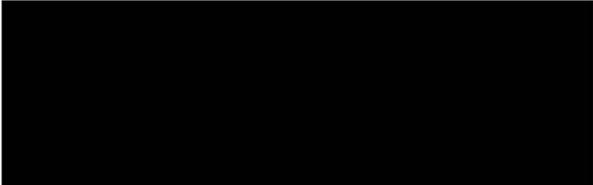




U.S. Citizenship
and Immigration
Services

36



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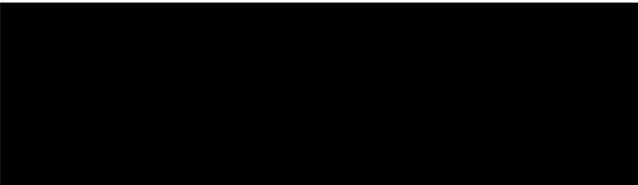
Office: NEBRASKA SERVICE CENTER

Date: DEC 07 2009

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

PETITION: Immigrant 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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner operates a hospital center, and seeks to employ the beneficiary permanently in the United States as a registered nurse, a professional or skilled worker pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3).

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), 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(l)(2), and section 203(b)(3)(A)(i) of 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 nature, for which qualified workers are not available in the United States. *See also* 8 C.F.R. § 204.5(l)(3)(ii).

The petitioner has applied for the beneficiary under a blanket labor certification pursuant to 20 C.F.R. § 656.5, Schedule A, Group I. *See also* 20 C.F.R. § 656.15. Schedule A is the list of occupations set forth at 20 C.F.R. § 656.5 with respect to which the Department of Labor (DOL) has determined that there are not sufficient United States workers who are able, willing, qualified and available, and that the employment of aliens in such occupations will not adversely affect the wages and working conditions of United States workers similarly employed.

Based on 8 C.F.R. §§ 204.5(a)(2) and (l)(3)(i) an applicant for a Schedule A position would file Form I-140, “accompanied by any required individual labor certification, application for Schedule A designation, or evidence that the alien’s occupation qualifies as a shortage occupation within the Department of Labor’s Labor Market Information Pilot Program.”¹ The priority date of any petition filed for classification under section 203(b) of the Act “shall be the date the completed, signed petition (including all initial evidence and the correct fee) is properly filed with [U.S. Citizenship and Immigration Services (USCIS)].” 8 C.F.R. § 204.5(d).

Pursuant to the regulations set forth in Title 20 of the Code of Federal Regulations, the filing must include evidence of prearranged employment for the alien beneficiary. The employment is evidenced by the employer’s completion of the job offer description on the application form and evidence that the employer has provided appropriate notice of filing the Application for Alien Employment Certification to the bargaining representative or to the employer’s employees as set forth in 20 C.F.R. § 656.10(d).

¹ On March 28, 2005, pursuant to 20 C.F.R. § 656.17, the Application for Permanent Employment Certification, ETA 9089 replaced the Application for Alien Employment Certification, Form ETA 750. The new Form ETA 9089 was introduced in connection with the re-engineered permanent foreign labor certification program (PERM), which was published in the Federal Register on December 27, 2004 with an effective date of March 28, 2005. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004).

Also, according to 20 C.F.R. § 656.15(c)(2), aliens who will be permanently employed as professional nurses must have: (1) passed the Commission on Graduates of Foreign Nursing Schools (CGFNS) Examination; or (2) hold a full and unrestricted license to practice professional nursing in the [s]tate of intended employment; or (3) that the alien has passed the National Council Licensure Examination for Registered Nurses (NCLEX-RN).

On April 26, 2007, the director denied the petition because the petitioner failed to properly post the position in accordance with 20 C.F.R. § 656.10(d)(1) and failed to demonstrate its ability to pay the proffered wage. Specifically, the director found that the petitioner failed to include the proffered wage on the notice. In addition, the director found that the petitioner failed to demonstrate that it had either net current assets or a net income sufficient to pay the proffered wage to the beneficiary. On May 29, 2007, the petitioner filed a motion to reopen, which was granted and reopened. The director dismissed the petition by decision dated July 21, 2007 and reiterated that the petitioner failed to demonstrate its ability to pay the proffered wage, but noted that the petitioner submitted an additional notice of the posting that contained the correct wage.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.²

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

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

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.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the date that the I-140 was filed, which in this case was June 1, 2006. The proffered wage as stated on the Prevailing Wage Determination generated by the D.C. Department of Employment Services is \$45,386 per year.

