

**AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA**

PETITIONER:

Employer Account No. - 2553769
ALIEN LABOR CERTIFICATION
1470 NW 107 AVE SUITE L
MIAMI FL 33172

RESPONDENT:

State of Florida
Agency for Workforce Innovation
c/o Department of Revenue

**PROTEST OF LIABILITY
DOCKET NO. 2010-161264L**

ORDER

This matter comes before me for final Agency Order.

Having fully considered the Special Deputy's Recommended Order and the record of the case and in the absence of any exceptions to the Recommended Order, I adopt the Findings of Fact and Conclusions of Law as set forth therein. A copy of the Recommended Order is attached and incorporated in this Final Order.

In consideration thereof, it is ORDERED that the determination dated October 4, 2010, is REVERSED.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **April, 2011**.



TOM CLENDENNING
Assistant Director
AGENCY FOR WORKFORCE INNOVATION

**AGENCY FOR WORKFORCE INNOVATION
Unemployment Compensation Appeals**

MSC 345 CALDWELL BUILDING
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143

PETITIONER:

Employer Account No. - 2553769
ALIEN LABOR CERTIFICATION
ATTN: RAUL G SEBAZCO
1470 NW 107 AVE SUITE L
MIAMI FL 33172

RESPONDENT:

State of Florida
Agency for Workforce Innovation
c/o Department of Revenue

**PROTEST OF LIABILITY
DOCKET NO. 2010-161264L**

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Assistant Director,
Agency for Workforce Innovation

This matter comes before the undersigned Special Deputy pursuant to the Petitioner's protest of the Respondent's determination dated October 4, 2010.

After due notice to the parties, a telephone hearing was held on March 3, 2011. The Petitioner, represented by its Certified Public Accountant, appeared and testified. The Respondent was represented by a Department of Revenue Tax Audit Supervisor.

The record of the case, including the recording of the hearing and any exhibits submitted in evidence, is herewith transmitted. Proposed Findings of Fact and Conclusions of Law were not received.

Issue:

Whether the Petitioner's corporate officers received remuneration for employment which constitutes wages, pursuant to Sections 443.036(21), (44), Florida Statutes; Rule 60BB-2.025, Florida Administrative Code.

Whether the Petitioner is entitled to a waiver of penalty and interest for delinquent reports pursuant to Section 443.141(1), Florida Statutes and Rule 60BB-2.028(4), Florida Administrative Code.

Findings of Fact:

1. The Petitioner is a subchapter S corporation which operates a labor certification consulting business. The business is operated by the Petitioner's president.
2. The Petitioner was selected by the Department of Revenue for an audit of the Petitioner's books and records for the 2009 tax year to ensure compliance with the Florida Unemployment Compensation Law.

3. The audit was performed in June 2010. At that time the Petitioner had not yet filed the 2009 *U. S. Income Tax Return for an S Corporation*. Since the tax return was not available the Petitioner provided the Tax Auditor with a profit and loss statement for the 2009 tax year. The profit and loss statement was a preliminary document which was prepared before the Certified Public Accountant made yearend adjustments. The profit and loss statement revealed net income for 2009 in the amount of \$8,042.70.
4. The Petitioner did not report any wages for the Petitioner's president for 2009. The Tax Auditor determined that wages should have been reported for the president since the president was active in the operation of the business and since the business realized a net profit. The Tax Auditor determined that the Petitioner should have reported taxable wages in the amount of \$7,000 for the president.
5. The Petitioner's Certified Public Accountant prepared the Petitioner's 2009 *U. S. Income Tax Return for an S Corporation* for filing in approximately September or October 2010. The tax return was prepared after the Certified Public Accountant made the yearend adjustments. The tax return reported an ordinary business loss in the amount of \$26,665 for 2009. The Certified Public Accountant contacted the Tax Auditor and requested that the Tax Auditor change the audit results to show that the Petitioner's president did not receive any income or wages from the business during 2009. The Tax Auditor advised the Certified Public Accountant that the audit had already been submitted to Tallahassee and that the Petitioner's only recourse was through an appeal.
6. The Department of Revenue issued a *Notice of Proposed Assessment* on or before October 4, 2010, notifying the Petitioner that additional taxes of \$378 were due with interest in the amount of \$28.04. The Petitioner filed a timely protest on October 22, 2010, protesting both the tax and the interest.

Conclusions of Law:

7. Section 443.1216(1)(a)1., Florida Statutes, provides that the employment subject to the Unemployment Compensation Law includes a service performed by an officer of a corporation.
8. Section 443.036(20)(c), Florida Statutes provides that a person who is an officer of a corporation, or a member of a limited liability company classified as a corporation for federal income tax purposes, and who performs services for the corporation or limited liability company in this state, regardless of whether those services are continuous, is deemed an employee of the corporation or the limited liability company during all of each week of his or her tenure of office, regardless of whether he or she is compensated for those services. Services are presumed to be rendered for the corporation in cases in which the officer is compensated by means other than dividends upon shares of stock of the corporation owned by him or her.
9. In Spicer Accounting, Inc. v. United States, 918 F.2d 90 (9th Cir. 1990), the court determined that dividends paid by an S corporation to an officer of the corporation who performed services for the business, were wages subject to federal employment taxes, including federal unemployment compensation taxes. The court relied upon federal regulations which provide that the "form of payment is immaterial, the only relevant factor being whether the payments were actually received as compensation for employment."
10. Based on the profit and loss statement the Tax Auditor properly concluded that the Petitioner should have reported wages for the Petitioner's president since the president was active in the operation of the business and since the Petitioner realized a profit for the year. However, the profit and loss statement was only a preliminary document and did not accurately reflect the Petitioner's income or loss for 2009. The evidence reveals that the Petitioner incurred a loss for

2009 and that no remuneration was paid to the Petitioner's president. Since the president did not receive compensation for his services, no wages are reportable for unemployment tax purposes.

11. Since no additional taxes are due, the interest charged on the *Notice of Proposed Assessment* is abated.

Recommendation: It is recommended that the determination dated October 4, 2010, be REVERSED.

Respectfully submitted on March 7, 2011.



R. O. SMITH, Special Deputy
Office of Appeals