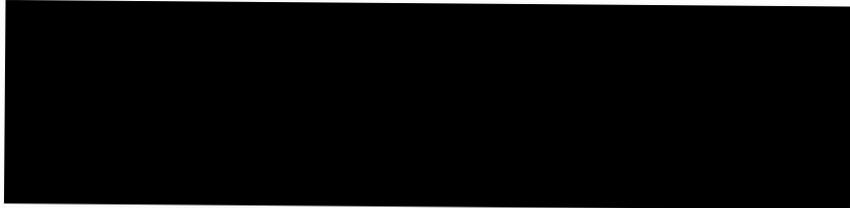


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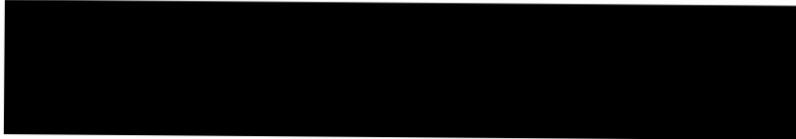
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FILE: EAC-05-018-52916 Office: VERMONT SERVICE CENTER Date: **SEP 08 2006**

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 medical office and physical therapy firm. It seeks to employ the beneficiary permanently in the United States as a physical therapist. 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 January 21, 2005 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. 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 October 23, 2004. The proffered wage as stated on the Form ETA 750 is \$22.00 per hour, which amounts to \$45,760.00 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 copies of a Form W-2 Wage and Tax Statement of the beneficiary for 2004, copies of paychecks from the petitioner to the beneficiary and pay statements of the beneficiary through February 4, 2005, and a copy of an unaudited financial statement of the petitioner as of November 30, 2004.

Other relevant evidence in the record submitted previously includes a copy of a Form 1120S U.S. Income Tax Return for an S Corporation of the petitioner for 2003, a copy of a payroll record of the petitioner for the beneficiary for five pay periods in 2004, copies of three paychecks from the petitioner to the beneficiary in 2004, a letter from the office manager of the petitioner, a copy of an evaluation of the beneficiary's education and copies of licensing and educational documents of the beneficiary.

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, the petitioner states that the beneficiary has worked for the petitioner since June 1, 2004 and has been paid at a rate higher than the proffered wage. Counsel also states that the petition was filed on October 23, 2004 and that the petitioner's 2003 federal tax return was submitted because it was the financial document available at that time. Counsel states that a financial statement of the petitioner for the eight months ended November 30, 2004 shows that after paying the beneficiary at a rate higher than the proffered wage during 2004 the petitioner still registered a net profit of \$6,717.00. Counsel also states that a statement from a certified public accountant certifies the petitioner's ability to pay the proffered 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). For each year at issue, the petitioner's financial resources generally must be sufficient to pay the annual amount of the beneficiary's 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 27, 2004, the beneficiary did not claim to have worked for the petitioner. However other evidence in the record indicates that the beneficiary began working for the petitioner on June 1, 2004.

The record contains a copy of a Form W-2 Wage and Tax Statement of the beneficiary for 2004, which is the year of the priority date. That Form W-2 shows 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.
2004	\$30,878.00	\$45,760.00	\$14,882.00

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in the year 2004.

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 a copy of the petitioner's Form 1120S U.S. Income Tax Return for an S Corporation for 2003. The I-140 petition was submitted on October 23, 2004. As of that date, the petitioner's Form 1120S tax return for 2003 was the most recent return available.

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. Where an S corporation has income from sources other than from a trade or business, that income is reported on Schedule K. An S corporation's total income from its various sources are reported on lines 1 through 6 of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. 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 returns indicate no income from activities other than from a trade or business or additional relevant deductions. Therefore the figure for ordinary income on line 21 of page one of the petitioner's Form 1120S tax return may 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)
2003	\$(11,773.00)	\$14,882.00*	\$(26,655.00)

* Crediting the petitioner with the \$30,878.00 paid to the beneficiary in 2004.

The only year at issue in the instant petition is 2004, which is the year of the priority date. The tax return for 2003, which is the most recent year available, fails to establish the petitioner's ability to pay the proffered wage as of the priority date.

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 year-end net current assets as shown in the following table.

Tax year	Net current assets	Wage increase needed to pay the proffered wage	Surplus or (deficit)
2003	\$1,631.00	\$14,882.00*	\$(13,251.00)

* Crediting the petitioner with the \$30,878.00 paid to the beneficiary in 2004.

The above information fails to establish the petitioner's ability to pay the proffered wage as of the priority date.

Counsel states that a financial statement of the petitioner for the eight months ended November 30, 2004 shows that after paying the beneficiary at a rate higher than the proffered wage during 2004 the petitioner still registered a net profit of \$6,717.00. The record contains a copy of an unaudited financial statement of the petitioner, which is apparently the financial statement referred to by counsel. However, 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 pay checks from the petitioner to the beneficiary, which indicate that the beneficiary began working for the petitioner on June 1, 2004. The pay checks and the Form W-2 Wage and Tax Statement of the beneficiary for 2004 show that the beneficiary was paid at a rate higher than the proffered wage during that year. The Form W-2 shows compensation in the amount of \$30,878.00 for the

seven-month period from June 1, 2004 through December 31, 2004. On an annual basis, that rate of pay would be equal to \$52,933.71, a rate higher than the proffered wage of \$45,760.00.

The foregoing documents therefore indicate that as of the October 23, 2004 priority date, the petitioner was already paying the beneficiary a salary in excess of the proffered wage. Copies of pay checks and pay statements of the beneficiary submitted for the first time on appeal show that the petitioner continued to pay the beneficiary at a rate higher than the proffered wage through February 4, 2005. The pay statement for the pay period ending February 4, 2005 was the most recent pay statement available as of the February 11, 2005 filing date of the I-290B notice of appeal.

Although the evidence does not establish that the petitioner has paid the beneficiary proffered wage for an entire year, part of the reason for the limited evidence appears to be the relatively short time period between the October 23, 2004 priority date and the February 11, 2005 date on which the notice of appeal was filed. The record on appeal includes the petitioner's most recent tax return, which is its Form 1120S for 2003, and also includes the beneficiary's most recent Form W-2, which is the Form W-2 for 2004, and pay checks of the beneficiary and pay statements from June 1, 2004 through February 4, 2005.

The evidence submitted on appeal of actual payment of wages to the beneficiary in excess of the proffered wage beginning on June 1, 2004 and continuing through at least February 4, 2005 is considered 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.

In his decision, the director correctly found that the information on the petitioner's Form 1120S U.S. Income Tax Return for an S Corporation for 2003 failed to establish the petitioner's ability to pay the proffered wage as of the priority date. Concerning the actual payments made by the petitioner to the beneficiary, the evidence before the director included only copies of three pay checks and a copy of a payroll record for the beneficiary for five pay periods, through the period ending August 5, 2004. The decision of the director to deny the petition was correct, based on the evidence in the record before the director. The record before the director did not include a copy of the beneficiary's Form W-2 Wage and Tax Statement for 2004 nor the additional copies of pay checks and of pay statements of the beneficiary through February 4, 2005, which were submitted for the first time on appeal.

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.