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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

[Redacted]

FILE: [Redacted]

Office: TEXAS SERVICE CENTER

Date:

**AUG 20 2010**

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker Pursuant  
to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 203 (b)(3)

ON BEHALF OF PETITIONER:

[Redacted]

**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.

Thank you,

Perry Rhew  
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 matter will be remanded to the director.

The petitioner is a construction firm. It seeks to employ the beneficiary permanently in the United States as a carpenter helper. As required by statute, a Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor (DOL), 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 and denied the petition accordingly.

On appeal, the petitioner, through counsel, submits additional evidence and contends that the petitioner has demonstrated its ability to pay the proffered wage and that the petition should be approved.

The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).<sup>1</sup>

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 other 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.

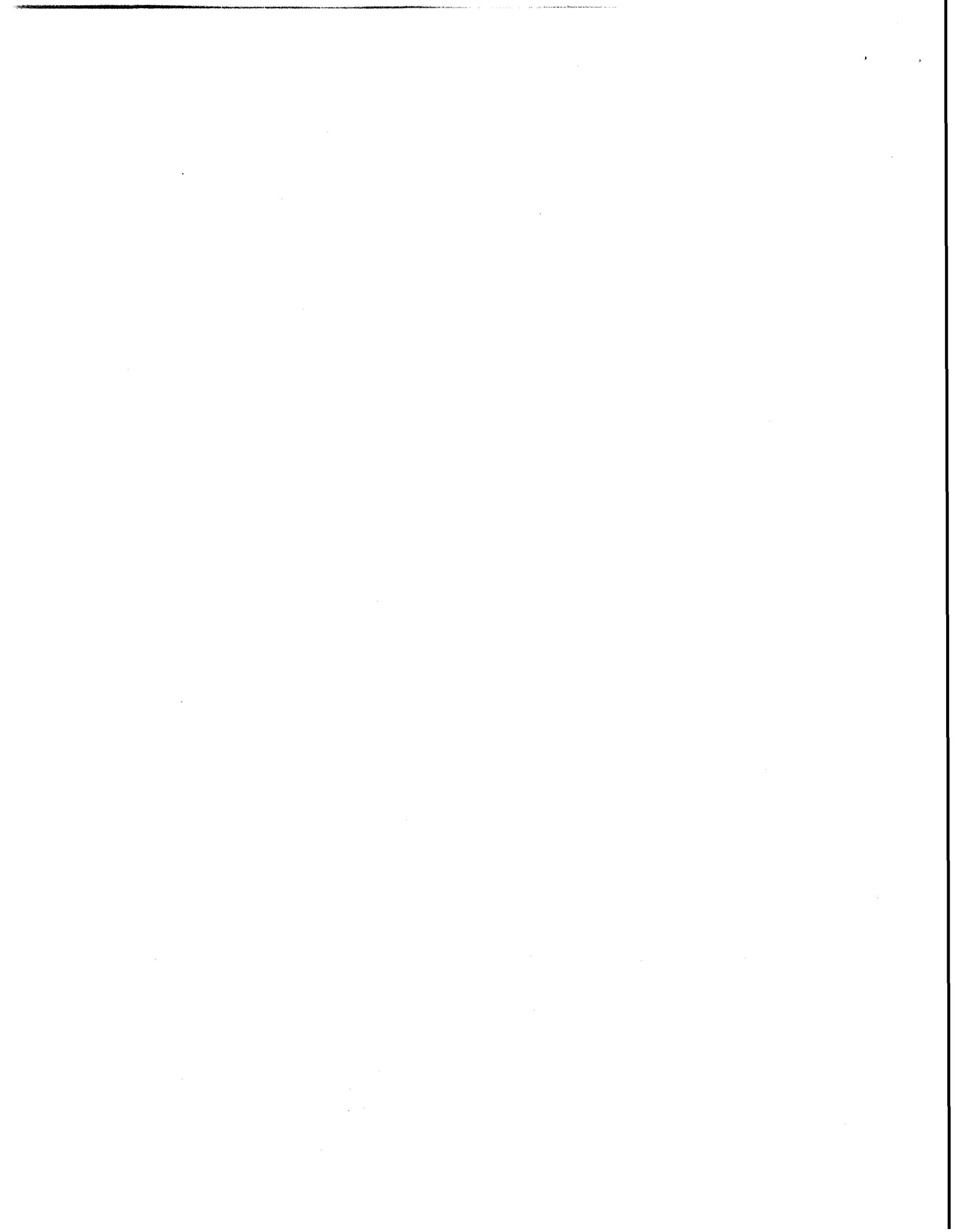
The regulation at 8 C.F.R. § 204.5(g) (2) states, in pertinent part:

