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U.S. Citizenship  
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[Redacted]

FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: AUG 24 2005  
WAC 04 009 51621

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

PETITION: Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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

**DISCUSSION:** The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is a concrete finishing firm. It seeks to employ the beneficiary permanently in the United States as a concrete construction supervisor. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

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

*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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d). The priority date in the instant petition is April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$15 per hour, which amounts to \$31,200 annually. On the Form ETA 750B, signed by the beneficiary on August 1, 2002, the beneficiary claimed to have worked for the petitioner beginning in August 1999 and continuing through the date of the ETA 750B.

The I-140 petition was submitted on October 9, 2003. On the petition, the petitioner claimed to have been established in 1980, to currently have 65 employees, to have a gross annual income of \$5.2 million, and to have a net annual income of \$125,489.97.

In support of the petition, the petitioner submitted:

- Counsel's Form G-28;
- An original certified ETA 750;
- Letters of support from the petitioner;
- A copy of the petitioner's unaudited "annual report," which consists of quarterly income statements and balance sheets for 2000;

- The petitioner's Form 1120S returns for 2000–2002; and
- The petitioner's last four quarterly Form 941 reports.

In a request for evidence (RFE) dated January 9, 2004, the director requested additional evidence relevant to the petitioner's job experience and the petitioner's continuing ability to pay the proffered wage beginning on the priority date. In accordance with 8 C.F.R. § 204.5(g)(2), the director requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director also specifically asked that the requested evidence cover the years 2001–2003.

In response to the RFE, counsel stated that the petitioner had not filed its tax returns for 2003 nor produced a 2003 financial statement. Counsel also submitted a February 5, 2004 letter from the petitioner's controller that further detailed the beneficiary's job experience with the petitioner.

In a decision dated March 19, 2004, the director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and denied the petition.

On appeal, counsel submits a brief and additional evidence. Counsel submits:

- The Form W-2 Wage and Tax Statements the petitioner issued to the beneficiary for 2000–2002;
- A signed copy of the petitioner's "discussion draft"<sup>1</sup> Form 1120S return for 2003 reporting ordinary income of \$317,935.

Counsel states on appeal that the director erred in determining the petitioner's ordinary income from its tax return without adding back the petitioner's wages paid and officer compensation, and from undefined "negative assets." Further, counsel states the director should have considered the petitioner's W-2s issued to the beneficiary.<sup>2</sup>

The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). Where a petitioner fails to submit to the director a document which has been specifically requested by the director, but attempts to submit that document on appeal, the document will be precluded from consideration on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). In the instant case, however, the director did not make a specific request for any of the documents submitted for the first time on appeal. Therefore no grounds would exist to preclude any documents from consideration on appeal. For this reason, all evidence in the record will be considered as a whole in evaluating the instant appeal.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient

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<sup>1</sup> Counsel does not assert that the petitioner has filed this "discussion draft" of Form 1120S for 2003 with the Internal Revenue Service. Therefore, this office will not treat the "draft" 2003 return as evidence.

<sup>2</sup>First submitted on appeal.

to pay the first year of the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

The record also contains copies of unaudited financial statements. Unaudited financial statements are not persuasive evidence. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and of its ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage.

In determining the petitioner's ability to pay the proffered wage CIS 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 proffered wage. In the instant case, on the Form ETA 750B, the beneficiary claimed to have worked for the petitioner beginning in 1999 and continuing through the date of the ETA 750B.

The record contains copies of Form W-2 Wage and Tax statements of the beneficiary. Only the beneficiary's Form W-2's for 2000–2002<sup>3</sup> show compensation received from the petitioner, as shown in the table below.

Year	Beneficiary's actual compensation	Proffered wage	Wage increase needed to pay the proffered wage.
2001	\$19,184.00	\$31,200	\$12,016
2002	\$22,068.25	\$31,200	\$9,132

Therefore, the petitioner must show that it can pay the remainder of the proffered wage for each year, which would be \$12,016 in 2001 and \$9,132 in 2002.

As another means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return for a given year, without consideration of depreciation or other expenses. Contrary to counsel's assertions, 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 (9<sup>th</sup> Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 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 (7<sup>th</sup> Cir. 1983). In *K.C.P. Food Co., Inc.*, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than 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.

The petitioner's tax returns show the amounts for taxable income on line 28 as shown in the table below.

<sup>3</sup> The chart omits the 2000 W-2 figures, which are irrelevant as antedating the petition's April 30, 2001 priority date.

<u>Tax Year</u>	<u>Net Income</u>	<u>Wage Increase Needed<sup>4</sup> To Pay The Proffered Wage</u>	<u>Surplus or (Deficit)</u>
2001	-\$49,705	\$12,016	\$12,016
2002	-\$31,506	\$9,132	\$9,132

Those figures fail to establish the ability of the petitioner to pay the proffered wage.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are a corporate taxpayer's current assets less its current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18. If a corporation's net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The petitioner can reasonably expect the conversion of net current assets into cash as the proffered wage becomes due. Thus, the difference between current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, is evidence of the petitioner's ability to pay.

Calculations based on the Schedule L's attached to the petitioner's tax returns yield the amounts for net current assets as shown in the following table.

<u>Tax Year</u>	<u>Net Current Assets</u>	<u>Wage Increase Needed To Pay The Proffered Wage<sup>5</sup></u>	<u>Surplus (Shortfall)</u>
2001	\$11,571	\$12,016	(\$445)
2002	\$12,091	\$ 9,132	\$2,959

From the foregoing, the petitioner can establish its ability to pay the proffered wage in 2002 but not in 2001, when net current assets fall short, by \$445, of establishing the petitioner's ability to pay the proffered wage.

This office notes that the petitioner's tax returns report compensation to officers of \$157,000 for 2001 and of \$156,000 for 2002. While neither the petitioner nor counsel assert a wish to divert such compensation toward payment of the proffered wage to cover the \$445 shortfall, such compensations lends support for the proposition that the petitioner has the ability to pay the proffered wage. Counsel's assertions about concerning the petitioner's size, number of employees, gross profits and the like cannot be overlooked. Although CIS will not consider gross income without also considering the expenses that were incurred to generate that income, the overall magnitude of the entity's business activities should be considered when the entity's ability to pay is marginal or borderline. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). With an employee payroll of about 65, and incorporation in 1980, the petitioner's gross income has risen above \$5 million in recent years and its wages each year more than \$200,000, not counting officer compensation. Thus, assessing the totality of circumstances in this individual case, it is concluded that the petitioner has proven its financial strength and viability and has the ability to pay the proffered wage.

<sup>4</sup>Crediting the petitioner with the amounts actually paid to the beneficiary in each year.

<sup>5</sup>Crediting the petitioner with the amount actually paid to the beneficiary.

After a review of the federal tax returns, therefore, it is concluded that the petitioner has established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has met that burden.

**ORDER:** The appeal is sustained. The petition is approved.