

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy
PUBLIC COPY

U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



B6

FILE: [REDACTED]
LIN-07-030-52305

Office: NEBRASKA SERVICE CENTER

Date: **AUG 04 2010**

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

at least 1000 copies of
the manuscript must be
submitted to the
publisher.

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

The petitioner is a hotel. It seeks to employ the beneficiary permanently in the United States as a hotel manager. As required by statute, an ETA Form 9089, Application for Permanent Employment Certification approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the petitioner failed to demonstrate that the beneficiary satisfied the minimum level of education stated on the labor certification and that the petitioner failed to show continuing ability to pay the proffered wage from the priority date to the present.

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal¹ and in response to the AAO's request for evidence.

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 nature, for which qualified workers are not available in the United States. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. See *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the ETA Form 9089 was accepted for processing on January 20, 2006.² The Immigrant Petition for Alien Worker (Form I-140) was filed on November 9, 2006.³

¹ The submission of additional evidence on appeal is allowed by the instructions to the U.S. Citizenship and Immigration Services (USCIS) 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).

² If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date is clear.

³ This is the identical petition the petitioner filed on behalf of the beneficiary. The petitioner filed an I-140 petition (SRC-06-140-51849) for the beneficiary on March 31, 2006 and the petition was denied on September 25, 2006.



The certified ETA Form 9089 was filed for a position of hotel manager. DOL assigned the occupational code of 11-9081.00, Lodging Manager, the closest type of occupation to the proffered position. DOL's occupational codes are assigned based on normalized occupational standards. According to DOL's public online database at <http://online.onetcenter.org/find/result?s=11-9081&g=Go> (accessed July 26, 2010) and its extensive description of the position and requirements for the position most analogous to hotel manager position, the position falls within Job Zone Three requiring "medium preparation" for the occupation type closest to hotel manager position. According to DOL, previous work-related skill, knowledge or experience is needed for such an occupation. DOL assigns a standard vocational preparation (SVP) range of 6-7 to the occupation, which means "[m]ost occupations in this zone require training in vocational schools, related on-the-job experience, or an associate's degree. See <http://online.onetcenter.org/link/summary/11-9081.00#JobZone> (accessed July 26, 2010). Additionally, DOL states the following concerning the training and overall experience required for these occupations:

Previous work-related skill, knowledge, or experience is required for these occupations. For example, an electrician must have completed three or four years of apprenticeship or several years of vocational training, and often must have passed a licensing exam, in order to perform the job.

Employees in these occupations usually need one or two years of training involving both on-the-job experience and informal training with experienced workers.

See id.

Therefore, generally a hotel manager position could be properly analyzed a skilled worker and not necessarily as a professional.⁴ In the instant case, the certified ETA Form 9089 requires a bachelor's degree and one year of experience and Line 14 of Part H reflects that "[a]ny suitable combination of this education and experience will be considered acceptable." The petitioner checked the box "e" in Part 2 of the I-140 form, which is for either a professional or a skilled worker. The director reviewed the petition under the professional category and determined that the beneficiary does not possess a foreign degree equivalent to a U.S. bachelor's degree in hotel management because the beneficiary's three-year bachelor of science degree in hotel administration from the [REDACTED] is not the equivalent of a US bachelor's degree. Accordingly, the director denied the petition. On appeal counsel submitted a brief arguing that the ETA Form 9089 does not specifically require a single source four-year bachelor's degree claiming that the petition should be considered under the skilled worker category. The AAO concurs with counsel's assertion on appeal that the instant petition

⁴ A professional occupation is statutorily defined at Section 101(a)(32) of the Act as including but not limited to "architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." It is noted that office manager positions are not included in this section.



should be also properly evaluated under the skilled worker category. Accordingly, the AAO will examine the instant appeal and the petition under both categories and determine whether or not the petitioner establish the beneficiary's qualifications for the proffered position as a professional or skilled worker.

For the professional category, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) states the following:

If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form of an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study. To show that the alien is a member of the professions, the petitioner must submit evidence that the minimum of a baccalaureate degree is required for entry into the occupation.