*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.

The petitioner must demonstrate that it has the continuing financial ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within DOL's employment system. *See* 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted for

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<sup>1</sup>The procedural history of this case is documented in the record and is incorporated herein. Further references to the procedural history will only be made as necessary.



processing on April 28, 2003.<sup>2</sup> The proffered wage is stated as \$15.65 per hour, which amounts to \$28,483 per annum.<sup>3</sup> Part B of the Form ETA 750, signed by the beneficiary, indicates that he has worked for the petitioner since February 2000. The signature is not dated.

The Immigrant Petition for Alien Worker, (Form I-140) was filed on September 26, 2007. Part 5 of the petition indicates that the petitioner was established in 1995, claims a gross annual income of \$1,200,000 and employs seven workers.

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, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the overall 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).

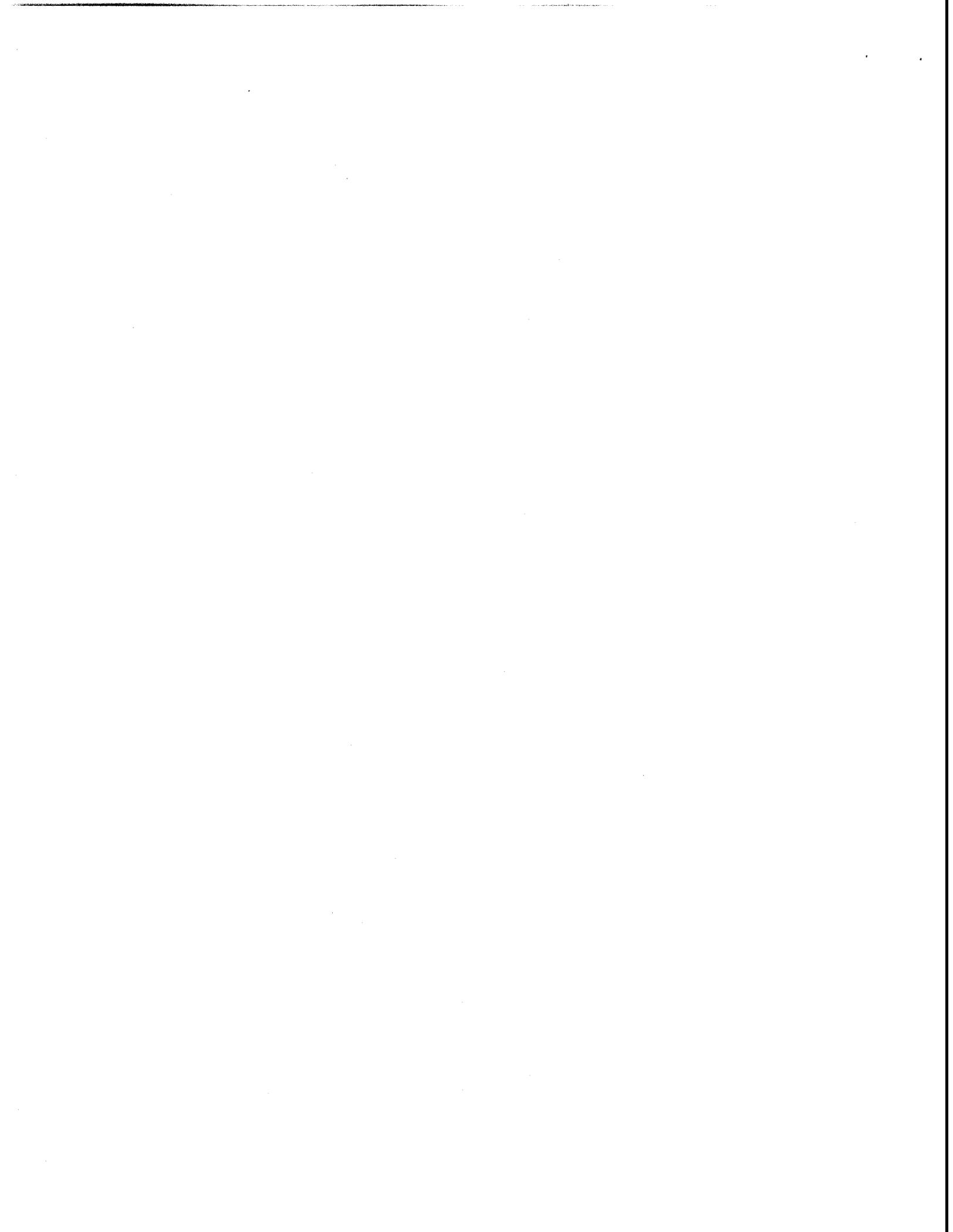
In support of its ability to pay the proffered wage of \$28,483, the petitioner provided copies of its 2003, 2004, 2005, 2006 and 2007 Form 1120S, U.S. Income Tax Return for an S Corporation to the underlying record and on appeal. They reflect that its fiscal year is a standard calendar year. The tax returns contain the following information:

