

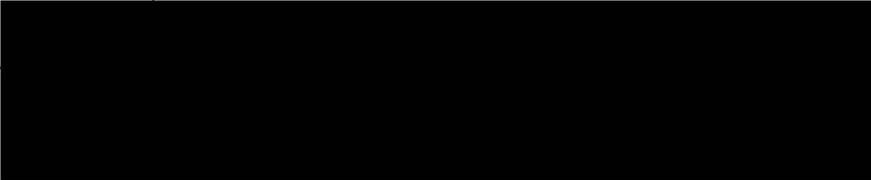
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U.S. Citizenship
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FILE: 7 EAC-04-157-54805 Office: VERMONT SERVICE CENTER Date: **JUL 27 2006**

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, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont 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 dry cleaning company. It seeks to employ the beneficiary permanently in the United States as a tailor. 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.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history of this case is documented in the record and is incorporated into this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's October 12, 2004 decision denying the petition, the single issue in this case is whether the evidence establishes the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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 September 20, 2002. The proffered wage as stated on the Form ETA 750 is \$11.96 per hour, which amounts to \$21,767.20 annually.

The AAO reviews appeals on a *de novo* basis. See *Dorr v. I.N.S.* 891 F.2d 997, 1002, n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including any new evidence properly submitted on appeal.

In the instant appeal, the petitioner submits a brief and additional evidence.

Relevant evidence submitted on appeal includes a complete copy of the petitioner's federal tax return for 2002. Other relevant evidence in the record submitted previous includes a partial copy of the petitioner's federal tax returns for 2002 and copies of unaudited financial statements of the petitioner for 2001 and 2002.

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). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

On appeal, counsel states that the petitioner has been a successful dry cleaning business since 1998 and that it has continually met its sizable payroll obligations, while also growing to now include four dry cleaning stores. Counsel states that the petitioner's net income in 2002 fell short of the proffered wage by \$1,091.20, but that the total assets of the company were \$222,851.00, an amount which far exceeds the proffered annual wage.

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 September 19, 2002, the beneficiary did not claim to have worked for the petitioner, and no other evidence in the record indicates that the beneficiary has worked for the petitioner.

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 an S corporation. The record contains one partial copy and one complete copy of the petitioner's Form 1120S U.S. Income Tax Return for an S Corporation for 2002.

The record before the director closed on April 30, 2004 with the receipt by the director of the I-140 petition and supporting documents. The I-140 petition was signed on behalf of the petitioner on April 7, 2004 by one of the petitioner's two shareholders, who is identified on the petitioner's 2002 tax return as the petitioner's president. The I-140 petition was also signed by counsel as preparer on that same date. As of April 7, 2004, the petitioner's federal income tax return for 2003 was not yet due. The record indicates that the petitioner's counsel did not immediately mail the I-140 petition to CIS. Counsel's cover letter accompanying the I-140 petition is dated April 29, 2004 and the I-140 petition was received by CIS on April 30, 2004. Although the general due date for the petitioner's 2003 federal income tax return would have been April 15, 2004, the record does not indicate whether the 2003 return was in fact available when the I-140 petition was mailed on April 29, 2004. Provisions exist in the Internal Revenue Code for automatic extensions of the filing dates of federal tax returns upon request by a taxpayer. In the previous year, the petitioner's Form 1120S tax return for 2002 was signed by its president on June 15, 2003. That fact suggests that the petitioner may have had a practice of submitting its tax returns beyond the general filing date. In light of the foregoing information, the year 2003 will not be considered to be a year at issue in the instant I-140 petition.

Concerning the petitioner's return for 2002, the copy submitted with the I-140 petition was a partial copy, consisting of only page one of that return. However, a complete copy of the petitioner's Form 1120S tax return for 2002 has been submitted on appeal.

Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S. The instructions on the Form 1120S U.S. Income Tax Return for an S Corporation state on page one, "Caution: Include only trade or business income and expenses on lines 1a through 21." Where an S corporation has income from sources other than from a trade or business, that income is reported on Schedule K. See Internal Revenue Service, Instructions for Form 1120S (2003), available at <http://www.irs.gov/pub/irs-prior/i1120s--2003.pdf>; Instructions for Form 1120S (2002), available at <http://www.irs.gov/pub/irs-prior/i1120s--2002.pdf>.

Similarly, some deductions appear only on the Schedule K. See Internal Revenue Service, Instructions for Form 4562 (2003), at 1, available at <http://www.irs.gov/pub/irs-prior/i4562--2003.pdf>; Internal Revenue Service, Instructions for Form 1120S (2003), at 22, available at <http://www.irs.gov/pub/irs-prior/i1120s--2003.pdf>.

Where the Schedule K has relevant entries for either additional income or additional deductions, net income is found on Line 23 of the Schedule K, for income.

In the instant petition, the petitioner's tax return for 2002 indicates no income from activities other than from a trade or business and no additional relevant deductions. Therefore the figure for ordinary income on line 21 of page one of the petitioner's Form 1120S tax return will be considered as the petitioner's net income. That figure is shown in the table below.

Tax year	Net income or (loss)	Wage increase needed to pay the proffered wage	Surplus or (deficit)
2002	\$20,676.00	\$21,767.20*	\$(1,091.20)

* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary.

For the year 2002, the petitioner would have incurred a deficit of only \$1,091.20 if it had paid the beneficiary the proffered wage that year. The petitioner paid total wages in 2002 of \$229,550.00. The amount of \$1,091.20 is only 0.48% of the petitioner's total wages in 2002. Also, the petition's 2002 tax return shows

expenses for compensation of officers in the amount of \$107,600.00. Schedule K-1's attached to the petitioner's 2002 tax return show that two individuals each own 50% of the petitioner's shares. The petitioner's expenses for compensation of officers were presumably made to those two individuals. The amount of \$1,091.20 is only 1.01% of the amount of the petitioner's expenses for compensation of officers.

The sole shareholders of a corporation have the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation's taxable income. If the petitioner's shareholders had directed the petitioner to pay the beneficiary the full proffered wage in 2002, the petitioner would still have had \$106,508.80 available for compensation of officers that year.

For the foregoing reasons, the information on the petitioner's 2002 Form 1120S tax return concerning its net income, its expenses for total wages and its expenses for compensation of officers is sufficient to establish the petitioner's ability to pay the proffered wage in 2002.

For the reasons discussed above, the year 2002 is considered to be the only year at issue in the instant petition. Therefore, the evidence is sufficient to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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. Therefore, the unaudited financial statements in the record provide no further support to help establish the petitioner's ability to pay the proffered wage.

In her decision, the director correctly stated the petitioner's net income in 2002, though the copy of the petitioner's Form 1120S U.S. Income Tax Return for an S Corporation for 2002 in the record before the director was incomplete, consisting only of page one of that return. Therefore no supporting schedules to the petitioner's tax returns were in the record before the director. The regulation at 8 C.F.R. § 204.5(g)(2) requires evidence in one of three alternative forms, namely copies of annual reports, federal tax returns, or audited financial statements. The single page of the petitioner's Form 1120S submitted for the record prior to the director's decision did not satisfy the requirements of that regulation. The decision of the director to deny the petition was therefore correct, based on the evidence in the record before the director. However, for the reasons discussed above, the assertions of counsel on appeal and the evidence submitted on appeal are sufficient 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 met that burden.

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