² 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). *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in April 1986. According to the tax returns in the record, the petitioner's fiscal year runs from July 1 to June 30. On the Form ETA 9089, signed by the beneficiary on April 7, 2006, the beneficiary did not claim to have worked for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. In Schedule A cases, the filing of an I-140 establishes a priority date for the immigrant petition so, 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, USCIS 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 during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner provided no wage statements or pay records to demonstrate that it employed the beneficiary during the relevant time period.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009). 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. Texas 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). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, 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. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income.

On appeal, the petitioner argues that its aggressive depreciation amount should be taken into account. With respect to depreciation, the court in *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts, 558 F.3d at 116. “[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner’s ability to pay. Plaintiffs’ argument that these figures should be revised by the court by adding back depreciation is without support.” *Chi-Feng Chang*, 719 F.Supp. at 537 (emphasis added). As a result, we will not take into account the amounts that the petitioner used in valuing its depreciation amount. Similarly, we will not look at the total assets in isolation.

For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. The record before the director closed on February 28, 2007 with the receipt by the director of the petitioner’s submissions in response to the director’s request for evidence. As of that date, the petitioner’s 2006 federal income tax return was not yet due, so the 2005 return was the most recent return available. The petitioner’s 2005 Form 1120 for the tax year from July 1, 2005 to June 30, 2006 stated net income of -\$352,470. A negative income cannot demonstrate sufficient net income to pay the proffered wage. Additionally, as the priority date is June 1, 2006, the petitioner’s 2005 tax return alone would be insufficient, even with positive net income, to demonstrate the petitioner’s ability to pay from the priority date onward.

As an alternate means of determining the petitioner’s ability to pay the proffered wage, USCIS may review the petitioner’s net current assets. Net current assets are the difference between the petitioner’s current assets and current liabilities.³ A corporation’s year-end current assets are shown

³According to *Barron’s Dictionary of Accounting Terms* 117 (3rd ed. 2000), “current assets” consist of items having (in most cases) a life of one year or less, such as cash, marketable securities,

on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. The petitioner's 2005 Form 1120 demonstrates its end-of-year net current assets as -\$2,099,050. A negative net current asset amount is insufficient to establish that the petitioner was able to pay the proffered wage based on its fiscal year 2005 tax return.

Additionally, the petitioner filed for a second worker with a similar priority date. If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750 and Form ETA 9089). *See also* 8 C.F.R. § 204.5(g)(2). The record in the instant case contains no information about the proffered wage for the beneficiary of the second petition, about the current immigration status of that beneficiary, whether that beneficiary has withdrawn from the visa petition process, or whether the petitioner has withdrawn its job offer to that beneficiary. Furthermore, no information is provided about the current employment status of that beneficiary, the date of any hiring, and any current wages of that beneficiary.

Therefore, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date. The petitioner also provided its financial statements from June 30, 2006 to December 30, 2006 and for the "years ended June 30, 2006 and June 30, 2005." The financial statements covering the time period July 1, 2004 to June 30, 2006 do not cover the relevant time period after the priority date. With its response to the director's RFE, the petitioner submitted unaudited "income statements" for its 2004 and 2005 fiscal years and the first quarter of its 2006 fiscal year. The director's RFE specifically requested "latest annual report, your latest U.S. income tax return, or *audited* financial statements." In the director's April 26, 2007 decision, he cited the regulation at 8 C.F.R. § 204.5(g)(2) indicating that financial statements "must be audited." In conjunction with the motion to reopen, the petitioner submitted reviewed financial statements for the fiscal years 2004 and 2005.⁴ In conjunction with the appeal, the petitioner submitted financial statements for the first half of its fiscal year 2006 with a caption stating that the statements are

inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

⁴ The accountant's report that accompanied these financial statements makes clear that they are reviewed statements, as opposed to audited statements. Specifically, the accountant states that he "reviewed the accompanying balance sheet . . . A review consists principally of inquiries of company personnel and analytical procedures applied to financial data. It is substantially less in scope than an audit in accordance with generally accepted auditing standards[.]"

“UNAUDITED: For Managements [sic] Purposes Only.” The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance whether the financial statements of the business are free of material misstatements. The financial statements is clearly marked that it is unaudited and the letter from the accountant states that the statements are reviewed statements. The unaudited financial statements that counsel submitted with the petition are not **persuasive evidence**. **Reviews are governed by the American Institute of Certified Public Accountants’ Statement on Standards for Accounting and Review Services (SSARS) No.1.,** and accountants only express limited assurances in reviews. As the account’s report makes clear, the financial statements are the representations of management and the accountant expresses no opinion pertinent to their accuracy; none of the financial statements were audited. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

USCIS may consider the overall magnitude of the petitioner’s business activities in its determination of the petitioner’s ability to pay the proffered wage. *See Matter of Sonegawa*, 12 I&N Dec. 612 (BIA 1967). The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner’s prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner’s clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner’s determination in *Sonegawa* was based in part on the petitioner’s sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner’s financial ability that falls outside of a petitioner’s net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner’s business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner’s reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner’s ability to pay the proffered wage.

