



U.S. Citizenship
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Services

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FILE:



WAC-04-040-53219

Office: CALIFORNIA SERVICE CENTER

Date: **MAR 21 2006**

IN RE:

Petitioner:

Beneficiary:



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:



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 dismissed.

The petitioner is a company which develops enhancements for existing semiconductors. It seeks to employ the beneficiary permanently in the United States as a Director of Strategic Global Sales and Marketing. A photocopy of a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The original of that Form ETA 750 was later submitted by the petitioner in response to a request for additional evidence issued by the director.

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. Section 203(b)(3)(A)(ii) of the Act provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

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 \$120,000.00 per year. On the Form ETA 750B, signed by the beneficiary on April 24, 2001, the beneficiary claimed to have worked for the petitioner beginning in January 2001 and continuing through the date of the ETA 750B. The ETA 750 was certified by the Department of Labor on November 2, 2001.

The I-140 petition was submitted on November 26, 2003. On the petition, the petitioner claimed to have been established in 1996, to currently have eight employees, to have a gross annual income of -\$1,883,489.00, and to have a net annual income of -\$1,883,489.00. With the petition, the petitioner submitted supporting evidence.

In a request for evidence (RFE) dated January 20, 2004, the director requested additional evidence relevant to the beneficiary's experience and additional evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The director also requested the original certified Form ETA 750 labor certification, which had not been submitted with the I-140 petition.

In response to the RFE, the petitioner submitted additional evidence. The petitioner also submitted the original certified Form ETA 750. The petitioner's submissions in response to the RFE were received by the director on April 2, 2004.

In a decision dated October 14, 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 the I-290B, signed by counsel on November 5, 2004, counsel checked the block indicating that he would be sending a brief and/or evidence to the AAO within 30 days. When the AAO began adjudicating this appeal in early February 2006, the AAO noted that no additional documentation was found in the file.

On February 10, 2006 the AAO sent a facsimile message to counsel informing him that the AAO had no record that any further evidence or brief was ever received with regard to this appeal. The AAO requested that "a copy of the additional evidence and/or brief be sent to the AAO by mail or fax within five business days, along with evidence of the date it was originally filed with this office." (Facsimile Transmission dated February 10, 2006 to counsel from the AAO).

On February 13, 2006 the AAO received a facsimile transmission from counsel consisting of a facsimile transmission cover sheet, a copy of a four-page letter dated December 2, 2004 to the AAO from counsel, and a one-page attached exhibit consisting of a shipping tracking report. The tracking report shows a package referenced as "██████████" shipped on December 2, 2004 and delivered to an unspecified location in Washington, D.C. on December 3, 2004 at 10:42 a.m. The tracking report states that the package was signed for by "██████████". The report does not identify the office which sent the package, nor does it identify the shipping company. The surname of "██████████" is the surname of the beneficiary in the instant petition.

In his letter dated December 2, 2004, counsel states that twelve exhibits are attached. However, the only attachment to the copy of the letter received by facsimile is the tracking report. Even assuming that the tracking report is evidence of a delivery to the AAO of documents relevant to the instant appeal, that tracking report does not indicate the content of the package, nor its size. Counsel's facsimile transmittal cover sheet dated February 13, 2006 states

Attached you will find a copy of the Appeal of Denial of I-140/WAC-04-040-53219 which was sent on December 2, 2004 via FedEx.

Also attached is a copy of our FedEx Confirmation indicating the package with Tracking number ██████████, was sent to Washington, DC and signed for by ██████████ on December 3, 2004 at 10:42 AM.

(Facsimile transmittal from counsel, Feb. 13, 2006, at 1).

Counsel's facsimile transmittal states that the transmission consists of six total pages, including the cover sheet. Counsel does not state that any of the exhibits submitted on December 3, 2004 have been omitted from

the facsimile transmission. Rather counsel states that the facsimile transmission is “a copy” of the appeal which was sent on December 2, 2004 via FedEx. Exhibit number 1 is the copy of the tracking report, which is evidence pertaining only to the timeliness of the petitioner’s brief on appeal, and is not evidence pertaining to the merits of the instant appeal. However, the record lacks any copies of documents referred to in counsel’s letter dated December 2, 2004 as exhibit numbers 2 through 12, and the record lacks any indication that those documents were ever submitted to the AAO. Accordingly, the AAO will evaluate the director’s decision based on the evidence submitted for the record prior to the director’s decision.