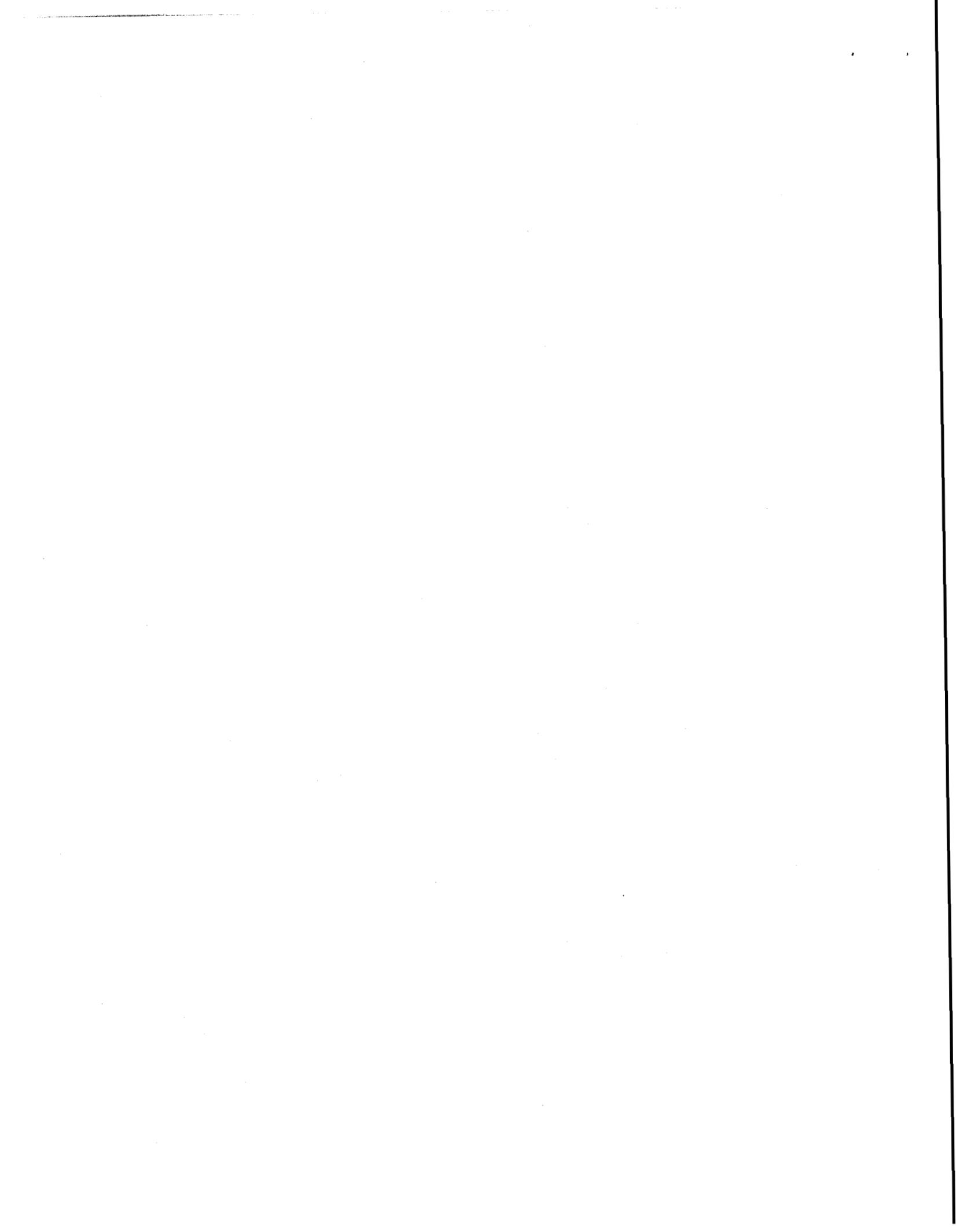
The above regulations use a singular description of foreign equivalent degree. Thus, the plain meaning of the regulatory language concerning the professional classification sets forth the requirement that a beneficiary must produce one degree that is determined to be the foreign equivalent of a U.S. baccalaureate degree in order to be qualified as a professional for third preference visa category purposes.

