

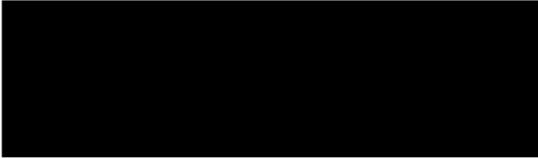
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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Office of Administrative Appeals, MS 2090  
Washington, DC 20529-2090

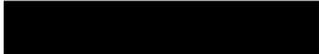


U.S. Citizenship  
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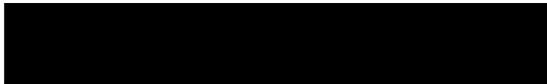


Office: TEXAS SERVICE CENTER

Date: AUG 25 2010

IN RE:

Petitioner:



Beneficiary:

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:



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 your 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

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**DISCUSSION:** The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an adult assisted living residence. It seeks to employ the beneficiary permanently in the United States as a nursing aide. As required by statute, an ETA Form 9089 Application for Permanent 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 ETA Form 9089 was accepted for processing by any office within DOL's employment system. The petitioner must also demonstrate that the beneficiary possessed the requisite education and experience as set forth on the ETA Form 9089. *See* 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977).

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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.



Here, the ETA Form 9089 was accepted for processing on April 28, 2006.<sup>2</sup> The proffered wage is stated as a range from \$8.00 to \$10.00 per hour. At \$8.00 per hour, the proposed wage offer amounts to \$16,640 per annum. Part H of the ETA Form 9089 also establishes that the beneficiary must have, at a minimum, a high school education and three months of experience in the job offered as a nursing aide. The job duties, as described on Part H-11 include basic patient care consisting of feeding, bathing, grooming, dressing, and moving the patients, as well as changing linens. The ETA Form 9089, which was signed by the beneficiary on May 10, 2006, does not indicate that the petitioner has employed her.

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 2000, claims a gross annual income of \$312,900, a net annual income of \$17,195 and employs eight workers.

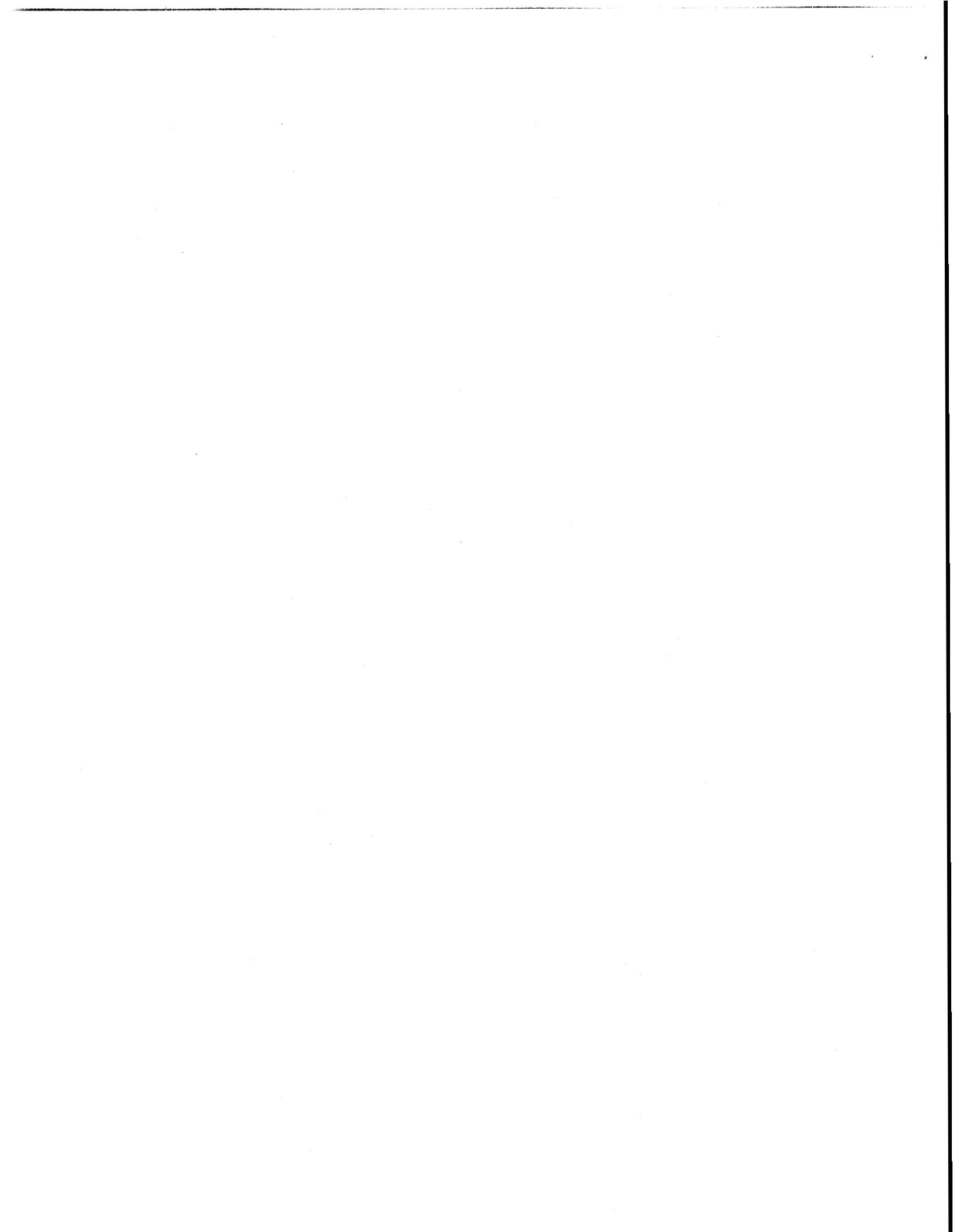
The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 9089, the petitioner must establish that the job offer was 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).