Counsel states on appeal that the director failed to consider that the petitioner has paid wages to the beneficiary at levels at or near the proffered wage. Counsel further states that the director failed to consider the petitioner’s significant assets or its position as a viable business governed by the Securities and Exchange Commission.

Counsel states that documents submitted for the first time on appeal, including copies of Form W-2 Wage and Tax Statements of the beneficiary, a copy of a Form 1099 of the beneficiary, and a paycheck stub establish the wages paid to the beneficiary. Counsel further states that copies of the bank statements of the petitioner and copies of other business documents also submitted for the first time on appeal establish that the petitioner is a viable business. However, as noted above, the record lacks any copies of the evidentiary documents which counsel claims to have submitted on 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 to pay 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).

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, signed by the beneficiary on April 24, 2001, the beneficiary claimed to have worked for the petitioner beginning in January 2001 and continuing through the date of the ETA 750B.

On the notice of appeal, counsel states that the petitioner has been paying the beneficiary the proffered wage. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The record contains no copies of any Form W-2 Wage and Tax Statements of the beneficiary. Although counsel asserts that copies of Form W-2’s of the beneficiary were submitted for the first time on appeal, the record contains no such copies. Nor does the record contain evidence which establishes that such documents were ever submitted for the record, as discussed above.

The record contains a letter dated April 1, 2004 from the petitioner’s chairman and chief executive officer which refers to an annual report of the petitioner in the record as evidence of compensation paid to the beneficiary. In

the letter, the chairman states, "As detailed in the annual report [the beneficiary's] compensation was \$121,928 in 2003; \$183,000 in 2002 and \$120,000 in 2001." (Letter from Chairman and Chief Executive Officer, April 1, 2004, at 1).

The record contains a copy of a proxy statement of shareholders of the petitioner dated January 27, 2003 for an annual meeting to be held March 25, 2003. That proxy statement contains information on salary and other compensation to the beneficiary, who is listed as one of the petitioner's officers. The notice also contains information on salary and other compensation to the other two officers of the petitioner and to a director of the petitioner. The notice states that the beneficiary is the petitioner's vice-president and director.

The record also contains a copy of a proxy statement dated January 30, 2004. That proxy statement refers to an annual meeting to be held on March 31, 2004. The reference in the Chairman's letter to an annual report appears to be a reference to the January 30, 2004 proxy statement. In the proxy statement, the beneficiary is identified as the petitioner's president, director and secretary. The proxy statement show the amounts of payments of salary and other compensation to the beneficiary as well to the petitioner's two officers and to a director of the petitioner.

Information in the two proxy statements shows that the petitioner's fiscal years are from October 1 until September 30 of the following year. In those documents, the years are referred to by the year of the ending calendar date. Therefore, the fiscal year for the period from October 1, 2000 to September 30, 2001 is referred to as fiscal year 2001. That year includes the priority date of April 30, 2001.

The compensation amounts to the beneficiary shown in the January 2003 proxy statement are as follows,

Fiscal Year	Salary	Bonus	Other Annual Compensation
2000 (ended 9/30/00)	-	-	-
2001 (ended 9/30/01)	\$120,000.00	-	-
2002 (ended 9/30/02)	\$120,000.00	-	\$63,000.00

Notes pertaining to the beneficiary's compensation in the January 2003 proxy statement show that not all of the beneficiary's compensation in 2002 was paid in cash. Those notes on the beneficiary's compensation are slightly amended and are updated in the January 2004 proxy statement, which is discussed below.