To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date, which as noted above, is January 20, 2006. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

In Part J of the ETA Form 9089, the beneficiary indicated that the highest level of education achieved relevant to the requested occupation is a Bachelor's degree in hotel management in 2000 from the Institute of International Hospitality Management in the Netherlands. In corroboration of the ETA Form 9089, the petitioner provided the beneficiary's Bachelor of Science Degree in Hotel Administration and transcripts from the institute.

In determining whether the beneficiary possessed a U.S. bachelor's degree in hotel management or a foreign equivalent degree, we have reviewed the [REDACTED] created by the [REDACTED].

[REDACTED] according to its website, www.aacrao.org, is "a nonprofit, voluntary, professional association of more than 10,000 higher education admissions and registration professionals who represent approximately 2,500 institutions in more than 30 countries." Its mission "is to provide professional development, guidelines and voluntary standards to be used by higher education officials regarding the best practices in records management, admissions, enrollment management, administrative information technology and student services." According to the registration page for EDGE, <http://aacraoedge.aacrao.org/register/index/php>, EDGE is "a web-based resource for the evaluation of foreign educational credentials."



EDGE provides a great deal of information about the educational system in the Netherlands, and while it confirms that a bachelor of science degree is awarded upon completion of three years of study at a university requiring a VWO diploma for admission and represents attainment of a level of education comparable to three years of university study in the United States, it does not suggest that a three-year degree from the Netherlands may be deemed a foreign equivalent degree to a U.S. baccalaureate.

The petitioner claimed that the beneficiary's three-year bachelor's degree is equivalent to a U.S. bachelor's degree according to private credential evaluations from Worldwide Education Evaluations, Inc., which evaluate the beneficiary's three-year bachelor of science degree in hotel administration from the Institute of International Hospitality Management in the Netherlands as the equivalent of a bachelor's degree in hotel management from an accredited institution of higher education in the United States. However, a bachelor degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244, 245 (Comm. 1977). Therefore, the beneficiary's three-year bachelor's degree from the Netherlands cannot be considered a foreign equivalent degree. U.S. Citizenship and Immigration Services (USCIS) may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

Therefore, the record does not contain any evidence that the beneficiary holds a single United States baccalaureate degree or a single foreign equivalent degree to be qualified as a professional for third preference visa category purposes. Because the beneficiary does not have a "United States baccalaureate degree or a foreign equivalent degree," the beneficiary does not qualify for preference visa classification under section 203(b)(3)(ii) of the Act as he does not have the minimum level of education required for the equivalent of a bachelor's degree. Thus, the petitioner failed to demonstrate that the beneficiary is qualified for the proffered professional position, and the petition cannot be approved under professional category.

As previously noted, the AAO will also discuss whether the beneficiary would meet the educational requirements set forth on the ETA Form 9089 and thus be qualified for the proffered position as if the petitioner had requested the proffered position be analyzed under the skilled worker category.

For the reasons discussed below, we find that decisions by federal circuit courts, which are binding on this office, have upheld our authority to evaluate whether the beneficiary is qualified for the job offered.

While no single degree is required for the skilled worker classification, the regulation at 8 C.F.R. § 204.5(1)(3)(B) provides that a petition for an alien in this classification must be accompanied by evidence that the beneficiary "meets the education, training or experience, and any other requirements of the individual labor certification."

