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U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
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Services

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**MAY 01 2009**

FILE: [REDACTED]  
LIN 07 156 51645

OFFICE: NEBRASKA SERVICE CENTER

Date:

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. 103.5(a)(1)(i).

John F. Grissom  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Nebraska Service Center. The director subsequently granted the petitioner's motion to reconsider and affirmed the prior adverse decision. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner claims to be a Florida corporation that seeks to employ the beneficiary as its president/chief executive officer (CEO).<sup>1</sup> 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 denied the petition based on the conclusion that the petitioner failed to establish that it would employ the beneficiary in a managerial or executive capacity.

On motion, counsel disputed the director's conclusions and submitted a brief addressing the adverse findings.

In his subsequent decision, the director reaffirmed his prior findings, concluding that the record failed to establish that the beneficiary would primarily perform duties within a qualifying managerial or executive capacity.

On appeal, counsel submits a brief asserting that the beneficiary's proposed job duties fit the statutory definition of executive capacity. A full discussion of the director's findings and counsel's responses is provided below.

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

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<sup>1</sup> It should be noted that, according to Florida state corporate records, the petitioner's corporate status in Florida was "administratively dissolved" on September 14, 2007. Therefore, since the corporation may not carry on any business except that necessary to wind up and liquidate its affairs, and the petitioner has not taken steps under Florida law to seek reinstatement, the company can no longer be considered a legal entity in the United States. See § 607.1421, Fla. Stat. (2006). Therefore, this dissolution clearly and unequivocally renders the petitioner ineligible for the classification sought and, in fact, renders it subject to automatic revocation without prior notice even if the grounds of ineligibility discussed herein had been overcome on appeal. See 8 C.F.R. § 205.1(a)(3)(iii)(D).

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 a firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and who 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 which 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.

The primary issue in this proceeding calls for an analysis of the beneficiary's proffered job duties. Specifically, the AAO will examine the record to determine whether the beneficiary would be employed in the United States in a qualifying managerial or executive capacity.

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 support of the Form I-140, the petitioner submitted a letter dated April 30, 2007, claiming that it "merged" with Wireless +, Inc. in order to form 3 G Communications, Inc. However, in the context of corporations, a merger is defined as follows:

An amalgamation of two corporations pursuant to statutory provision in which one of the corporations survives and the other disappears. The absorption of one company by another, the former losing its legal identity, and the latter retaining its own name and identity and acquiring assets, liabilities, franchises, and powers of former, and absorbed company ceasing to exist as separate business entity. It differs from a consolidation wherein all the corporations terminate their existence and become parties to a new one.

*Black's Law Dictionary* 682 (Abridged 6th Ed. 1991). In the present matter, the record contains two stock certificates issued by 3 G Communications, Inc., transferring 500 shares to Wireless +, Inc. and another 500 shares to the petitioner, thus indicating that a merger has not in fact taken place. Rather, the documentation on record indicates that the petitioner and Wireless +, Inc. engaged in a joint business venture to form a third and separate legal entity, i.e., 3 G Communications, Inc. There is no indication that the creation of 3 G Communications, Inc. resulted in the termination of the petitioner's separate corporate existence.<sup>2</sup>

In addition to the above claim, the petitioner's support letter included the following description of the beneficiary's proposed employment in the United States:

[The beneficiary] will establish the goals and policies of the business. He will plan, develop, and establish policies and objectives of [the] business organization and the overall direction of the company. He will explore new business investments for the

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<sup>2</sup> While the AAO previously noted that the petitioner's corporate status had been administratively dissolved due to its failure to meet annual reporting requirements, there is no evidence of a nexus between the petitioner's administrative dissolution and its claimed "merger," which, as discussed above, was merely a joint venture with another company that led to the creation of a newly formed entity in which the petitioner had a vested ownership interest.

parent company. ***[The beneficiary] will dedicate approximately 70% of his time to these executive functions.***

He will review activity reports and financial statements to determine progress and status in attaining objectives and revise objectives and plans in accordance with current conditions. He will direct and coordinate formulation of financial programs to provide funding for new and continuing operations to maximize returns on investments, and to increase productivity. ***[The beneficiary] will dedicate approximately 15% of his time [to] performing these functions.***