Year	2003	2004	2005	2006
Net Income <sup>4</sup>	\$ 30,899	\$43,785	\$53,954	\$48,165

<sup>2</sup> 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, including a prospective U.S. employer's ability to pay the proffered wage is clear.

<sup>3</sup> As set forth on item 10 of Part A of the ETA 750, the proposed work week is 35 hours, so the calculation of the annual proffered wage is 35hrs x \$15.65 x 52 weeks.

<sup>4</sup> Where an S Corporation's income is exclusively from a trade or business, U.S. Citizenship and Immigration Services (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. 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 23 (2003) line 17e (2004,



Current Assets	\$ 14,441	-\$ 36,262	\$14,627	\$21,491
Current Liabilities	\$ -0-	\$ -0-	\$ -0-	\$ -0-
Net Current Assets	\$ 14,441	\$ 36,262	\$14,627	\$ 21,491

2007

Net Income	\$41,240
Current Assets	\$ 7,103
Current Liabilities	\$49,596
Net Current Assets	-\$42,493

Besides net income and as an alternative method of reviewing a petitioner's ability to pay a proposed wage, USCIS will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>5</sup> It represents a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid for that period. In this case, the corporate petitioner's year-end current assets and current liabilities are shown on Schedule L of its federal tax returns. Here, current assets are shown on line(s) 1 through 6 and current liabilities are shown on line(s) 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the corporate petitioner is expected to be able to pay the proffered wage out of those net current assets.<sup>6</sup>

Because the director had not received financial documentation for 2003 through 2006, he denied the petition on October 15, 2008, determining that the petitioner had failed to demonstrate its continuing financial ability to pay the proffered salary.