In the instant case, the petitioner did not demonstrate some sort of off year or that other circumstances to demonstrate that the tax return does not paint an accurate financial picture of the petitioner’s ability to pay the proffered wage. The unaudited financial statements provided are unacceptable evidence. In addition, the petitioner presented no evidence regarding its reputation or standing in the community. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage for the beneficiary or the additional sponsored worker.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

The second issue relates to the adequacy of the notice pursuant to 20 C.F.R. § 656.10(d). 20 C.F.R. § 656.10(d) provides:

- (1) In applications filed under § 656.15 (Schedule A), § 656.16 (Sheepherders), § 656.17 (Basic Process); § 656.18 (College and University Teachers), and § 656.21 (Supervised Recruitment), the employer must give notice of the filing of the Application for Permanent Employment Certification and be able to document that notice was provided, if requested by the certifying officer as follows:

...

- (ii) If there is no such bargaining representative, by posted notice to the employer's employees at the facility or location of the employment. The notice must be posted for at least 10 consecutive business days. The notice must be clearly visible and unobstructed while posted and must be posted in conspicuous places where the employer's U.S. workers can readily read the posted notice on their way to or from their place of employment . . . In addition, the employer must publish the notice in any and all in-house media, whether electronic or printed, in accordance with the normal procedures used for the recruitment of similar positions in the employer's organization.

...

- (3) The notice of the filing of an Application for Permanent Employment Certification shall:

- (i) State that the notice is being provided as a result of the filing of an application for permanent alien labor certification for the relevant job opportunity;
 - (ii) State any person may provide documentary evidence bearing on the application to the Certifying Officer of the Department of Labor;
 - (iii) Provide the address of the appropriate Certifying Officer; and
 - (iv) Be provided between 30 and 180 days before filing the application.

(6) If an application is filed under the Schedule A procedures at § 656.15. . . the notice must contain a description of the job and rate of pay and meet the requirements of this section.

Additionally, section 212 (a)(5)(A)(i) of the Act states the following:

Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified . . . that

- (I) there are not sufficient workers who are able, willing, qualified . . . and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
- (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the U.S. similarly employed.

The petitioner initially submitted a posting notice that stated a wage of \$45,000 instead of the listed proffered wage of \$45,386. The director cited the petitioner's failure to comply with 20 C.F.R. § 656(d)(10) in his decision. The petitioner submitted a notice with its motion to reopen that stated the correct wage, which the director accepted. The AAO does not agree.

USCIS may reject a fact stated in the petition that it does not believe that fact to be true. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The notice provided with the motion to reopen that contained the proffered wage is substantially similar to the original notice provided with the petition **and is a copy instead of an original. The notices are so similar that when overlaid, the signature of [REDACTED] lines up exactly on the two forms.** In addition, the petitioner supplied no affidavit or any other statement explaining how any error was made in the original notice, only that the "error [was] due to a mix up in the attorney's office." "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). Without a credible explanation as to why two notices for the same dates of posting with two different wages were provided, we are unable to conclude that the petitioner provided the requisite notice to U.S. workers.

Although not raised by the director, the posting is also deficient in that it lists the wrong address for the certifying officer.⁵ As the posting was completed in April 2006, it would be governed by the

⁵ An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the

PERM regulations. The correct certifying officer address for a job offer in Washington, DC is the United States Department of Labor, Employment and Training Administration, Atlanta Processing Center, Harris Tower, 233 Peachtree Street, N.E., Suite 400, Atlanta, GA 30303 and not the local State Workforce Agency in Baltimore or the regional DOL address in Philadelphia listed.⁶ Additionally, the posting fails to adequately set forth the position requirements in accordance with 20 C.F.R. § 656.10(d)(6) as it does not state the required Associate's degree. Further, the posting states that it is for positions throughout the D.C. metropolitan area. Nothing on ETA Form 9089 or Form I-140 indicates that the beneficiary will work anywhere other than the petitioner's headquarters. Accordingly, the petitioner has failed to post notice in compliance with 20 C.F.R. § 656.10(d) and the petition will be denied on this basis as well.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.

initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a de novo basis).

⁶ *See* FAQ Round 1 at http://www.foreignlaborcert.doleta.gov/pdf/perm_faqs_3-3-05.pdf (accessed October 9, 2009).