He will plan the company's marketing campaign. He will devise plans to improve the company's image and relations with customers, employees, and the public. ***[The beneficiary] dedicates approximately 10% of his time [to] performing these functions.***

He will evaluate performance of executives for compliance with established policies and objectives of the company and contributions in attaining objectives. When necessary, he hires/fires company personnel. ***[The beneficiary] dedicates approximately 5% of his time [to] performing these duties.***

The petitioner stated that the primary portion of the beneficiary's time is spent performing executive-level tasks and further claimed that it is staffed with support personnel who will relieve the beneficiary from having to primarily perform non-qualifying tasks. Among the supporting documents, the petitioner has provided a list of managers and other staff employed at the two recently created entities wherein the beneficiary has been named president. It is noted that none of the personnel listed in this document is shown as belonging to the petitioner. Rather, the personnel is shown as belonging to 3 G Communications, Inc., the company that is jointly owned by the petitioner and Wireless +, Inc., and General Growth Development, the subsidiary of 3 G Communications, Inc. The petitioner did not provide information describing its own personnel structure.

On July 23, 2007, the director issued a request for additional evidence (RFE) instructing the petitioner to provide further information about the nature of its retail operation and W-2 statements for each of its employees as well as a duty roster or schedule showing each employee's work hours. The petitioner was also instructed to provide its organizational chart illustrating its staffing levels and the beneficiary's position compared to others within the hierarchy. Lastly, the petitioner was asked to expand on the beneficiary's previously provided position description by specifying actual tasks to be performed.

In response, the petitioner provided an organizational chart showing the beneficiary as the head of three organizations—the petitioner, 3 G Communications, Inc., and General Growth Development, LLC. Although the organizational chart contains a complete list of names and position titles, illustrating what appears to be a fully-staffed organization, further analysis of the document shows that, other than the beneficiary himself, none of the employees are shown as being employed by the petitioning entity. Rather, the support personnel are shown as being employed either by 3 G Communications, Inc. or by General Growth Development, LLC. Although the petitioner also

provided a letter from counsel dated October 10, 2007 in which counsel claimed that the petitioner and Wireless +, Inc. "ha[d] begun conduct[ing] business under 3G Communications, Inc.," as previously discussed, there is no evidence on record to establish that a merger took place or that the petitioner's corporate existence had otherwise been replaced with another corporation. Nor is there any evidence that the petitioner has been authorized to conduct its business under a different name. 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)).

Additionally, it is noted that the petitioner has submitted several 2006 W-2 wage and tax statements, all belonging to 3 G Communications, as well as a 2006 first quarterly wage report belonging to Wireless +. None of the submitted documents pertained to the petitioner. The petitioner did provide an undated document containing a supplemental job description for the beneficiary. However, the document expressly stated that the petitioner intended to employ the beneficiary for the purpose of managing its U.S. subsidiary. Thus, it appears that the supplemental job description applies to the work the beneficiary would perform for the newly created 3 G Communications, not for the petitioning entity. The supplemental job description is as follows:

[The beneficiary] will establish the goals and policies of the business. For instance, he will have to analyze operations to evaluate [the] performance of the company and staff in meeting the company's objectives, and to determine areas of potential cost reduction, program improvement, or policy change. [He] will be setting the objectives towards achieving the development and growth of 3 G Communications, Inc[.] by opening additional retail locations and enhancing the customer experience. He will establish and executive the strategy that would lead to a successful operation while maintaining increased customer satisfaction by implementing the customer follow[-]up program to ensure that customer satisfaction and to acquire repeated business. [The beneficiary] will also ensure that there is a level of training available to all employees including managers and executives through monthly classes for the employees at the company headquarters.

He will plan, develop, and establish policies and objectives of [the] business organization and the overall direction of the company. He will be responsible for overseeing operational functions of the company, specifically, sales, marketing, finance and administration to be able to maximize investments, and increase efficiency. He will also be directing all of the [f]inance operations for General Growth Development, LLC, [sic] by maintaining efficient cash flow from the Deere Run Estate project and ensuring sales projections are met. He will review activity reports and financial statements to determine progress and status to maintain objectives and revise objectives and plans in accordance with current conditions of the operations. He will work closely with the company accountant while performing these duties.

