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20 Mass Ave N.W., Rm. 3000  
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U.S. Citizenship  
and Immigration  
Services

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[REDACTED]

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File: [REDACTED] Office: NEBRASKA SERVICE CENTER Date:  
LIN 06 224 52256

DEC 23 2008

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)

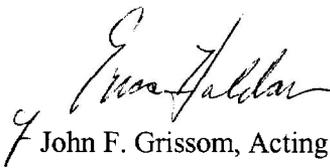
IN BEHALF OF PETITIONER:

[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 or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

  
John F. Grissom, Acting Chief  
Administrative Appeals Office

**DISCUSSION:** The employment based immigrant visa petition was denied by the Director, Nebraska Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner was incorporated in the State of Florida in 2003 and claims to be engaged in international ride design for theme parks. It seeks to employ the beneficiary as its finance and administration manager 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 petitioner claims to be the subsidiary of Rex Studios, Ltd., located in the United Kingdom.

The director denied the petition, determining that: (1) the petitioner had not established that it had the continuing ability to pay the proffered wage beginning on the priority date of the visa petition; and (2) the beneficiary will not be employed in a primarily managerial or executive capacity in the United States. Specifically, the director found that the petitioner's financial documents showed that the petitioner lacks the financial ability to pay the proffered wage. Moreover, the director noted that despite her managerial title, the beneficiary would not be primarily engaged in performing qualifying managerial or executive duties.

On appeal, counsel for the petitioner submits a statement and evidence.

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 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 first issue in this matter is whether the petitioner has the ability to pay the beneficiary's proffered wage of \$39,988.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

*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 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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner filed the immigrant visa petition on July 24, 2006. With the petition, the petitioner provided evidence in support of its ability to pay the proffered wage, including copies of the beneficiary's Forms W-2, Wage and Tax Statement, for 2004 and 2005; a copy of the petitioner's Form 1120, U.S. Corporation Income Tax Return for 2005; copies of the petitioner's Form 941, Employer's Quarterly Tax Returns, for the quarters ending June 30, 2005, September 30, 2005 and March 31, 2006; and copies of the petitioner's bank statements for February, March and April 2006.

The director subsequently issued a request for evidence on May 23, 2007, requiring that the petitioner submit evidence establishing its ability to pay the proffered wage. In response to the director's request, counsel submitted several documents, including a copy of the beneficiary's Form W-2 for 2006, an unaudited financial statement for the year ending April 2007, a copy of the beneficiary's two most recent pay slips, and an unsigned copy of the petitioner's Form 1120 for 2006.

After reviewing the beneficiary's W-2 form and petitioner's net income for the relevant period, the director determined that the evidence submitted did not establish the ability to pay the proffered wage since both the petitioner's net income and net current assets were less than the proffered wage. Accordingly, the director denied the petition.

On appeal, counsel submits a brief statement of Form I-290B and contends that the petitioner has entered into a new business contract which will generate additional revenue for the petitioner's

enterprise. Counsel fails to specifically address the deficiencies in the financial documentation, and submits no new financial evidence to overcome the director's basis for the denial.

In determining the petitioner's ability to pay the proffered wage, United States Citizenship and Immigration Services (USCIS) will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered *prima facie* proof of the petitioner's ability to pay the beneficiary's salary. In the present matter, the priority date is July 24, 2006. The proffered wage is \$769 per week, or \$39,988 per year. Therefore, the petitioner must demonstrate that it paid the beneficiary a salary equal to or greater than the proffered wage as of the date of filing and that it continues to pay the proffered salary.

The petitioner has submitted the beneficiary's Form W-2 for 2006, demonstrating that the beneficiary was paid wages in the amount of \$19,720. Therefore, the petitioner has not demonstrated that it was paying the beneficiary the proffered wage as of the priority date of the petition.

As an alternative method for determining the petitioner's ability to pay the proffered wage, the AAO will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). In *K.C.P. Food Co., Inc. v. Sava*, the court held the Immigration and Naturalization Service (now USCIS) had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than on the petitioner's gross income. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. at 537; see also *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. at 1054.

