

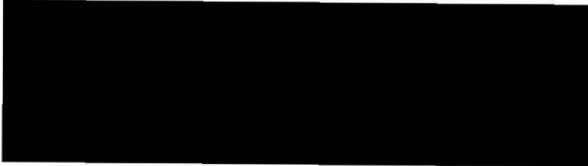
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**U.S. Citizenship  
and Immigration  
Services**

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FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: **MAY 04 2006**  
SRC-03-117-52587

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

PETITION: Petition for Alien Worker as an Other Worker 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, Texas 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 an import-export retail and wholesale company. It seeks to employ the beneficiary permanently in the United States as a sales representative. 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)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), 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 unskilled labor, 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 27, 2001. The proffered wage as stated on the Form ETA 750 is \$30,000.00 per year. On the Form ETA 750B, signed by the beneficiary on April 21, 2001, the beneficiary did not claim to have worked for the petitioner. The ETA 750 was certified by the Department of Labor on January 16, 2003.

The I-140 petition was submitted on March 17, 2003. On the petition, the petitioner claimed to have been established on June 17, 1996, to currently have eleven employees, and to have a gross annual income of \$1,006,276.00. The item on the petition for net annual income was left blank. With the petition, the petitioner submitted supporting evidence.

In a request for evidence (RFE) dated August 6, 2004, the director requested additional evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

In response to the RFE, the petitioner submitted additional evidence. The petitioner's submissions in response to the RFE were received by the director on October 19, 2004.

In a decision dated October 25, 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.

The petitioner filed a Form I-290B Notice of Appeal on November 23, 2004. On that same day, the petitioner also filed a Motion to Reopen and Reconsider the director's decision of October 25, 2004. With the notice of appeal and the motion, the petitioner submitted additional evidence.

In a decision dated December 16, 2004 the director denied the petitioner's Motion to Reopen and Reconsider. The director then transmitted the file to the AAO for consideration of the petitioner's notice of appeal.

On appeal, counsel submits no brief, but counsel's analysis of the evidence and the law is found in the petitioner's Motion to Reopen and Reconsider.

Counsel states on appeal that the petitioner's tax and financial documents establish the petitioner's ability to pay the proffered wage and that the petitioner has a solid history of operating a viable business, of having substantial assets and of meeting its salary obligations since 1996. Counsel also states that the petitioner's income dropped in 2001 as a result of the World Trade Center attacks of September 11, 2001 but that the petitioner's financial situation is expected to become positive in 2004.

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).

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 21, 2001, the beneficiary did not claim to have worked for the petitioner. However, the record contains a copy of a Form W-2 Wage and Tax Statement of the beneficiary for 2003 showing compensation from the petitioner. The relationship of the beneficiary's actual compensation to the proffered wage is shown in the table below.

Year	Beneficiary's actual compensation	Proffered wage	Wage increase needed to pay the proffered wage.
2001	not submitted	\$30,000.00	\$30,000.00
2002	not submitted	\$30,000.00	\$30,000.00
2003	\$9,680.00	\$30,000.00	\$20,320.00

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.

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 (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. 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 copies of the petitioner's Form 1120S U.S. Income Tax Returns for an S Corporation for 1999, 2000, 2001, 2002 and 2003. The record before the director closed on October 19, 2004 with the receipt by the director of the petitioner's submissions in response to the RFE. As of that date the petitioner's federal 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. 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. 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. The cost of business property elected to be treated an expense deduction under Section 179 of the Internal Revenue Code, rather than as a depreciation deduction, is carried over from line 12 of the Form 4562 to line 8 of 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 1999 indicates a Section 179 deduction. Therefore the figure for ordinary income on line 21 of page one of the petitioner's Form 1120S tax return for that year does not include all of the petitioner's relevant deductions. For this reason, the petitioner's net income for 1999 is the figure on line 23 of the Schedule K, for income. For the other tax returns in the record, the Schedule K's show no additional income and no additional relevant deductions. Therefore for each of the other years the figure on line 21 for ordinary income is the same as the figure on line 23 of the Schedule K for income. The petitioner's tax returns state amounts for income on line 23 of Schedule K as shown in the table below.

Tax year	Net income	Wage increase needed to pay the proffered wage	Surplus or deficit
1999	\$83,069.00	not applicable	not applicable
2000	\$20,703.00	not applicable	not applicable
2001	-\$16,873.00	\$30,000.00*	-\$46,873.00
2002	-\$144,930.00	\$30,000.00*	-\$174,930.00
2003	-\$66,855.00	\$20,320.00**	-\$87,175.00

\* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary in 2001 or 2002.

\*\* Crediting the petitioner with the \$9,680.00 actually paid to the beneficiary in 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.

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
1999	\$162,667.00	not applicable	not applicable
2000	\$148,705.00	not applicable	not applicable
2001	\$187,935.00	\$30,000.00*	\$157,935.00
2002	\$82,174.00	\$30,000.00*	\$52,174.00
2003	\$20,186.00	\$20,320.00**	-\$134.00

\* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary in 2001 or 2002.

\*\* Crediting the petitioner with the \$9,680.00 actually paid to the beneficiary in 2003.

For 2001 and 2002, the petitioner's year-end net current assets are greater than the proffered wage. For 2003, the year-end net current assets are only \$134.00 less than the wage increase needed to raise the beneficiary's actual compensation to the proffered wage. The foregoing information 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 additional support to help establish the petitioner's ability to pay the proffered wage.

The record also contains copies of the petitioner's quarterly wage and withholding reports for 2001, 2002, and 2003, and for the first three quarters of 2004. The information on those reports appears to be consistent with the information on the petitioner's tax returns discussed above.

For the foregoing reasons, 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.

In her decision of October 25, 2004 denying the petition, the director correctly stated the petitioner's net income in 2001, of -\$16,873.00. Since that figure is negative, the director found that it failed to establish the petitioner's ability to pay the proffered wage that year. In calculating the petitioner's net current assets, the director erroneously calculated net current liabilities as \$294,056.00, rather than the correct figure of \$59,277.00. The director erred in considering the figure of \$234,779.00 for loans from shareholders as representing current liabilities. That figure appears on line 19 of the Schedule L for 2001. However, current liabilities are listed only on lines 16, 17 and 18 of the Schedule L. The record contains no evidence indicating that the loans from shareholders on line 19 of the Schedule L for 2001 should be considered as current liabilities.

The director correctly found that the beneficiary's Form W-2 for 2003 failed to establish the petitioner's ability to pay the proffered wage that year.

In her October 25, 2004 decision, the director did not analyze the petitioner's tax returns for 2002 or 2003, since the director's findings regarding 2001 were considered to be sufficient reason to deny the petition. In her decision of December 16, 2004 denying the petitioner's Motion to Reopen and Reconsider, the director considered the petitioner's tax returns for 1999 and 2000, copies of which had been submitted for the first time with the motion and the notice of appeal. The director found that the information in the petitioner's tax returns for 1999 and 2000 was not directly relevant, since those years are before the year of the priority date. The director also found that the information in those returns provided no additional support to help establish the petitioner's ability to pay the proffered wage.

For the reasons discussed above, the evidence in the record at the time of the director's decision of October 25, 2004 was 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. Therefore the director's decision to deny the petition was incorrect, based on the evidence then in the record.

The evidence newly submitted on appeal provides additional support for the conclusion that the evidence previously submitted is sufficient to establish the petitioner's ability to pay the proffered wage during the relevant period. The assertions of counsel on appeal and the evidence submitted on appeal therefore 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.