[H]e will be in charge of developing new projects. Therefore, he will explore new business investments for the parent company. He will provide immediate direction and credibility to new and existing projects encouraging creativity. He will create

deadlines to meet targeted goals and objectives. He will identify and develop close strategic partnerships with customers, and investors, as appropriate.

The petitioner also stated that 70% of the beneficiary's time would be spent directing and coordinating the formulation of financial programs to maximize returns on existing investments and to fund additional investments, which would require the beneficiary to work closely with a certified public accountant and financial analyst, develop investor relations services, and represent the company during investment presentations and in the course of meetings and discussions.

The petitioner stated that another 15% of the beneficiary's time would be allocated to overseeing the company's marketing campaign, which would be jointly developed by the beneficiary, the vice president, and the managing director. He would also oversee digital marketing and sales materials as well as any plans to improve the company's image with customers, employees, and the public. The beneficiary would create relationships with marketing and media vendors and oversee the real estate brokers with regard to the Deere Run Estates project undertaken by General Growth Development, LLC, the subsidiary of the petitioner's joint venture company.

Another 10% of the beneficiary's time would be devoted to evaluating the performance of executives, work with managers to meet weekly business goals, and ensure that managers are providing the employees with the necessary sales training to meet sales goals. The beneficiary would also hire and fire when necessary.

Although the petitioner stated that the remaining 5% of the beneficiary's time would be spent "performing these duties," no duties were actually discussed in connection with this portion of the beneficiary's time.

In the most recent decision, dated April 15, 2008, the director summarized the beneficiary's previously provided job descriptions, whose contents served as the ultimate basis for the director's conclusion. The AAO notes, however, that while the director pointed to the various deficiencies in the provided job descriptions, he failed to acknowledge a more relevant flaw that was briefly mentioned earlier in this decision. Namely, the record shows that the majority of the documentation and information regarding the beneficiary's proposed job duties directly concerned the beneficiary's position with a non-petitioning entity. In other words, there is no evidence to show that the petitioner is operating or conducting business in its own right or that the beneficiary would perform any of the previously cited job duties within the context of the petitioning entity. Rather, it appears that the beneficiary's role and associated responsibilities would be carried out in his capacity as an employee of 3 G Communications, Inc., a company that is partly owned by the petitioner. While the beneficiary's services may ultimately benefit the petitioner in light of its ownership interest in 3 G Communications, Inc., it appears that the services to be performed by the beneficiary would go directly toward the benefit of the latter company. It is further noted that despite the director's express request for further discussion of the petitioner's specific retail operation, i.e., an explanation of what namely the petitioner purports to sell, the petitioner failed to provide this relevant information.

On appeal, counsel persistently argues that the beneficiary's proposed employment would consist primarily of qualifying job duties. Counsel accuses U.S. Citizenship and Immigration Services

(USCIS) of overlooking information regarding the real estate arm of the business. However, this further shows counsel's apparent lack of awareness that the services the beneficiary intends to perform in the United States would not be performed for the petitioning entity, which appears to be nothing more than an investor in the companies for whom the beneficiary's services are intended.

As the evidence of record indicates that the beneficiary would not be providing his services to the petitioning entity, but rather to the U.S. subsidiary of the petitioner, the AAO cannot conclude that the petitioner would employ the beneficiary in a qualifying managerial or executive capacity.

That being said, even if the deficiency discussed in above the paragraph were not an issue in the present matter, the deficient job description provided by the petitioner would nevertheless warrant an adverse conclusion. In examining the executive or managerial capacity of the beneficiary, USCIS will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). 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. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). In the present matter, the need for a detailed job description was stressed in the RFE, where the petitioner was asked to expand on the job description provided initially in support of the petition. The mere fact that the director asked for further information clearly indicated that the earlier job description lacked the necessary degree of detail.