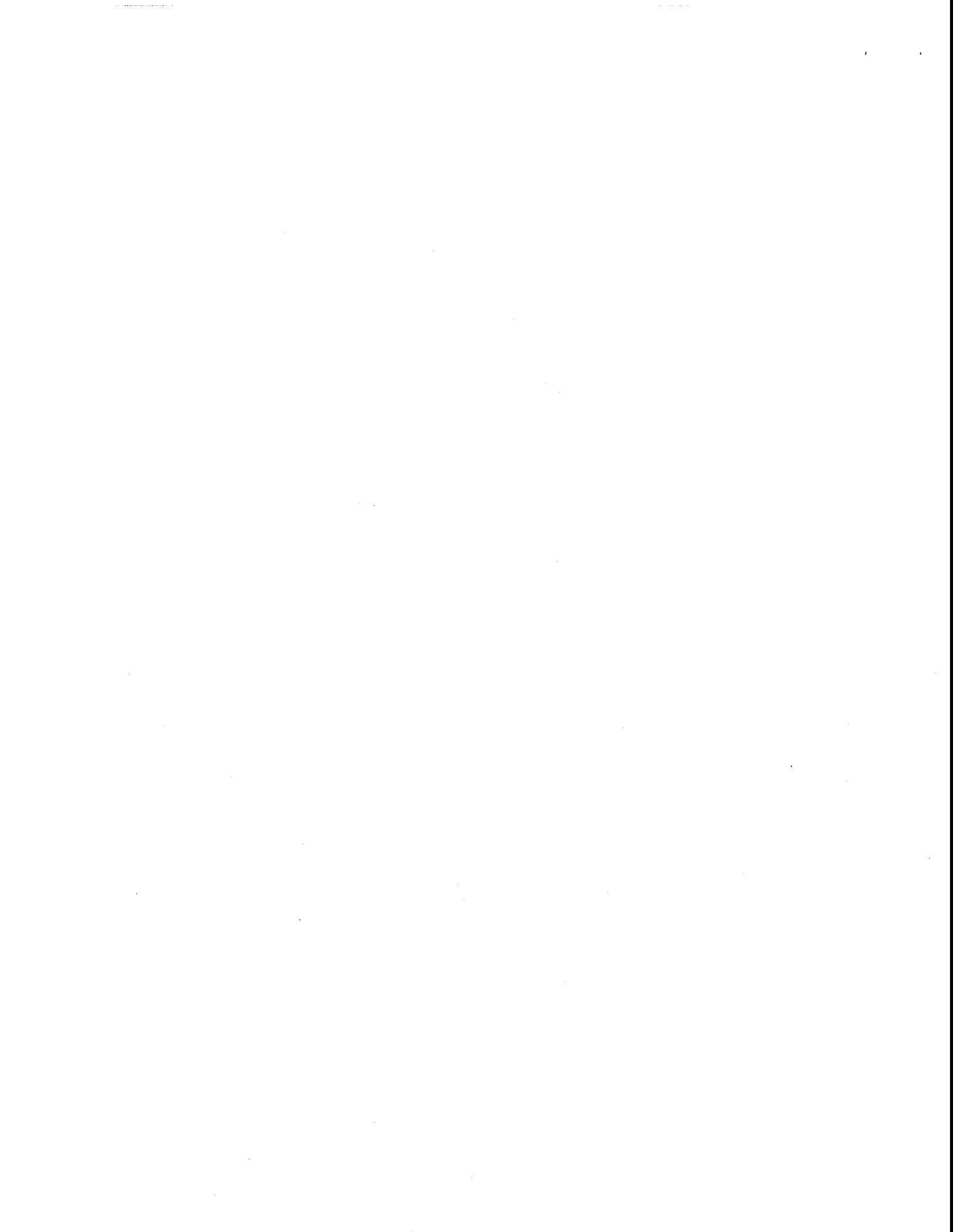


The AAO notes that in Part H of the ETA Form 9089, the petitioner indicates that "Any suitable combination of this education and experience will be considered acceptable." However, the record does not contain any evidence showing that the petitioner actually used these defined equivalent requirements in the petitioner's labor market test. Therefore, on June 11, 2010, the AAO issued the RFE to obtain evidence of the petitioner's intent concerning the actual minimum requirements of the position as that intent was explicitly and specifically expressed to DOL while that agency oversaw the labor market test and determination of the actual minimum requirements set forth on the certified labor certification application. In response to the AAO's RFE, the petitioner submitted the job order, the notice of filing, advertisements in a newspaper or professional journal and copies of H-1B petitions for the beneficiary in the proffered position. The recruitment materials submitted show that the petitioner clearly expressed its intent to accept any suitable combination of education and experience in lieu of the bachelor's degree. The underlying labor certification was certified under these terms. Accordingly, the requirements of the proffered position may be met with three-year bachelor's degree or even lesser degree plus appropriate years of experience in the job offered or related occupations, and thus, the job offer portion of the ETA Form 9089 does not require a single source four-year bachelor's degree in hotel management as minimum requirements for the proffered position. Therefore, the petition can be properly considered under the skilled worker category.