The compensation amounts for the beneficiary shown in the January 2004 proxy statement are as follows

Fiscal Year	Salary	Salary Deferred	Other Annual Compensation	Total
2001 (ended 9/30/01)	\$120,000.00	-	-	\$120,000.00
2002 (ended 9/30/02)	\$104,400.00	15,600.00	\$63,000.00	\$183,000.00
2003 (ended 9/30/03)	\$69,639.00	\$52,289.00	-	\$121,928.00

Notes pertaining to the beneficiary's compensation in the January 2004 proxy statement state as follows:

For 2003 salary of \$50,360 was not paid in cash, but deferred to a future period, along with \$1,929 estimated interest on this unpaid amount. For 2002 salary of \$15,600 was not paid in

cash, but deferred to a future period. Subsequent to year end September 2002, [the beneficiary] exchanged \$10,000 of deferred salary for a B Unit in the Company's November 2002 Private Placement Offering for 125,000 shares of restricted stock and 100,000 Common Stock purchase warrants exercisable at a price of \$.50 per share. Other Compensation for 2002 also includes \$63,000 for restricted Common Stock grants subject to risk of forfeiture if 2004 sales do not meet or exceed key targets (See Note 2 above and Employment Agreements below). Also subsequent to September 30, 2003 year end, [the beneficiary] deferred substantially all of his October and November salary of \$10,000 each month to a future period, and this amount of \$19,900 remains unpaid. From September 2002 [the beneficiary's] share of contributions to the Company's health insurance program of approximately \$7,900 were deducted from the balance of wages owing, leaving as of the end of December 2003, unpaid wages of approximately \$68,000, accrued vacation pay of approximately \$19,000 and accrued interest of approximately \$3,000 for a combined total of approximately \$90,000. (See Employment Agreements below).

(Proxy Statement, January 30, 2004, at 5-6).

The Employment Agreements section of the January 2004 proxy statement states the following in reference to the beneficiary:

[The beneficiary] was hired in December 2000 as manager of the sales organization. He was hired as an at-will employee at a rate of \$120,000 per year base salary, plus commission on sales. He became Vice President of Technology Applications & Sales for [the petitioner] in September 2001, and a director and formally an officer of the corporation in August of 2002. In January of 2003, [the beneficiary] entered into a one-year employment contract with the Company to serve as Vice President of Technology Applications & Sales. In June of 2003 [the beneficiary] was promoted to President of the Company. The contract automatically renews for additional one-year terms unless either party chooses to terminate. [The beneficiary's] contract provides for an annual gross salary of \$150,000, payable monthly. In the event of a change in control or sale of substantially all the assets of [the petitioner], the employment agreement between [the beneficiary] and [the petitioner] automatically terminates, and [the beneficiary] is to receive fifty percent (50%) of the then current year's annual salary.

For September, October, and November of 2002, [the beneficiary] deferred 100% of his payable salary, reducing his immediately payable cash salary to \$0 per month. For the year ended September 30, 2003 [the beneficiary] deferred \$50,360 of his salary and was paid \$69,640 in cash. For the three months ending December 31, 2003, [the beneficiary] deferred \$19,900 in salary and was paid \$10,100 in cash.

[The beneficiary] was granted 500,000 shares of stock from the Company's Stock Retainage Program pool of shares discussed above, subject to the Company achieving in excess of \$400,000 in sales in calendar year 2004. [The beneficiary] was granted an additional 500,000 shares of stock under this program, subject to sales exceeding \$1,500,000 for calendar year 2004.

The board has also determined that it may grant approximately 500,00 [sic] additional options to [the beneficiary] in calendar year 2004 based on the achievement of calendar year 2004

business objectives, including such areas as product development and customer base development. Such a plan has not yet received final board approval.

(Proxy Statement, January 30, 2004, at 7-8).

CIS will not consider share awards and stock options as part of the petitioner’s actual wage payments, since the value of compensation in such forms may fluctuate significantly. The record contains no copies of any Form 1099-MISC Miscellaneous Income statements or other similar tax statement issued by the petitioner to the beneficiary which might assist in determining the value of any share awards or stock options granted to the beneficiary.

According to the petitioner’s January 2004 proxy statement, in fiscal 2002 the petitioner’s stock price ranged from a high of \$0.44 to a low of \$0.07 per share, and in fiscal 2003 its stock price ranged from a high of \$0.28 to a low of \$0.06. (Proxy Statement, January 30, 2004, at 24). Nor will CIS consider any deferred salary payments as evidence of the petitioner’s actual wage payments to the beneficiary, since unpaid salary claims are not evidence of the petitioner’s ability to pay the proffered wage. CIS will consider only the actual cash paid to the beneficiary as evidence of the petitioner’s ability to pay the proffered wage.