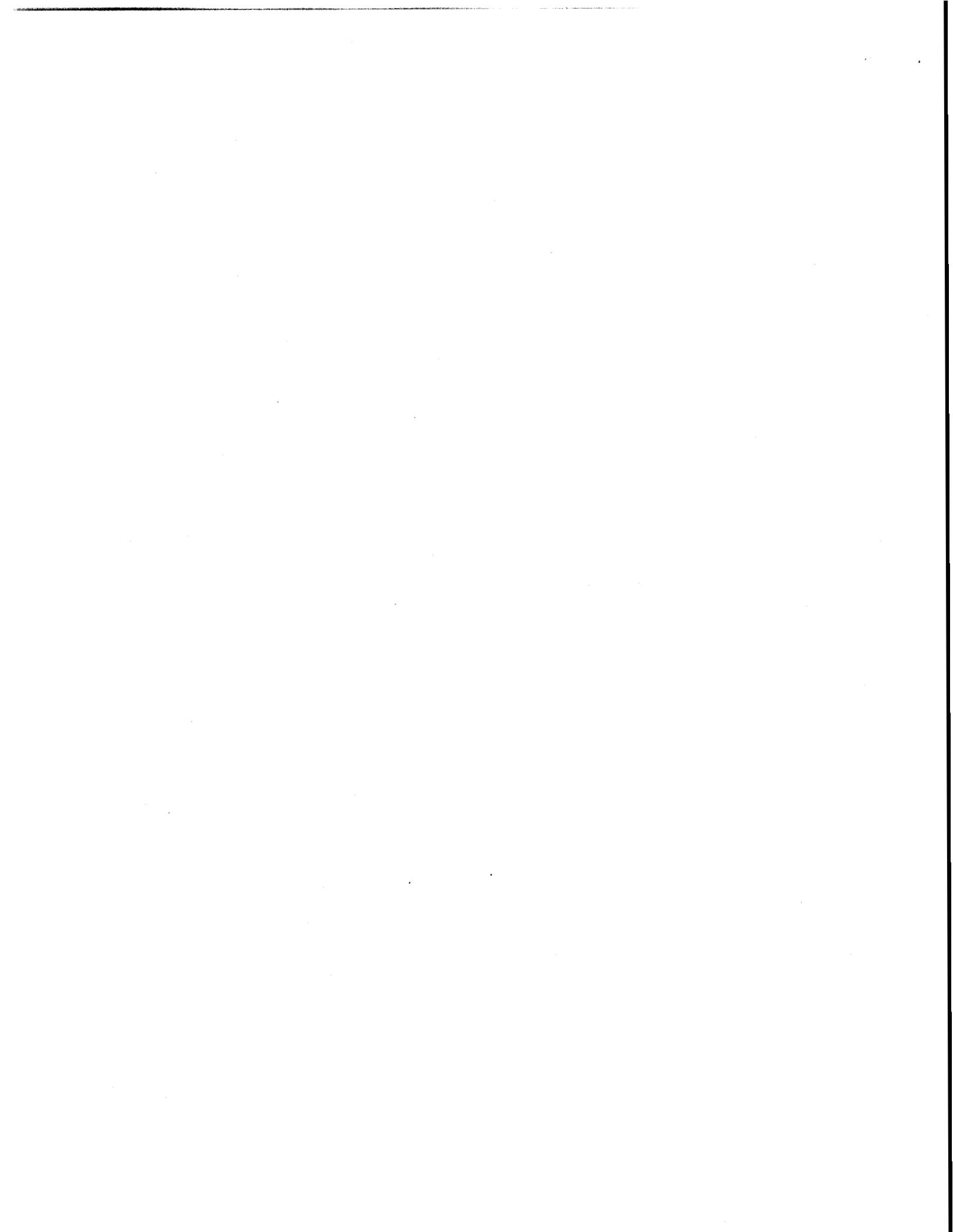
On appeal, counsel submits copies of the petitioner's 2003, 2004, 2005 and 2006. Counsel asserts that the beneficiary would suffer irreparable harm if the petition is not approved.

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2005) or line 18 (2006, 2007) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Here, the petitioner's net income is reflected on line 23 of Schedule K in 2003, line 17e in 2004-2005 and on line 18 in 2006 and 2007.

<sup>5</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

<sup>6</sup> A petitioner's total assets and total liabilities are not considered in this calculation because they include assets and liabilities that, (in most cases) have a life of more than one year and would also include assets that would not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage.