The record contains copies of the beneficiary's bachelor's degree in hotel administration and the transcripts from the Institute of International Hospitality Management in the Netherlands and the record also contains documentary evidence from the beneficiary's former employers to establish his qualifying experience as set forth on the ETA Form 9089. Therefore, the AAO concludes that the petitioner established that the beneficiary meets the minimum education and experience requirements set forth on the ETA Form 9089 for the proffered position under the skilled worker category. Accordingly, the portion of the director's decision that the petitioner failed to establish that the beneficiary possessed a four-year U.S. bachelor's degree in hotel management or a foreign equivalent degree will be withdrawn.

The director also denied the petition based on the ground that the petitioner failed to establish its continuing ability to pay the proffered wage from the priority date to the present. The regulation 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 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.



The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089 was accepted for processing by any office within the employment system of the U.S. DOL. See 8 CFR § 204.5(d). The priority date in this case is January 20, 2006. The proffered wage as stated on the ETA Form 9089 is \$37,000 per year. On the petition, the petitioner claims to be established in 1996, have a gross annual income of \$1,600,000, a net annual income of \$85,000 and 16 employees.

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 beneficiary claimed to have worked for the petitioner in the proffered position since October 1, 2000. The record contains the beneficiary's W-2 forms for 2001 through 2005 submitted with the previous filing. However, the beneficiary's W-2 forms for 2001 through 2005 are not necessarily dispositive since the priority date is in 2006. The petitioner submitted the beneficiary's paystubs for 2006. The paystubs show that the petitioner paid the beneficiary at the rate of \$10.00 per hour in 2006 and the year-to-date earnings as of October 15, 2006 were \$18,373.20. Counsel did not submit the beneficiary's W-2 forms for 2006 and subsequent years on appeal and in response to the AAO's RFE, nor did counsel provide any explanation why these requested documents were not submitted. If the petitioner had continued to pay the beneficiary at the rate for the whole year of 2006, the beneficiary would have been paid \$20,800 by the end of 2006. Therefore, the petitioner failed to establish its ability to pay the instant beneficiary the full proffered wage in 2006 and subsequent years through the examination of wages already paid to the beneficiary. The petitioner must demonstrate that it had sufficient net income or net current assets to pay the instant beneficiary the difference of \$16,200 between wages actually paid to the beneficiary and the proffered wage in 2006 and the full proffered wage in 2007 and thereafter.

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 sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits 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 the Service should have considered income before expenses were paid rather than net income.

With respect to depreciation, the court in [REDACTED] noted:

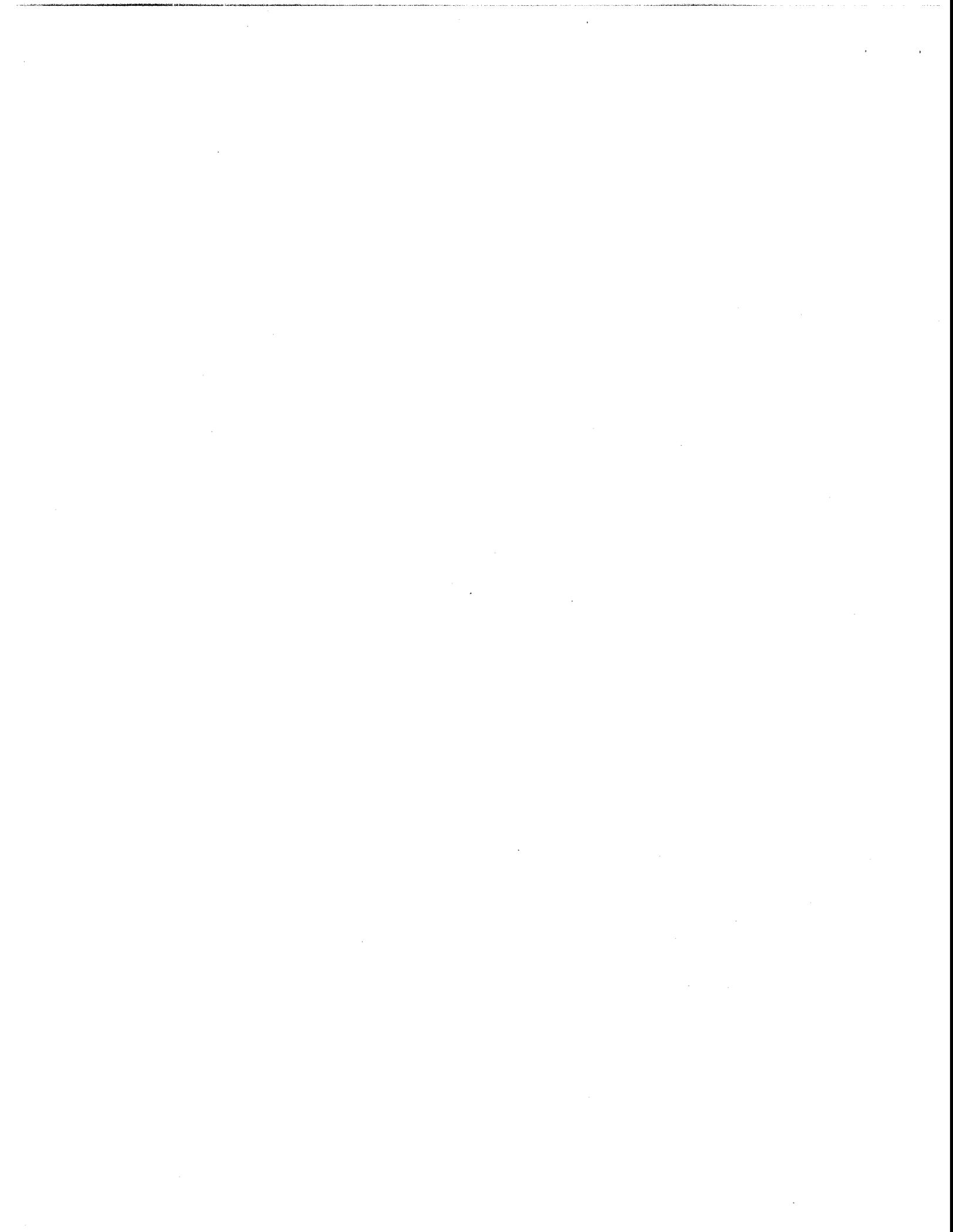
The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread 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 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* at 537 (emphasis added).

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.⁵ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if

⁵According 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, 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.



any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

The record contains the petitioner's Form 1120S U.S. Income Tax Return for an S Corporation Income Tax Return, for 2005. The tax return shows that the petitioner is structured as an S corporation and its fiscal year is based on the calendar year. However, the petitioner's tax return for 2005 is not necessarily dispositive since the priority date in the instant case is January 20, 2006. The petitioner did not submit its tax returns for 2006 through 2009. The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Although specifically and clearly requested by this office, the petitioner declined to provide its annual reports, tax returns or audited financial statements for 2006 through 2009. The annual reports, tax returns or audited financial statements would have demonstrated the amount of net income⁶ and net current assets the petitioner reported to the IRS and further reveal its ability to pay the proffered wage. The petitioner's failure to submit these documents cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

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 or approved simultaneously, the petitioner must produce evidence that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions or approved petitions, including I-129 nonimmigrant petitions.