The information in the January 2003 proxy statement and in the January 2004 proxy statement, including the notes and the sections on employment agreements, indicate that the cash payments of salary to the beneficiary were the amounts shown in the following table.

Fiscal Year	Beneficiary’s actual compensation	Proffered wage	Wage increase needed to pay the proffered wage.
2000 (ended 9/30/00)	-	not applicable	not applicable
2001 (ended 9/30/01)	\$120,000.00	\$120,000.00	\$0.00
2002 (ended 9/30/02)	\$104,400.00	\$120,000.00	\$15,600.00
2003 (ended 9/30/03)	\$69,639.00	\$120,000.00	\$50,361.00

The above information is sufficient to establish the petitioner's ability to pay the proffered wage in the petitioner’s fiscal year 2001, which includes the April 30, 2001 priority date. But the above information fails to establish the petitioner's ability to pay the proffered wage in the other two years at issue, fiscal years 2002 and 2003.

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. 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. 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 (7th 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. Finally, there is no precedent that would allow the petitioner to “add back to net cash the depreciation expense charged for the year.” *See Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The evidence indicates that the petitioner is a corporation. The record contains copies of the petitioner's Form 1120 U.S. Corporation Income Tax Returns for 2000 and 2001. Those returns show that the petitioner's tax year runs from October 1 to September 30 of the following year. Unlike the fiscal years as reported in the documents discussed above, which are labeled with the year of the fiscal year's closing calendar date, the petitioner's tax returns are labeled with the year of the tax year's beginning date. The petitioner's 2000 tax year covers the same period as its 2001 fiscal year, and its 2001 tax year covers the same period as its 2002 fiscal year.

The petitioner's Form 1120 tax return for 2000 covers the period from October 1, 2000 to September 30, 2001, a period which includes the April 30, 2001 priority date. The petitioner's return for 2001 covers the period from October 1, 2001 to September 30, 2002.

The record before the director closed on April 2, 2004 with the receipt by the director of the petitioner's submissions in response to the RFE. The record contains a copy of a Form 7004 Application for Automatic Extension of Time to File Corporation Income Tax Return submitted by the petitioner for its 2002 tax return, covering the period October 1, 2002 to September 30, 2003. The Form 7004 requests an automatic 6-month extension of time until June 15, 2004 for the petitioner to submit its tax return for 2002. The date on the signature line of the Form 7004 is December 11, 2003. Because of the automatic extension of time, the petitioner's Form 1120 for 2002 was not yet due when the record before the director closed on April 2, 2004. No copy of the 2002 return was submitted for the record prior to the decision of the director, nor has a copy of that return been submitted on appeal.

Although the petitioner's federal tax return for its 2002 tax year was not yet due when the record before the director closed, the fact that the petitioner had obtained an extension of time to file its federal tax return does not relieve the petitioner of its burden in the instant petition to submit evidence to prove all essential elements. The petitioner must establish its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The regulation states three alternative forms of acceptable evidence, namely copies of annual reports, federal tax returns and audited financial statements. 8 C.F.R. § 204.5(g)(2). In the instant petition, the petitioner has submitted copies of its January 2003 proxy statement and of its January 2004 proxy statement. Those documents include audited financial statements for the petitioner which are discussed below.

In analyzing the federal tax returns of a corporate petitioner concerning its ability to pay the proffered wage, CIS considers the corporation's net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of the Form 1120 U.S. Corporation Income Tax Return.

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

Tax year	Net income	Wage increase needed to pay the proffered wage	Surplus or deficit
2000 (FY 2001)	-\$1,370,078.00	\$0.00*	-\$1,370,078.00
2001 (FY 2002)	-\$109,150.00	\$15,600.00**	-\$124,750.00
2002 (FY 2003)	not submitted	\$50,361.00***	no information

* Crediting the petitioner with the \$120,000.00 actually paid to the beneficiary in tax year 2000 (FY 2001).