In the present matter, the beneficiary's job descriptions consist primarily of broad statements that focus on business objectives rather than the specific daily tasks, which would explain the means by which the beneficiary intends to meet those objectives. For instance, the petitioner stated that the beneficiary will establish goals and policies by analyzing operations to evaluate staff performance. While staff performance is clearly key to a successful business operation, the petitioner fails to explain how the beneficiary plans to execute performance evaluations of the staff, nor does the petitioner define what it means to "analyze operations." The petitioner does not illustrate how the analysis will take place or state what specific tasks the beneficiary will undertake on a daily basis. Equally unclear is the petitioner's claim that the beneficiary will establish and execute strategy. The petitioner has not identified any specific strategies, nor explained the beneficiary's specific role in the execution of these unknown strategies. In other words, how would the beneficiary's role in the strategy execution differ from the role of subordinate employees? Only by specifying the underlying tasks can the petitioner make this crucial distinction, as the actual duties themselves reveal the true nature of the employment. *Id.* At 1108.

Next, the petitioner stated that the beneficiary would oversee the company's sales, marketing, finance, and administration. However, oversight is not a specific task. Rather, there are most likely a number of specific actions the beneficiary would perform in order to ensure oversight over the key functions stated above. However, the petitioner does not provide this degree of detail, leaving the AAO to question how exactly the beneficiary plans to carry out his oversight responsibilities.

The AAO further notes that while the petitioner attempted to describe the beneficiary's proposed employment with time allocations, this was not done in a sufficiently detailed manner. Rather, the petitioner allocated a percentage of time to a group of what it identified as executive functions. However, these executive functions were described using general job responsibilities and only a few

specific tasks were actually mentioned. The petitioner did not enumerate the specific tasks that it deemed to be executive, nor did it indicate the percentage of time to be allocated to each specific task. More specifically, the petitioner claimed that the beneficiary would direct and coordinate the formulation of financial programs. However, the petitioner did not identify specific tasks the beneficiary would perform to reach this broad business objective. Although it appears that the beneficiary would meet with current and future business investors, the petitioner did not explain how this sales-task qualifies as executive. Similarly, the petitioner did not explain how making investment presentations and meeting with potential investors qualify as executive tasks. It is noted that 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). As the petitioner has failed to specify how much of the beneficiary's time would be allotted to those job duties that are deemed as non-qualifying, USCIS cannot determine whether the primary portion of the beneficiary's time would be spent performing qualifying tasks.

On appeal, counsel introduces written expert opinions, claiming that such opinions support the petitioner's eligibility. However, while the AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony, the AAO is not required to accept or may give less weight to any opinion that is not in accord with other information or is in any way questionable. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). Here, there is no evidence or indication that any of the expert opinions are based on the respective experts' in-depth knowledge of immigration law or the specific statutory definitions provided in sections 101(a)(44)(A) and (B) of the Act. Therefore, the expert opinions offered on appeal will only be allotted minimal probative value in establishing the petitioner's eligibility in this proceeding.

In general, counsel's objections to the director's findings lack sufficient merit. The core of the director's findings was the lack of sufficient detail in describing the beneficiary's proposed employment, which allowed for a number of the beneficiary's responsibilities to be interpreted as non-qualifying. While counsel argues that the director's interpretation is erroneous, he fails to provide further detail regarding the beneficiary's tasks and therefore fails to assist in conveying a true understanding of what specific tasks would consume the primary portion of the beneficiary's time on a daily basis. As such, counsel has failed to establish that the beneficiary would be employed in a qualifying managerial or executive capacity.

Regardless, based on the AAO's prior finding that the beneficiary intends to remain in the United States in order to provide his services to an entity other than the petitioner, this petition cannot be approved.

Furthermore, the record does not support a finding of eligibility based on additional grounds that were not previously addressed in the director's decision.