Further, where multiple petitions are filed, the petitioner is obligated to show that it has sufficient funds to pay the proffered wages to all the sponsored beneficiaries from their respective priority dates or in accordance with the regulation at 8 C.F.R. § 204.5(g)(2). Additionally, the petitioner would be obligated to pay each H-1B petition beneficiary the prevailing wage in accordance with DOL regulations, and the labor condition application certified with each H-1B petition. *See* 20 C.F.R. § 655.715. In this case, USCIS electronic records indicate that the petitioner filed at least one other I-140 on July 2, 2007.<sup>3</sup> It was approved on January 25, 2008 with a priority date of April 7, 2006. Therefore it was pending during the same period as the I-140 in this matter. The petitioner indicates that the proffered wage of that petition was also \$16,640 per year.

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<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>The petition was filed with receipt number SRC0721252731.



In support of its ability to pay the proffered wage of \$16,640, the petitioner provided copies of its 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	2006	2007
Net Income <sup>4</sup>	\$ 17,217	-\$ 4,734
Current Assets	\$ 17,307	-\$ 20,363
Current Liabilities	\$ 34,567	\$ 34,205
Net Current Assets	- \$ 17,260	-\$ 13,842

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>

<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, 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



In support of the corporate petitioner's ability to pay the proffered wage, the petitioner also provided a copy of the principal shareholders' 2007 individual Form 1040 income tax return. Also submitted is a copy of one of the shareholders' individual retirement savings statement, dated May 31, 2008, from Fidelity, as well as an unidentified online statement from BB&T, and a statement of individually held accounts from the Navy Federal Credit Union and Bank of America that are both dated June 9, 2008.

The director declined to consider the personal assets of the shareholders and concluded that the corporate petitioner had failed to establish its ability to pay the proffered wage.<sup>7</sup>

On appeal, counsel resubmits documentation supplied to the underlying record and additionally provides a copy of a letter from one of the petitioner's two shareholders, [REDACTED]. The letter states that the payroll has always been met and that additional cash can be provided if necessary. [REDACTED] affirms that she needs the beneficiary's services in order to increase revenue. Counsel asserts that because the petitioner is a Subchapter S corporation, the tax avoidance structure supports the attribution of the individual shareholders' assets to the corporate petitioner's ability to pay the proffered wage.