** Crediting the petitioner with the \$104,400.00 actually paid to the beneficiary in tax year 2001 (FY 2002)

*** Crediting the petitioner with the \$69,639.00 actually paid to the beneficiary in tax year 2002 (FY 2003).

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in any of the years at issue in the instant petition. However, for tax year 2000 (fiscal year 2001), the actual compensation of \$120,000.00 paid to the beneficiary by the petitioner is sufficient to establish the petitioner's ability to pay the proffered wage that year, as discussed above.

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 net current assets are expected to be converted to 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, evidences 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.

Tax year	Net Current Assets		Wage increase needed to pay the proffered wage
	Beginning of year	End of year	
2000 (FY 2001)	\$2,664,502.00	-\$110,249.00	\$0.00*
2001 (FY 2002)	-\$110,249.00	-\$817,599.00	\$15,600.00*
2002 (FY 2003)	not submitted	not submitted	\$50,361.00*

* Crediting the petitioner with the \$120,000.00 actually paid to the beneficiary in tax year 2000 (FY 2001).

** Crediting the petitioner with the \$104,400.00 actually paid to the beneficiary in tax year 2001 (FY 2002)

*** Crediting the petitioner with the \$69,639.00 actually paid to the beneficiary in tax year 2002 (FY 2003).

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in any of the years at issue in the instant petition.

The January 2003 proxy statement and the January 2004 proxy statement submitted in evidence each contain financial statements for the petitioner for the petitioner's most recent fiscal year and for its preceding fiscal year. Each of those financial statements is an annual report. Moreover, the financial statements are audited. Annual reports and audited financial reports are forms of acceptable evidence specified by the regulation at 8 C.F.R. § 204.5(g)(2).

The financial statements attached to the January 2003 proxy statement and those attached to the petitioner's proxy statement dated January 30, 2004 are consistent with each other. Those financial statements state the petitioner's net income as shown in the following table.

Fiscal year	Net income	Wage increase needed to pay the proffered wage	Surplus or deficit
2001	-\$6,234,868.00	\$0.00*	-\$6,234,868.00
2002	-\$1,883,489.00	\$15,600.00**	-\$1,904,089.00
2003	-\$952,564.00	\$50,361.00***	-\$1,002,925.00

* Crediting the petitioner with the \$120,000.00 actually paid to the beneficiary in fiscal year 2001.

** Crediting the petitioner with the \$104,400.00 actually paid to the beneficiary in fiscal year 2002.

*** Crediting the petitioner with the \$69,639.00 actually paid to the beneficiary in fiscal year 2003 .

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in any of the years at issue in the instant petition.

The petitioner's financial statements also contain year-end balance sheets, which include figures for total current assets and total current liabilities. Calculations based on those figures yield the amounts for net current assets as shown in the following table.

Fiscal year	Net Current Assets		Wage increase needed to pay the proffered wage
	Beginning of year	End of year	
2001	not stated	-\$10,248.00	\$0.00*
2002	not stated	-\$821,784.00	\$15,600.00**
2003	not stated	-\$643,941.00	\$50,361.00***

* Crediting the petitioner with the \$120,000.00 actually paid to the beneficiary in fiscal year 2001.

** Crediting the petitioner with the \$104,400.00 actually paid to the beneficiary in fiscal year 2002.

*** Crediting the petitioner with the \$69,639.00 actually paid to the beneficiary in fiscal year 2003.

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in any of the years at issue in the instant petition.

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.

The record also contains copies of Securities and Exchange Commission Form 10-QSB quarterly reports of the petitioner for the quarters ended March 31, 2000 and June 30, 2003. Financial statements are attached to those reports. However those financial statements are not audited. For the reasons discussed above, unaudited financial statements are not persuasive evidence of a petitioner's ability to pay the proffered wage.

The record contains no other evidence relevant to the petitioner's financial situation.