First, 8 C.F.R. § 204.5(j)(3)(i)(D) states that the petitioner must establish that it has been doing business for at least one year prior to filing the Form I-140. The regulation at 8 C.F.R. § 204.5(j)(2) states that 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." In the present matter, the petitioner actually claims to have merged with another entity and to have commenced doing business as the newly formed entity. As previously discussed, the petitioner's definition of the term "merger" was incorrect and, as shown by the evidence of record, the petitioner did not merge with another company.<sup>3</sup> However, even where an entity maintains its corporate existence, doing so is not sufficient to establish that it meets the requirements of 8 C.F.R. § 204.5(j)(3)(i)(D). In the present matter, while the record contains some sales invoices, two of which show the petitioner's business transactions dating back to January and February 2006, respectively, the current Form I-140 was filed in May 2007. Therefore, in order to meet the requirements, the petitioner would have to establish that it was doing business from the full one-year time period from May 2006 through April 2007. As the petitioner's latest invoice is dated February 2006, the AAO cannot conclude that the petitioner has established that it was doing business in the manner and during the time period described above.

Second, by virtue of the beneficiary's claimed ownership of the U.S. petitioner, it appears more likely than not that the beneficiary will not be an "employee" of the United States operation. As explained in 8 C.F.R. § 204.5(j)(5), the petitioner must establish that the beneficiary will be "employed" in an executive or managerial capacity. It is noted that "employer," "employee," and "employed" are not specifically defined for purposes of the Act even though these terms are used repeatedly in the context of addressing the multinational executive and managerial immigrant classification. Section 203(b)(1)(C), 8 U.S.C. § 1153(b)(1)(C), requires beneficiaries to have been "employed" abroad and to render services to the same "employer" in the United States. Further, section 101(a)(44), 8 U.S.C. § 1101(a)(44), defines both managerial and executive capacity as an assignment within an organization in which an "employee" performs certain enumerated qualifying duties. Finally, the specific definition of "managerial capacity" in section 101(a)(44)(A), 8 U.S.C. § 1101(a)(44)(A), refers repeatedly to the supervision and control of other "employees." Neither the legacy Immigration and Naturalization Service nor U.S. Citizenship and Immigration Services (USCIS) has defined the terms "employee," "employer," or "employed" by regulation for purposes of the multinational executive and managerial immigration classification. *See, e.g.*, 8 C.F.R. § 204.5 and 8 C.F.R. § 214.2(l). Therefore, for purposes of this immigrant classification, these terms are undefined.

The Supreme Court of the United States has determined that where a federal statute fails to clearly define the term "employee," courts should conclude "that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine." *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 322-323 (1992) (hereinafter "*Darden*") (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989)). That definition is as follows:

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

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<sup>3</sup> See Fn. 1.

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; see also *Restatement (Second) of Agency* § 220(2) (1958); *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003) (hereinafter "*Clackamas*"). As the common-law test contains "no shorthand formula or magic phrase that can be applied to find the answer, . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Darden*, 503 U.S. at 324 (quoting *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258 (1968)).

Within the context of immigrant petitions seeking to classify the beneficiary as a multinational manager or executive, when a worker is also a partner, officer, member of a board of directors, or a major shareholder, the worker may only be defined as an "employee" if he or she is subject to the organization's "control." See *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440, 449-450 (2003); see also *New Compliance Manual* at § 2-III(A)(1)(d). Factors to be addressed in determining whether a worker, who is also an owner of the organization, is an employee include:

- Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work.
- Whether and, if so, to what extent the organization supervises the individual's work.
- Whether the individual reports to someone higher in the organization.
- Whether and, if so, to what extent the individual is able to influence the organization.
- Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts.
- Whether the individual shares in the profits, losses, and liabilities of the organization.

*Clackamas*, 538 U.S. at 449-450 (citing *New Compliance Manual*).

Applying the *Darden* and *Clackamas* tests to this matter, the petitioner has not established that the beneficiary will be an "employee" employed in a managerial or executive capacity. As explained above, the petitioner is a corporation, which the petitioner claims is ultimately owned and controlled by the beneficiary, who purports to assume a role as the petitioner's principal. There is no evidence that anyone other than the beneficiary himself is in a position to exercise any control over the work to be performed. As such, it appears the beneficiary would be the employer for all practical purposes. He intends to control the organization; set the rules governing his work; and share in all profits and losses.

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). Therefore, based on the additional grounds of ineligibility discussed above, this petition cannot be approved.

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*, 345 F.3d 683.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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 sustained that burden.

**ORDER:** The appeal is dismissed.