USCIS records show that the petitioner filed six I-140 immigrant petitions (including the instant petition) and 13 I-129 nonimmigrant petitions. All I-140 petitions, except for the instant petition, were approved⁷ by USCIS for which the petitioner is obligated to pay three proffered wages in 2006,

⁶ Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 18 (2007) of Schedule K. *See* Instructions for Form 1120S, 2007, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed on May 12, 2010) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.).

⁷ USCIS records show that the five approved immigrant petitions are as follows:

- SRC-05-228-50776 filed on August 16, 2005 with the priority date of April 30, 2001, and approved on August 14, 2006. The beneficiary was adjusted to lawful permanent resident status on May 8, 2007.
- LIN-06-273-52033 filed on September 26, 2006 with the priority date of February 19, 2002, and approved on May 22, 2007.



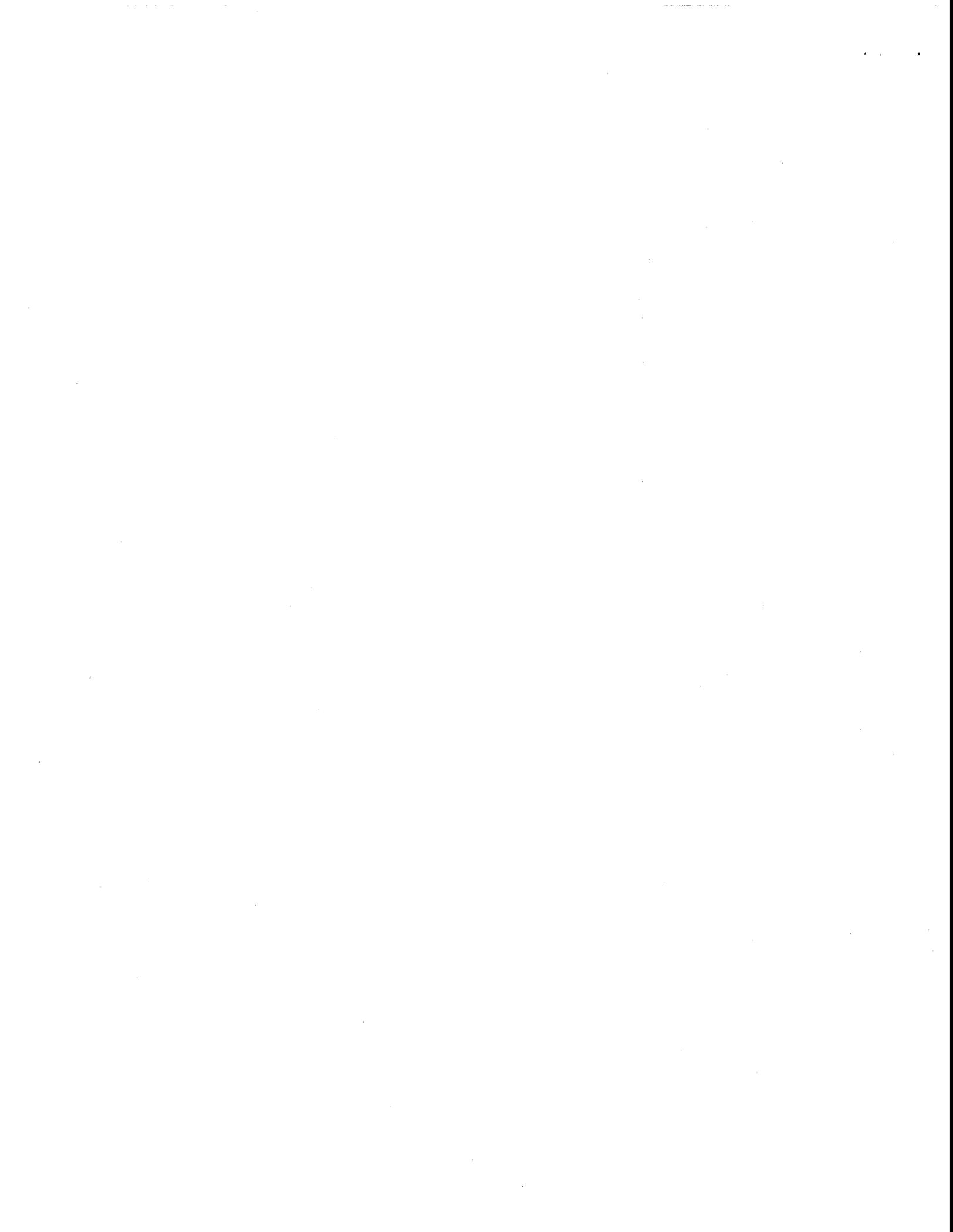
five in 2007, three in 2008 and two in 2009 as well as H-1B employees in addition to the instant beneficiary. The petitioner did not submit any documentary evidence showing that the petitioner paid these approved beneficiaries. The petitioner did not provide any regulatory-prescribed evidence to establish its ability to pay the instant beneficiary the proffered wage for the years 2006 through 2009 and also failed to establish ability to pay all the approved beneficiaries the proffered wages in these years.

