motion.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

> The term "managerial capacity" means 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.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily-

(i) directs the management of the organization or a major component or function of the organization;

(ii) establishes the goals and policies of the organization, component, or function;

(iii) exercises wide latitude in discretionary decision-making; and

(iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In its two prior decisions, the AAO determined that the proffered position was not in a managerial or executive capacity because the beneficiary spent the majority of his time performing technical services for the

petitioner's clients. On motion, counsel states that the beneficiary spends only 30 percent of his time performing technical work, while the remaining 70 percent of his time is spent directing the technical work of others. Counsel states further that any technical services that the beneficiary may perform "are clearly executive or managerial within the context of a computer consulting company." Counsel asserts that the AAO ignored the fact that a person may be considered a manager if he manages an essential function. Counsel asserts further that the beneficiary manages an essential function and manages professionals, including outside contractors. To support his assertion that the proffered position is in a managerial or executive capacity, counsel submits an opinion letter from Dr[redacted] Professor of Marketing, Graduate Program Chair, Department of Marketing, Lubin Graduate School of Business, Pace University.

Counsel's statements on motion are unpersuasive. Counsel cannot claim that the beneficiary works in a managerial capacity because he both manages an essential function *and* supervises professional employees. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). Otherwise, if it is claimed that the beneficiary's duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* § 101(a)(44)(A)(ii) of the Act. Whether the beneficiary manages an essential function or supervises employees, the petitioner must establish not only that the beneficiary performs the responsibilities specified in the definition of managerial capacity, but also that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

Counsel's claim that the beneficiary manages an essential function has no merit. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must 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. In addition, the petitioner must provide a comprehensive and detailed description of the beneficiary's daily duties demonstrating that the beneficiary manages the function rather than performs the duties relating to the function. As stated in prior decisions, there is no evidence that the beneficiary primarily manages the function rather than performs the technical duties of the function.

Regarding the supervision of professional employees, counsel's statements on motion raise questions about the veracity of previously submitted evidence. Counsel states in this motion that, in addition to supervising three staff members, the beneficiary is responsible for supervising outside contractors who occupy professional positions. However, prior to this motion, the petitioner never claimed that the beneficiary supervised persons other than those individuals on its payroll; the petitioner never mentioned that it used outside contractors. Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). Counsel's statements regarding the outside contractors will, therefore, not be considered.

Counsel's claim that the beneficiary works in a managerial capacity simply because he supervises professional employees is unpersuasive. The supervision of supervisory, managerial or professional

employees is just one responsibility outlined in the definition of managerial capacity. The beneficiary must primarily execute all four of the duties specified in managerial capacity; the supervision of certain types of employees is just one element that, by itself, is not enough to meet the definition of managerial capacity.

On motion, counsel submits a letter from a professor at Pace University, who opines that the proffered position is an "executive-level position." Citizenship and Immigration Services (CIS) may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, CIS is not required to accept or may give less weight to that evidence. *Cf. Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). When describing the proffered position in his letter, Dr. [redacted] elevates the job to a level that the petitioner never described. For example, Dr. [redacted] states that the beneficiary "leads a group of mangers in the administration of business-critical functions in such areas as technology development, the cultivation of relationships with new technology clients, sales, marketing, human resources management, project initiation and management, and the planning and architecture of network infrastructures." However, the petitioner's organizational chart indicates that the beneficiary supervises one sales and marketing manager, one systems analyst, and one manager of technical support. The organizational structure that the petitioner presented does not include "a group of managers"; Dr [redacted] seems to be referring to a job description that is different from the one that the petitioner presented to CIS. Accordingly, his opinion carries no weight in these proceedings.

Based upon the above discussion, the position offered to the beneficiary is not in an executive or managerial capacity. The AAO will not overturn its prior decision.

The second issue to be discussed is whether the petitioner and Gold Systems of India share a common relationship pursuant to 8 C.F.R. § 204.5(j)(3)(i)(C). On motion, counsel submits two stock certificates: stock certificate number one is issued to the beneficiary on behalf of Gold Systems of India for 1,000 shares of common stock; stock certificate number two is issued to [redacted] for 1,000 shares of common stock. Counsel states, "This arrangement is a joint venture between Gold Systems of India and [redacted] Both own 50% of the US entity and have equal control and veto power."

Contrary to counsel's opinion, the petitioner cannot be a joint venture. *Matter of Hughes* states that a joint venture is "a business enterprise in which two or more economic entities from different countries participate on a permanent basis." *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982)(quoting a definition from Endle J. Kolde, *International Business Enterprise* (Prentice Hall, 1973)). Mr. [redacted] who is an individual, would not be considered "an economic entity." Furthermore, the appearance of the beneficiary's name on stock certificate number one raises questions regarding the true owner of those 1,000 shares of stock. Regarding this matter counsel states, "Because Gold Systems of India is a partnership and not a corporate legal entity, Beneficiary holds the shares as a representative of the partnership entity. However, it is the partnership entity that actually owns 50% of the U.S. entity. Thus, Beneficiary's name appears on the share certificate only as a matter of convenience."

As stated in the AAO's prior decision, 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). Neither counsel nor the petitioner presents any

documentary evidence to substantiate counsel's claims that the beneficiary's name on the stock certificate is "a matter of convenience." In addition, the record contains no additional documentary evidence of the petitioner's ownership. The statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). Therefore, absent credible documentary evidence that establishes each entity's ownership, the AAO will not conclude that the petitioner and Gold Systems of India share a common relationship based solely on two stock certificates. Again, because the petitioner has not established the existence of a qualifying foreign entity, the beneficiary cannot meet the requirement of 8 C.F.R § 204.5(j)(3)(i)(B). This regulation states that the beneficiary must have been employed by the qualifying foreign entity in a managerial or executive capacity for at least one year in the three years immediately preceding his entry into the United States in a nonimmigrant status.

The third and final issue to be discussed is whether the petitioner has the ability to pay the proffered wage of $40,000. On motion, counsel states that, although the evidence indicated that the beneficiary was paid only $36,000, he was additionally compensated by the petitioner for the purchase of a 2000 Saturn automobile. Counsel states that, taken together, the beneficiary's total compensation package amounted to more than $40,000.

Pursuant to 8 C.F.R. § 204.5(g)(2):

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. . . .

As the above regulation stipulates, evidence of a petitioner's ability to pay includes annual reports, federal tax returns, or audited financial statements. CIS will not consider reimbursement for a car payment or automobile insurance when determining that the petitioner has the ability to pay the proffered wage. Accordingly, the prior decision will not be disturbed.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The decision of the Administrative Appeals Office, dated July 21, 2003, is affirmed. The petition is denied.