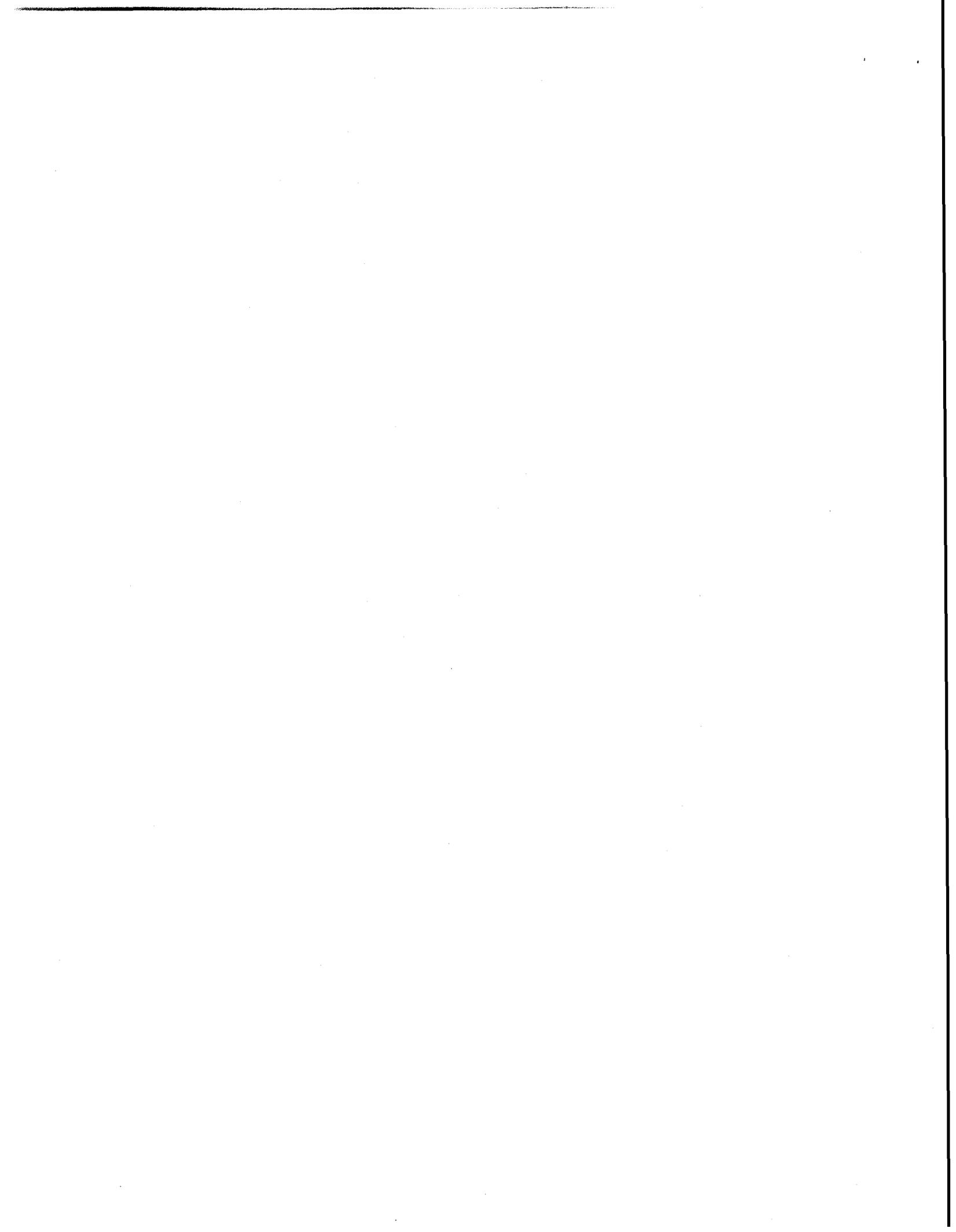
Counsel also contends that the petitioner's gross annual income supports the approval of the petition. Further, counsel maintains that the DOL has already certified the labor certification and approved the petitioner's ability to pay the certified wage.