The record contains bank statements for the petitioner's business checking accounts as evidence of the ability to pay the proffered wages. Counsel's reliance on the balances in its bank accounts is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that would be considered in determining the petitioner's net current assets.

Counsel submitted the petitioner's finance statements for six months ending June 30, 2006 as evidence to establish the petitioner's ability to pay the proffered wage. 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. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

In response to the RFE issued by the AAO on June 11, 2010, counsel advises that the beneficiary will replace another employee. Counsel submits [REDACTED] W-2 forms for 2006 through 2009 and asserts that the proffered position is currently held by [REDACTED] and the funds paid to [REDACTED] will be made available to the beneficiary once he takes the proffered position. The record does not, however, provide evidence that the petitioner has replaced or will replace him with the beneficiary. In

-
- SRC-07-267-51016 filed on September 7, 2007 with the priority date of April 30, 2001, and approved on October 15, 2008. The beneficiary was adjusted to lawful permanent resident status on February 24, 2009.
 - SRC-08-060-51314 filed on December 14, 2007 with the priority date of March 5, 2007, and approved on August 22, 2008.
 - SRC-08-132-52769 filed on March 17, 2008 with the priority date of October 30, 2007, and approved on April 15, 2009.



general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Moreover, there is no evidence that the position of [REDACTED] involves the same duties as those set forth in the ETA Form 9089. The petitioner has not documented the position, duty, and termination of the worker who performed the duties of the proffered position. If that employee performed other kinds of work, then the beneficiary could not have replaced him. The assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The purpose of the instant visa category is to provide employers with foreign workers to fill positions for which U.S. workers are unavailable. If the petitioner is, as a matter of choice, replacing U.S. workers with foreign workers, such an action would be contrary to the purpose of the visa category and could invalidate the labor certification.

Moreover, the beneficiary claims on the ETA Form 9089 that he has been working for the petitioner in the proffered position since October 1, 2000. The record contains the beneficiary's W-2 forms issued by the petitioner for 2001 through 2005 and paystubs for 2006. Counsel did not submit an explanation how the beneficiary will replace [REDACTED] while he is ready working in the position for the petitioner. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: "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." "Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition." The petitioner failed to establish its ability to pay the proffered wage from the priority date to the present through the replacement.

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 Sonogawa*, 12 I&N Dec. 612 (BIA 1967). The petitioning entity in *Sonogawa* 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 *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*,



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 submit the requested evidence and thus failed to establish its ability to pay the proffered wage for a single year. Furthermore, given the record as a whole, the petitioner's history of filing immigrant and nonimmigrant petitions, the AAO must also take into account the petitioner's ability to pay the petitioner's wages in the context of its overall recruitment efforts. 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 wages.

Therefore, the petitioner had not established that it had the ability to pay the instant beneficiary and all beneficiaries of the approved petitions the proffered wages from 2006 to the present through an examination of wages paid to the beneficiary, or its net income or its net current assets.

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. The director's January 28, 2008 decision is partially withdrawn, however, the petition remains denied.