Although counsel asserts that the individual shareholders' assets should be attributable to the petitioner's ability to pay the proffered wage, it remains that the named employer certified on the ETA 9089 is a corporation and must establish its own continuing ability to pay the proffered salary. Counsel cites no legal authority compelling USCIS to view the value of a shareholder's individually held assets as indistinguishable from that of the corporation when evaluating a corporate petitioner's ability to pay the proffered wage. It is well settled that a corporation is a distinct legal entity from its owners or individual shareholders:

The corporate personality is a fiction but it is intended to be acted upon as though it were a fact. A corporation is a separate legal entity, distinct from its individual members or stockholders.

The basic purpose of incorporation is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, own it, or whom it employs.

A corporate owner/employee, who is a natural person, is distinct, therefore, from the corporation itself. An employee and the corporation for which the employee works are different persons, even where the employee is the corporation's sole owner. Likewise, a corporation and its stockholders are not one and the same, even though the number of stockholders is one person

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business and will not, therefore, become funds available to pay the proffered wage.

<sup>7</sup>The director erred in identifying the amount of the proffered wage. Part G-1 of the ETA Form 9089 identifies it as a minimum of \$8.00 per hour, not \$7.70 per hour.



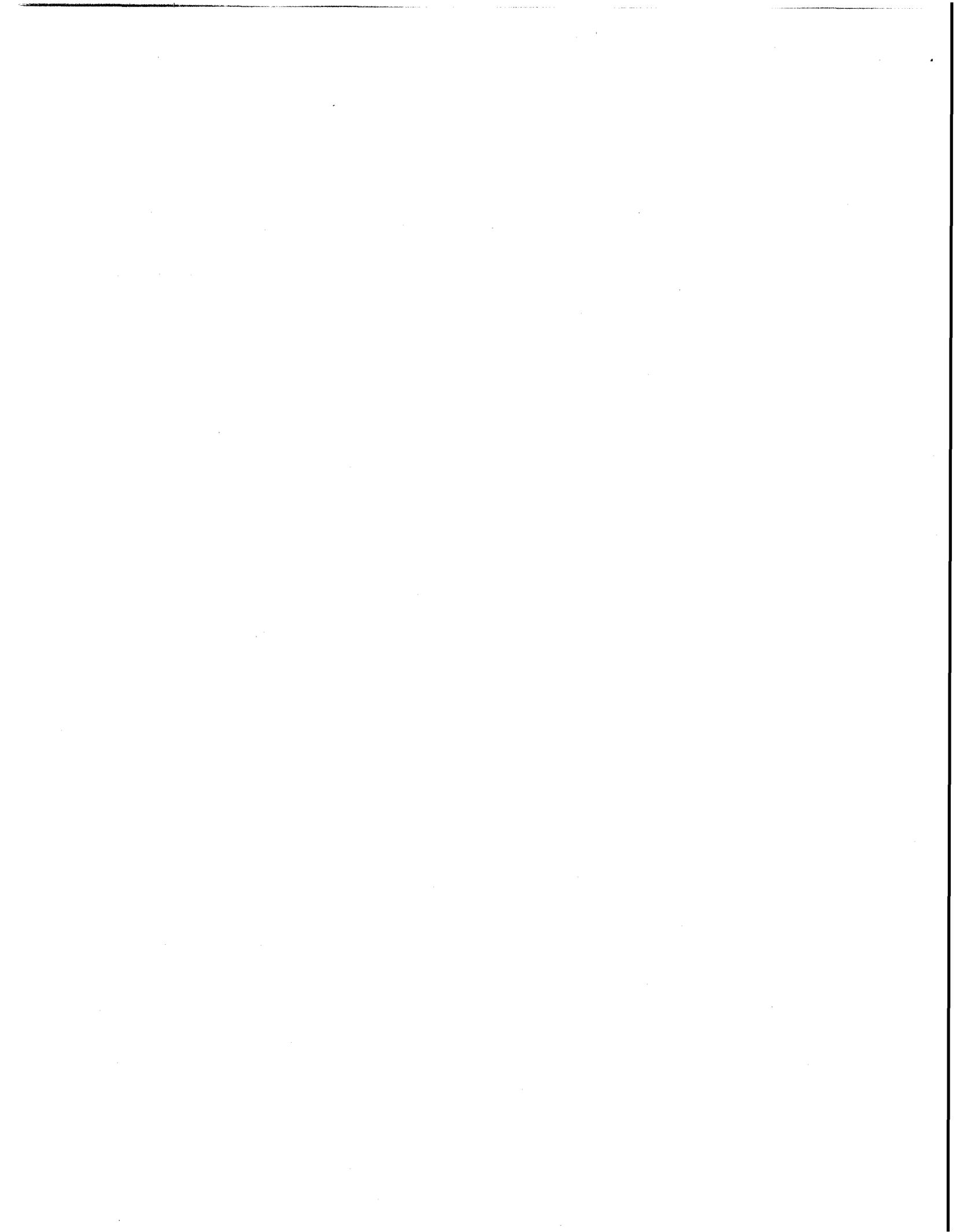
or even though a stockholder may own the majority of the stock. The corporation also remains unchanged and unaffected in its identity by changes in its individual membership.