In his letter dated December 12, 2004 counsel asserts that the beneficiary's Form W-2's and other compensation documents establish that the petitioner paid the beneficiary at or near the proffered wage in each of the years at issue. As noted above, those evidentiary documents are not in the record. Nonetheless, the analysis presented by counsel of those documents shows similar compensation figures for the beneficiary as are found in the proxy statements which are discussed above. Counsel's figures state compensation for the beneficiary on a calendar year basis, since Form W-2's and Form 1099's are issued on a calendar year basis, while the proxy statements state compensation figures for the beneficiary on a fiscal year basis. But even assuming that counsel's figures correctly state the beneficiary's calendar year compensation, counsel's figures show that the beneficiary received only \$49,559.00 in salary in 2002. Counsel states, "In addition, [the petitioner] provided [the beneficiary] with company stock, which he could sell and split with the company." (Letter from counsel, December 12, 2004, at 3). It is not clear what counsel means by saying that the beneficiary could sell stock and split with the company. The phrase "and split with the company" suggests that the stock granted to the beneficiary was subject to a claim by the petitioner for a portion of the proceeds. Counsel states that the beneficiary earned an additional \$33,815.00 from the sale of the stock, for total income of \$83,374.00 in 2002. However, even assuming that those figures are accurate, the amount of \$83,374.00 is still \$36,626.00 less than the proffered wage of \$120,000.00.

For 2003, counsel asserts that the beneficiary's Form W-2 shows that he was paid \$62,700.00 in salary. Counsel asserts that the petitioner also provided the beneficiary with \$63,000.00 worth of its stock that year, which the beneficiary was free to liquidate, but which he still retains. However, counsel's assertion that the beneficiary was free to liquidate that stock is inconsistent with information in the petitioner's January 2004 proxy statement. That statement gives details on the beneficiary's compensation for fiscal year 2002 (10/1/02 – 9/30/03). According to that proxy statement, the beneficiary's compensation for fiscal year 2002 "includes \$63,000 for restricted Common Stock grants subject to risk of forfeiture if 2004 sales do not meet or exceed key targets (See Note 2 above and Employment Agreements below)." (Proxy Statement, January 30, 2004, at 6). The cross reference to Note 2 is to information that the valuation formula for stock grants was set at 90% of the closing sales prices for such shares on the date of the grant. (Proxy Statement, January 30, 2004, at 5). The cross reference to Employment Agreements is to information that the grant to the beneficiary of shares of stock was "subject to the Company achieving in excess of \$400,000 in sales in calendar year 2004. (Proxy Statement, January 30, 2004, at 8).

Since the stock granted to the beneficiary in fiscal year 2002 (apparently in calendar year 2003) was restricted and was subject to forfeiture, it cannot be considered as compensation paid to the beneficiary in calendar year 2003.

Counsel also states in his letter dated December 12, 2004 that the petitioner experienced temporary financial hardship after the events of September 11, 2001. The assertions of counsel do not constitute evidence. *Matter of Obaighbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Counsel refers to business documents submitted on appeal as evidence to support counsel's assertions. However, as discussed above, the record lacks copies of any evidentiary documents claimed by counsel to have been submitted for the first time on appeal. The record lacks evidence which would support a finding that any of the years at issue in the instant petition were uncharacteristically unprofitable years for the petitioner. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

For the reasons stated above, the evidence in the record is sufficient to establish the petitioner's ability to pay the proffered wage as of the year of the priority date, based on the actual payment of compensation to the beneficiary equal to the proffered wage in fiscal year 2001 (October 1, 2000 to September 30, 2001). However, the evidence fails to establish the petitioner's ability to pay the proffered wage in any of the later years.

In his decision, the director failed to note that the petitioner's tax year does not correspond to the calendar year. The director therefore did not discuss the petitioner Form 1120 tax return in the record for 2000, which covers the period from October 1, 2000 until September 30, 2001. That tax year includes the priority date of April 30, 2001. For the petitioner's 2001 tax year, the director correctly stated the petitioner's net income, but the director failed to calculate the petitioner's year-end net current assets. The director stated that the petitioner had negative assets of -\$744,151.00, but it is unclear how the director calculated that figure.

The director failed to consider the evidence of the actual compensation paid to the beneficiary as shown in the January 2003 proxy statement and in the January 2004 proxy statement. The director also failed to consider the audited financial statements contained in those documents.

Although the director's analysis of the evidence was incomplete, the decision of the director to deny the petition was correct. As the above analysis shows, the evidence in the record fails to establish the petitioner's ability to pay the proffered wage in fiscal years 2002 and 2003. The assertions of counsel on appeal fail to overcome the decision of the director.

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 not met that burden.

ORDER: The appeal is dismissed.