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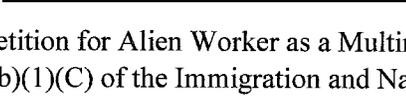


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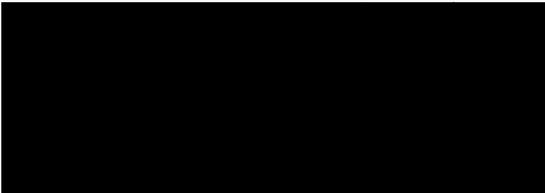
FILE: 
WAC 03 090 52840

Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner: 
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:



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

DISCUSSION: The Director, California Service Center, denied the employment-based petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a corporation organized in the State of Delaware in December 2000. It has been authorized to conduct business in the State of California since April 2001. It supports market development of its parent company's organic natural pesticide products in North and Latin American, Australian, and Caribbean markets. It seeks to employ the beneficiary as its president and treasurer. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager.

The director determined that the petitioner had not established that the beneficiary would be employed in a managerial or executive capacity for the United States entity. The petitioner subsequently filed two motions to reopen and reconsider. The director granted both motions and affirmed his previous decision.

On appeal, counsel for the petitioner submits a brief.

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 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.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary.

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 as a multinational executive or manager. 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 a managerial or executive

capacity. Such a statement must clearly describe the duties to be performed by the alien. *See* 8 C.F.R. § 204.5(j)(5).

The issue in this proceeding is whether the petitioner has established that the beneficiary will be employed in a managerial or executive capacity for the United States entity.

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.

The petitioner was organized in December 2000 but did not begin operations in the United States until the arrival of the beneficiary in January 2002. The petitioner's parent company's president and chief executive officer submitted a December 10, 2002 letter in support of the petition. The petition was filed January 27, 2003. The parent company stated that the petitioner marketed and provided technical support to North and Latin American, Australian, and Caribbean distributors of its organic natural pesticide products. The parent company noted that it had entered into several marketing agreements with companies located in the United States, Mexico, and Australia. Copies of the marketing agreements were submitted for the record. The parent company observed that the beneficiary was currently negotiating with several other companies to market and distribute the parent company's product.

The parent company also listed the beneficiary's specific responsibilities as:

- Execute [the petitioner's] marketing plan to promote the sale of E.I.D. Parry (India) Ltd.'s [the parent company] organic natural pesticide products as a safe alternative to chemical pesticides in the United States and other North and Latin American, Australian and Caribbean markets.
- Establish additional distributor relationships in the United States and other North and Latin American, Australian and Caribbean markets for the sale of E.I.D. Parry (India) Ltd.'s organic natural pesticide products.
- Promote [b]usiness collaborator, product distributor and consumer education on the use of E.I.D. Parry (India) Ltd.'s organic natural pesticide products as a safe alternative to chemical pesticides.
- Advice [sic] product users through distributors in United States and other target territories on product use methods and product value deliveries for maximum usage benefits.
- Explore new application opportunities for E.I.D. Parry (India) Ltd.'s organic natural pesticide products in the area of agriculture, landscape, animal and mosquito control in the United States and other North and Latin American, Australian and Caribbean markets.
- Manage E.I.D. Parry (India) Ltd.'s research, regulatory, intellectual and consultancy investments in the United States with Universities/Institutions and intellectual/technical firms.
- Development of products and achieve regulatory approvals from agencies such as EPA, CDPR and other State Department of Agriculture in the United States and other agencies in [the petitioner's] territories for E.I.D. Parry (India) Ltd.
- Assure compliance with all of federal and state government statutory requirements.
- Develop strategic directions for E.I.D. Parry (India) Ltd. further investments in new product research and development for growing organic crop markets with special emphasis to United States.

The petitioner also provided a job description for the president and treasurer. The job description divided the duties of the position into "technical support," "product development," "marketing/sales," and, "technology and alliances." The technical support aspect of the position required technical service to two different companies that had marketing and distributing agreements with the petitioner's parent company; the product development aspect of the position required consumer/user education, evolving business opportunities, coordinating with universities in organic and safer food production, establishing new distributor relationship for sales, obtaining registration approvals and new distributor networks in Canada, Mexico, and Argentina. The marketing and sales aspect required the beneficiary to sell and constantly explore markets; the technology and alliances aspect required the beneficiary to gather new technology and identify strategic alliances.

On March 27, 2003, the director requested the petitioner's organizational chart, its California Forms DE-6, Employer's Quarterly Wage Report, and payroll summaries. The director also requested that the petitioner explain why the beneficiary must report to the United States entity. The director further requested the petitioner's major sales invoices to establish that the petitioner was doing business.