In no legal sense can the business of a corporation be said to be that of its individual stockholders or officers. 18 Am. Jur. 2d *Corporations* § 44 (1985).

The court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) also considered whether the personal assets of one of a corporate petitioner's directors should be included in the examination of the petitioner's ability to pay the proffered wage. The petitioner in that case was a closely held family business organized as a corporation. In rejecting consideration of such individual assets, the court found that the petitioner had failed to rebut the principle that, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." It is concluded that the Mamarils' personal holdings will not be considered in determining the corporate petitioner's ability to pay the proffered wage.

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, the record does not establish that the petitioner has employed 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 (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.

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.

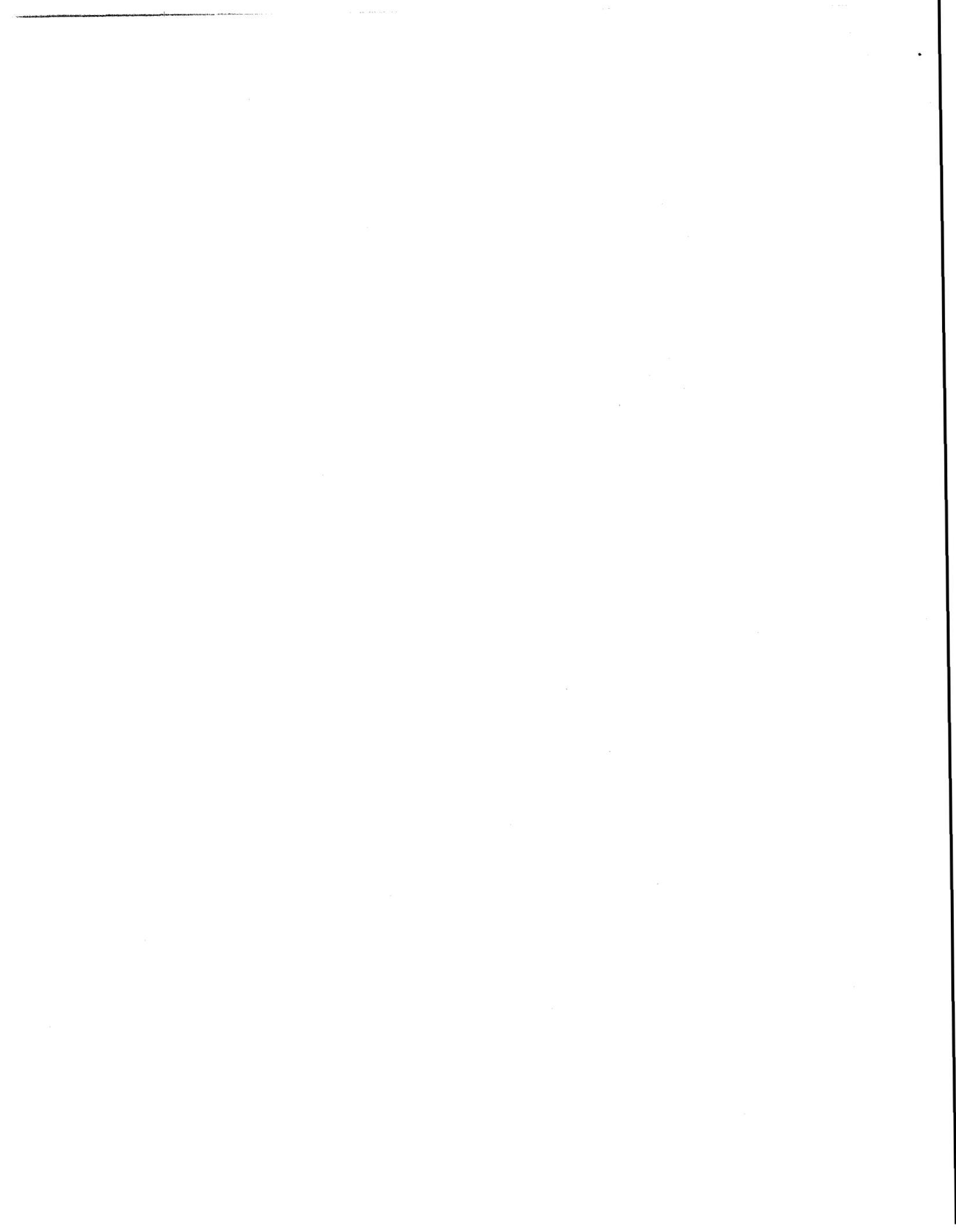
We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

*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).

As referenced above, the petitioner sponsored another beneficiary at the same proffered wage of \$16,640. The record does not reveal whether the petitioner had employed this beneficiary, but his address given on the I-140 suggests that no employment had commenced because he still resided in the Philippines. Therefore, for 2006, the petitioner's net income of \$17,217 could cover the first beneficiary's salary of \$16,640, but the remaining \$577 (after deducting \$16,640) was not sufficient to cover the instant beneficiary's wage of \$16,640. The petitioner's 2006 net current assets of -\$17,260 was similarly insufficient to cover the proffered wage.

In 2007, neither the petitioner's net income of -\$4,734, nor its net current assets of \$34,205 was sufficient to pay the proffered wage or establish the petitioner's ability to pay.

*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 *Sonegawa* 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.