According to its federal tax return, the petitioner's net income for the year 2006 was (\$18,941). Therefore, the petitioner could not pay a proffered wage of \$39,988 per year out of this income. Finally, if the petitioner does not have sufficient net income to pay the proffered salary, the AAO will review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities. Net current assets identify the amount of "liquidity" that the petitioner has as of the date of filing and is the amount of cash or cash equivalents that

would be available to pay the proffered wage during the year covered by the tax return. As long as the AAO is satisfied that the petitioner's current assets are sufficiently "liquid" or convertible to cash or cash equivalents, then the petitioner's net current assets may be considered in assessing the prospective employer's ability to pay the proffered wage. In this matter, the petitioner's net current assets for 2006 were substantially outweighed by its liabilities.<sup>1</sup>

Counsel also submits copies of the petitioner's bank statements for the period from February 2006 through April 2006 in an attempt to demonstrate that it had sufficient cash flow to pay the proffered wage.<sup>2</sup> These statements, however, are not persuasive evidence of the petitioner's ability to pay the wage offered because there is no proof that these statements somehow represent additional funds beyond those of the tax returns. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See 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). Bank statements, without more, are unreliable indicators of ability to pay because they do not identify funds that are already obligated for other purposes.

Finally, the petitioner submitted an unaudited financial statement for the year ending April 2007.<sup>3</sup> This statement is of little evidentiary value because it is based solely on the representations of management. *See* 8 C.F.R. § 204.5(g)(2). This regulation neither states nor implies that an unaudited document may be submitted in lieu of annual reports, federal tax returns, or audited financial statements.

As advised by the director in the request for evidence, the petitioner must show that it had the ability to pay the proffered wage beginning on the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg. Comm. 1977); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977); *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 1989). Upon review of the financial documentation in the record, it is evident that the director's finding that the petitioner lacked the ability to pay the proffered wage was correct.

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<sup>1</sup> Specifically, an examination of the petitioner's net current assets and liabilities as set forth on Schedule L of its Form 1120 demonstrated net current assets of (\$291,517) for 2006.

<sup>2</sup> It is noted on appeal that the director incorrectly states that the petitioner submitted bank statements from January to April 2006. Upon review, it appears that the director incorrectly referenced the foreign parent's bank statements and not those of the petitioner.

<sup>3</sup> Similar to the director's reference to bank statements in the denial, the director incorrectly states that the petitioner submitted unaudited financial statements for 2004, 2005, 2006 and 2007. Upon review, it appears that the director incorrectly referenced the foreign parent's financial statements and not those of the petitioner.

Based on the evidence submitted, it cannot be found that the petitioner had sufficient funds available to pay the beneficiary the proffered wage from the priority date and continuing throughout the time period required by 8 C.F.R. § 204.5(g)(2).

The second issue in this matter 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.

On Form I-140, filed on June 24, 2006, the petitioner indicated that the beneficiary would be employed as its finance and administration manager. In a letter of support dated June 30, 2006, the petitioner stated:

[The beneficiary] transferred to the United States subsidiary in December 2003 as Finance and Administration Manager. Her duties and responsibilities in this position include having executive and financial control of the company, setting policies and budgets, hiring and firing senior executive staff and representing the corporation to financial bodies. [The beneficiary] reports only to the President. [The beneficiary's] leadership, business knowledge, and her permanent presence is now vital to its ongoing profitability and its ability to continue to provide employment opportunities throughout its period of expansive development.

An additional statement dated June 28, 2008 by [REDACTED] Co-Owner/Director of the foreign entity, affirmed the above statements and confirmed that the beneficiary's transfer to the U.S. entity had resulted in rapid growth of a successful business.

Finally, the petitioner provided the following list of the beneficiary's duties:

- Advising the president on establishing the Corporation's financial and administration policies
- Setting and monitoring corporate goals, policies and procedures
- Reporting only to the President and CEO
- Carrying out review of all systems currently in place and recommending changes to ensure efficiency and profitability
- Ensuring all changes agreed by the President are implemented
- Preparing budgets and cashflow for the anticipated new workshop facility

- Attending meetings with the President to provide financial support in respect of the lease negotiation for the adjoining unit
- Recruiting, hiring and firing of senior staff
- Designing and implementing training schedules for all staff to ensure department is functioning to its fullest potential
- Keeping pace with new technological developments to ensure maximum efficiency
- Ensuring adequate staffing levels for efficient operation of the business
- Presentation of monthly financial reports to the President
- Setting budget & cash flow for the President and ensuring these are adhered to
- Reporting budget and cashflow variances to the President on a quarterly basis.