In response, the petitioner explained that the beneficiary was sent to the United States to serve as the petitioner's president and treasurer and to implement the following objectives:

- a. To improve existing business in the United States and develop business in the whole region for its parent company.
- b. To pursue regulatory clearances for product diversification and uses on pets, animals and mosquito control in the U.S. to expand market scopes.
- c. To obtain approval from the EPA for additional used of E.I.D. Parry (India) Ltd.'s organic pesticide products in the United States.
- d. To obtain approval from the governments of other counties in North, Central and South America, the Caribbean and Australia and to develop business for E.I.D. Parry (India) Ltd.'s organic pesticide products in these regions.
- e. To be the U.S. formulator and distributor of E.I.D. Parry (India) Ltd.'s organic pesticide products for select U.S. market segments upon completion of market research.
- f. To be the ultimate U.S. formulator and marketer for South and Central America markets and leverage U.S. branding for E.I.D. Parry (India) Ltd.'s organic pesticide products.
- g. To market future new product technologies and products for E.I.D. Parry (India) Ltd.
- h. To identify new technologies and products for the United States for the benefit of E.I.D. Parry (India) Ltd.

The petitioner submitted its California Forms DE-6, showing the beneficiary as its sole employee. The petitioner reiterated that the beneficiary would: develop and implement the petitioner's overall marketing strategy; execute the petitioner's marketing plan to promote the sale of its parent company's products; establish additional distributor relationships; promote consumer education; explore new applications for new opportunities; and, assure compliance with all federal and state government statutory requirements.

The petitioner also included a number of invoices issued by the petitioner to companies that had entered into agreements with the petitioner's parent company. The invoices were for attending meetings, providing

assistance, traveling, providing technical services, preparing data, and having technical and marketing discussions with companies, apparently on behalf of the companies who had agreements with the petitioner's parent company. The petitioner, beginning in May 2003, billed its parent company for professional services rendered in June 2003, to register the parent company's product in various countries.

In a February 6, 2004 decision, the director recited the beneficiary's job description and determined that it did not establish that the beneficiary primarily performed in an executive capacity. The director also determined that: (1) it was reasonable to believe that with the petitioner's organizational structure comprised of three employees, the beneficiary would assist with the day-to-day non-supervisory duties; (2) the beneficiary did not qualify as a manager because his position would not be over subordinate managers or professional employees; and, (3) the beneficiary would be performing routine operational duties rather than managing a function of the business. The director also included a second ground for denying the petition, determining that the petitioner had not established a qualifying relationship with the beneficiary's foreign employer; however, the determination was obviously based on information concerning unrelated companies.

In a March 8, 2004 motion to reopen, counsel for the petitioner pointed out that the director had erroneously relied on facts and evidence from a petition wholly unrelated to the petitioner's I-140. In addition, counsel asserted that the director had relied on unrelated and irrelevant facts when determining that the beneficiary would not be employed in a managerial or executive capacity. Counsel also disagreed with the director's analysis that the beneficiary's job description was vague and general.

On March 31, 2004, the director issued a new decision that again recited the beneficiary's job description. The director determined that based on the job description the beneficiary would not be employed in a primarily executive capacity. The director again included a paragraph describing the petitioner's organizational structure that did not comport with the record. The director, however, excluded the determination relating to the petitioner's qualifying relationship with the beneficiary's foreign employer.

In an April 16, 2004 motion to reopen, counsel for the petitioner again pointed out that the director had included evidence extraneous to the petitioner's organizational structure when denying the petition. Counsel also asserted that the director's decision disregarded facts and evidence, and failed to give proper weight to the facts relating to the beneficiary's managerial or executive capacity. Counsel again disagreed with the director's determination that the beneficiary's job description was vague and general.

Counsel also submitted an April 13, 2004 seven-page letter signed by the president of the parent company/director of the petitioner (hereinafter president/director). In the letter the president/director: stressed the autonomous nature of the beneficiary's duties; the use of outside contractors and consultants to perform routine office duties, to provide technology/regulatory services, accounting services, market research services, and legal services relating to the field of intellectual property; the use of existing marketing alliances between the parent company and third party companies to sell the parent company's product; the beneficiary's responsibility to determine which products to market and to identify new product opportunities in the United States; and, the beneficiary's access to the parent company's research and development team. The president/director indicated that: (1) the petitioner's business plan placed responsibility for its mission and strategy on the beneficiary; (2) the beneficiary had established employee policies which reflected an intention

to hire employees; and, (3) the beneficiary had entered into a liaison agreement with the parent company dated April 3, 2003, as well as other agreements with third parties also entered into after the petition was filed. The president/director attached copies of the various agreements, purchase orders, and regulatory decisions and approvals to his letter.

On May 1, 2004, the director issued a third decision. The director recited the beneficiary's job description and determined that it did not establish that the beneficiary would be employed in a primarily executive capacity. The director observed that the petitioner's organizational structure included the beneficiary as its sole employee and that it would be reasonable to believe that the beneficiary would assist with the day-to-day non-supervisory duties. The director again determined that the petitioner had not established that the beneficiary would qualify as a manager for the reasons previously cited. The director did not address the seven-page April 13, 2004 letter and attachments that had been submitted on behalf of the petitioner.