At the outset, it is noted that USCIS has authority with regard to determining an alien's qualifications for preference status and the authority to investigate the petition, including the petitioner's ability to pay the proffered wage under section 204(b) of the INA, 8 U.S.C. § 1154(b). This authority encompasses the evaluation of the alien's credentials in relation to the minimum requirements for the job, even though a labor certification has been issued by the DOL. *Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9<sup>th</sup> Cir. 1983); *Stewart Infra-Red Commissary v. Coomey*, 662 F.2d 1 (1<sup>st</sup> Cir. 1981); *Denver v. Tofu Co. v. INS*, 525 F. Supp. 254 (D. Colo. 1981); *Chi-FengChang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 1989). DOL's focus is whether it can certify that the labor market lacks sufficient willing and qualified U.S. workers for the certified position and that the alien's employment will not adversely affect wages and working conditions of U.S. workers. See Section 212(a)(5)(A) of the Act, 8 U.S.C. § 1182(a)(5)(A).

Additionally, counsel cites no legal authority for his theory that the beneficiary's personal harm from the possible denial of an I-140 is pertinent in this matter. This issue may be relevant in other immigration proceedings, but it is not under consideration in this case.

In determining a petitioner's ability to pay a proffered salary, USCIS considers whether a petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage. If established, this evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage during a given period. To the extent that the petitioner may have paid the beneficiary less than the proffered wage, those amounts will be considered. If the difference between the amount of wages paid and the proffered wage can be covered by the petitioner's net income or net current assets for a given year, then the petitioner's ability to pay the full proffered wage for that period will also be demonstrated. Here, as noted above, although the ETA 750B suggests that the petitioner has employed the beneficiary, the petitioner has provided no first-hand evidence of wages paid to the beneficiary.

If a petitioner does not establish that it has employed and paid the beneficiary an amount at least equal to the proffered wage during the pertinent 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 (1<sup>st</sup> 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 (9<sup>th</sup> 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 (7<sup>th</sup> 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.

With respect to depreciation as claimed by counsel, 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* 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).

*Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), is sometimes applicable where other factors such as the expectations of increasing business and profits overcome evidence of small profits. That case, however relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonogawa* petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner was a well-known fashion designer who had been featured in *Time*



and *Look*. Her clients included movie actresses, society matrons and Miss Universe. The petitioner had 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, historical growth and outstanding reputation as a couturiere.

Although this petitioner was established in 1996, and has had some growth during the relevant years, it has also yielded negative figures for net current assets in 2004 (-\$36,262) and for 2007 (-\$42,493). Further, no detail or documentation has been provided that would clearly establish that such analogous circumstances to *Sonegawa* are present in this case that would support the approval of this petition on this basis. See *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Unlike the *Sonegawa* petitioner, the instant petitioner has not submitted sufficient evidence demonstrating that uncharacteristic losses, factors of outstanding reputation or other circumstances that prevailed in *Sonegawa* that are persuasive in this matter. The AAO can not conclude that the petitioner has established that it has had the continuing ability to pay the proffered wage.

It is noted that the petitioner's net income in 2003 (\$30,899), 2004 (\$43,785), 2005 (\$53,954), 2006 (\$48,165), and 2007 (\$41,240) initially appears to be sufficient to cover the beneficiary's proposed wage offer of \$28,483 in each of those years. However, an additional factor is present in this case. The petitioner has filed at least one other Form I-140 for a beneficiary. It was filed on June 27, 2007 and was approved on December 7, 2007, with a priority date of 2001.<sup>7</sup> Therefore, it was pending during the same time that the instant petition has been pending. Where multiple beneficiaries are sponsored, a petitioner must demonstrate that it has sufficient net income or net current assets as expressed in corporate federal tax return(s), audited financial statement(s) or annual report(s) sufficient to cover all of the respective wages of each sponsored beneficiary from each priority date until the beneficiary has obtained permanent residency. Alternatively, it must show that it has paid the respective proffered wage to each beneficiary as of the individual priority date. We found that as the record currently stands, it is unknown whether or to what extent the petitioner's net income or net current assets of the same tax returns was allocated to the other beneficiary and supported that petition's approval. For this reason, this case will be remanded to the director for further investigation and review.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director to conduct further investigation and request any additional evidence from the petitioner pursuant to the requirements of 8 C.F.R. § 204.5(g)(2). Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

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<sup>7</sup> The receipt number of this I-140 is [REDACTED]



**ORDER:** The director's decision is withdrawn. The petition is remanded to the director for further action consistent with the foregoing.