Finally, an organizational chart demonstrated that the beneficiary, as finance and administration manager, was overseen by the president and vice president. Below the beneficiary on the organizational chart were three positions identified as “corporate accountant,” “financial institutions,” and “tax consultant.” Below these three positions was a museum manager, who oversaw two museum cashiers and one accounts clerk. The chart also indicated that it proposed to hire a merchandise cashier, a workshop facility manager, and four workshop staff members.

On January 24, 2008, the director denied the petition. The director noted that other than possessing a managerial title, the beneficiary’s position as a manager or executive required further review. Specifically, the director noted that it did not appear that the beneficiary was engaged primarily in managerial or executive tasks.

On appeal, counsel for the petitioner does not address this basis for the denial. Instead, counsel submits documentation showing that the petitioner has entered into a contract for a theme park in Spain, as well as documentation showing the petitioner’s involvement in an audiovisual theater. Counsel simply claims that the beneficiary was instrumental in acquiring these projects, but fails to specifically address the issue of the beneficiary’s managerial or executive capacity.

Upon review, the AAO concurs with the director’s findings. 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 must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity pursuant to the definitions at section 101(a)(44) of the Act. At a minimum, the petitioner must establish that the beneficiary's responsibilities will meet the requirements of one or the other statutory definitions.

The definitions of executive and managerial capacity each have two parts. First, the petitioner must show that the beneficiary performs the high level responsibilities that are specified in the definitions. Second, the petitioner must prove 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).

Although the petitioner provided a lengthy list of the beneficiary's duties with the petition, this list is nondescript and at times merely paraphrases the statutory definitions. Based upon the evidence submitted, it cannot be determined that the beneficiary would be primarily engaged in qualifying managerial and executive duties. Specifically, in both the initial letter of support and the list of duties provided, the description of duties simply adopts many of the key phrases used in the statutory definitions of managerial and executive capacity. See sections 101(a)(44)(A) and (B) of the Act. For example, in the list of duties, the petitioner claims that the beneficiary is responsible for "setting and monitoring corporate goals, policies and procedures" and "hiring and firing senior staff." These general statements do little to clarify the exact nature of the beneficiary's duties. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *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); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at \*5 (S.D.N.Y.). Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

Moreover, the organizational chart identifies various positions currently unstaffed, as well as outside organizations, such as "financial institutions." It is noted that the chart lists only five employees by name; namely, the beneficiary; [REDACTED]-cashier; [REDACTED] cashier; and [REDACTED] accounts clerk. However, the petitioner's most recent Form 941, Employer's Quarterly Federal Tax Return for the quarter ending March 31, 2006 indicates that the petitioner employed only four persons during that period. This document does not include relevant attachments which identify the employees by name. As a result, the AAO cannot properly determine the nature of the petitioner's organizational hierarchy and which employees, if any, the beneficiary actually supervises.

Moreover, the description of duties provided does not provide enough information to adequately assess the relationship between the beneficiary and the other staff members. It is unclear whether the petitioner employs secretarial or administrative staff to operate the business and perform day-to-day tasks. Moreover, the fact that the employees identified on the organizational chart are identified as “museum” employees suggests that they may operate outside of the petitioner’s corporate office. The brief and vague overview of the beneficiary’s role in the company, coupled with the unresolved issues surrounding the beneficiary’s subordinate staff, precludes a determination that the beneficiary is relieved from responsibility for many of the day-to-day functions essential to the petitioner’s business. 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. Section 101(a)(44) of the Act. Whether the beneficiary is an “activity” or “function” manager turns in part on whether the petitioner has sustained its burden of proving that his duties are “primarily” managerial.

On appeal, counsel for the petitioner does not address the issue of managerial and executive capacity, and simply concludes in his statement that the beneficiary is instrumental to the petitioner’s enterprise. However, counsel provides no objective evidence to support this contention. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner’s burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The petitioner bears the burden of documenting what portion of the beneficiary’s duties will be managerial or executive and what proportion will be non-managerial or non-executive. *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). Given the vague description of duties, the non-descript organizational chart, and a lack of the percentage of time the beneficiary will devote to managerial versus non-managerial tasks, the record does not demonstrate that the beneficiary will function primarily as a manager and/or executive.

Based on the foregoing discussion, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity. Accordingly, the appeal will be dismissed.

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if she shows 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 1025, 1043 (E.D. Cal. 2001), *aff’d*, 345 F.3d 683 (9th Cir. 2003).

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. Here, that burden has not been met.

**ORDER:** The appeal is dismissed.