On appeal, counsel for the petitioner asserts that when the director reopened the matter for a second time, the director was required to review all evidence submitted, including the April 13, 2004 letter and attachments. Counsel asserts that the evidence submitted on motion clarified the prior evidence in the record and explained the beneficiary's position in detail. Counsel states that the beneficiary is responsible for accomplishing the company's goals, is in control of the company's finances, conducts meetings with complete discretion, uses outside contractors, consultants, and marketing alliances, and manages the parent company's research, regulatory, intellectual and consultancy investments in the United States. Counsel asserts that the beneficiary's day-to-day activities of public relations, lobbying, and contracting are duties recognized by Citizenship and Immigration Services (CIS) as executive. Counsel concludes that as an executive, the beneficiary makes decisions as to the actions that the company will take and that as a manager he carries out those decisions.

Counsel's assertions are not persuasive. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary. *Id.* In this matter the beneficiary's responsibilities included executing a marketing plan, establishing additional distributorships, promoting consumer education, advising on product use, exploring new application opportunities, managing the parent company's research, regulatory, intellectual, and consulting investments, developing products, obtaining regulatory approvals and assuring compliance with government requirements, and developing strategy for the parent company's further investments. The beneficiary as the petitioner's sole employee is the individual responsible for carrying out these duties. When the petition was filed, the petitioner had no other employees and had not yet contracted with or paid independent contractors to provide the necessary services in order to carry out these responsibilities. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). In this matter, the petitioner had been operational for one year,¹ when the petition was filed in January 2003.

¹ The AAO will address whether the petitioner's operations comprised "doing business" as defined by the regulations later in this decision.

For example, during the year prior to filing the petition according to the invoices provided by the petitioner, the beneficiary provided consulting services to companies that had entered into agreements with the petitioner's parent company. Based on the petitioner's audited financial statements for the period January 1, 2002 through March 31, 2003, the petitioner's revenue came from providing technical services. The beneficiary as the petitioner's sole employee provided those technical services. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). 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).

In April 2003, three months after the petition was filed, the petitioner entered into an agreement with its parent company to act as a liaison to secure registration for its products in countries in addition to the United States. In August 2003, seven months after the petition was filed, the petitioner entered into an agreement with a third party to obtain assistance in acquiring registration of pesticides with the United States Environmental Protection Agency. The record also contains other agreements entered into sometime after the petition was filed. Although these agreements are evidence that the petitioner's business expanded after the petition was filed, again a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. at 49.

The record contains evidence that the petitioner has had an agreement with a company to provide administrative and secretarial assistance since January 2002. The record contains evidence that the petitioner may have used the services of accounting and law firms. However, the record is not specific regarding the timeframe that the petitioner utilized the accounting and legal services, nor does the record contain evidence of Internal Revenue Service (IRS) Forms 1099, Miscellaneous Income, issued to the law and accounting firms. Outsourcing administrative assistance does not relieve the beneficiary from performing the everyday consulting services of the enterprise. Further, the petitioner has not provided evidence supporting the full-time use of an attorney and an accountant to perform services that relieve the beneficiary from performing tasks associated with operating an enterprise that at least initially was required to provide consulting services. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The AAO agrees that the director should have addressed the April 13 2004, letter submitted on behalf of the petitioner on motion; however, the AAO observes that much of the evidence attached to the letter included evidence relating to the petitioner's circumstances subsequent to filing the petition. Counsel's assertion that the beneficiary is responsible for directing the management of the organization is not substantiated in the record. As observed above, the petitioner did not provide evidence that it utilized outside contractors or employed individuals who relieved the beneficiary from primarily providing consulting services to companies that had agreements with its parent company. The AAO notes that although the statutory definitions are not meant to exclude a beneficiary's duties that are not strictly executive or managerial, like customer and public relations, lobbying, and contracting; those duties may not be the beneficiary's primary responsibility if the beneficiary is to be considered an executive or manager. Finally, the AAO notes that counsel's statement that

as an executive, the beneficiary makes decisions as to the actions that the company will take and that as a manager he carries out those decisions, confirms that the beneficiary is performing the operational tasks of the company.

The petitioner has not provided evidence that the beneficiary's tasks comprise primarily managerial or executive duties as defined at section 101(a)(44)(A) and (B). The petitioner has not presented evidence to overcome the director's decision on this issue.

Beyond the decision of the director, the AAO questions whether the petitioner was doing business as defined by regulation, the year previous to filing the petition. The regulation at 8 C.F.R. § 204.5(j)(3) states in pertinent part:

- (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:

* * *

- (D) The prospective United States employer has been doing business for at least one year.

The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part: "*Doing Business* means the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office."

As observed above, the petitioner's parent company entered into several agreements with unrelated companies to sell the parent company's product. The beneficiary's initial service for the petitioner relates to providing technical consulting services to the third party companies. The critical focus in the definition of "doing business" is not whether the petitioner is an agent or representative office, but whether the entity constitutes the "mere presence of an agent or office" without conducting any business activities. The proper focus in this issue thus, is the nature and conduct of the petitioner's business activities in the one year prior to filing the petition, if any. In the matter at hand, the petitioner has not presented evidence that it, rather than the parent company, was involved in a high volume of transactions, in the year prior to filing the petition. For this additional reason, the petition will not be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

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. Here, that burden has not been met.

ORDER: The appeal is dismissed.