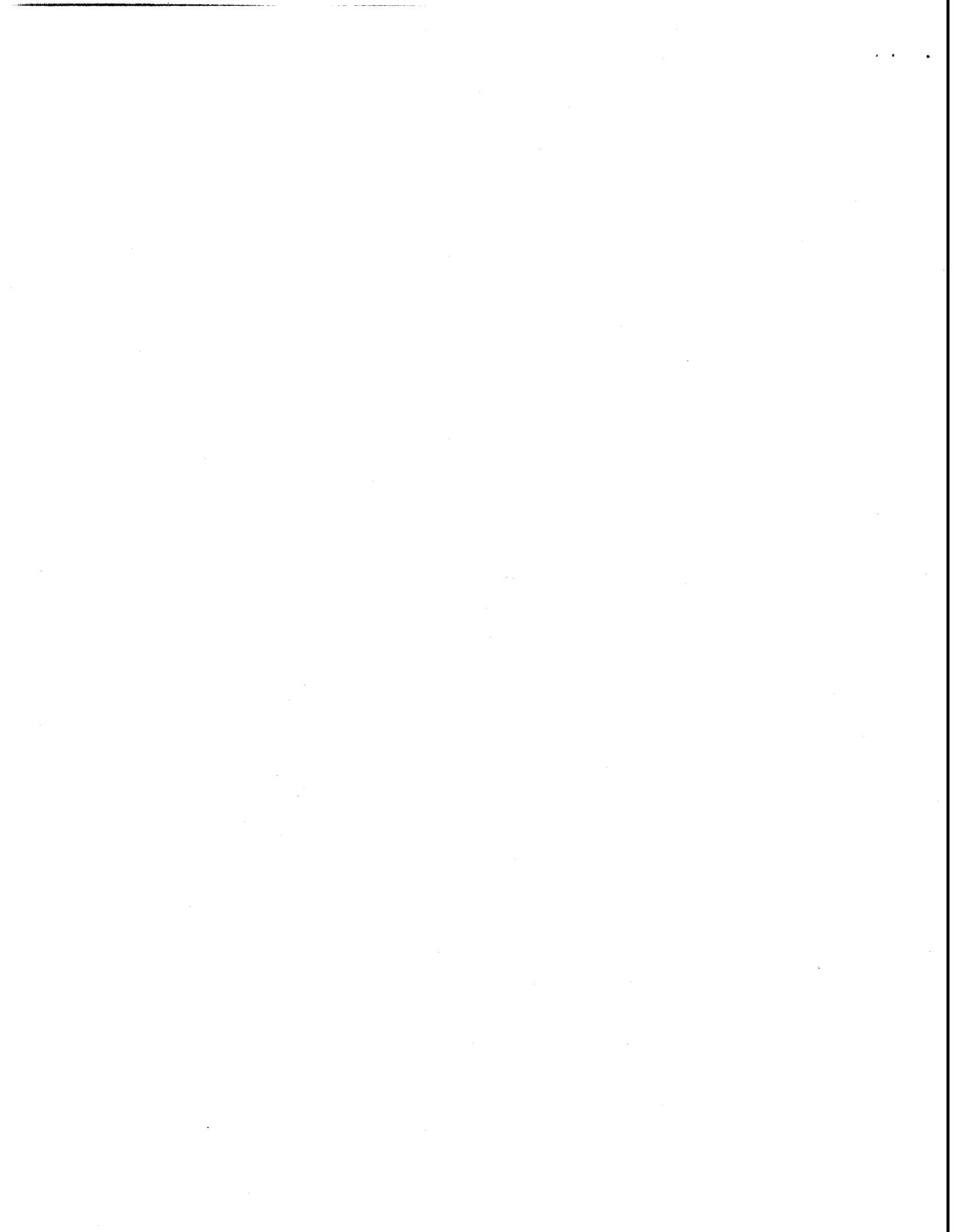
Although [REDACTED] affirmed that she would like to hire more help, no detail or documentation has been provided that would clearly establish that such analogous circumstances to *Sonegawa* are present in this case that would support the approval of this petition on this basis. Going on record without 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)). Further, from the two corporate tax returns submitted to the record, it is noted that from 2006 to 2007, the petitioner's declared gross income declined by \$55,644. 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 cannot conclude that the petitioner has established that it has had the continuing ability to pay the proffered wage.

Beyond the decision of the director, as noted above, the ETA Form 9089 requires three months of work experience in the job offered of nursing aide. The regulation at 8 C.F.R. § 204.5(l)(3) provides in relevant part:

(ii) *Other documentation*—

- (A) *General*. Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

A letter from the [REDACTED] dated January 5, 2006, is contained in the record. It is signed by the [REDACTED] [REDACTED] confirms that the beneficiary worked there from January 2, 2001 to October 15, 2006 as a nursing assistant, but fails to state whether this was part-time or full-time employment and



fails to describe the beneficiary's duties. This is not sufficient to confirm that the beneficiary possessed the requisite experience set forth by the terms of the ETA Form 9089. Further, it is noted that the beneficiary's description of the duties of this position as stated on Part K of the ETA Form 9089 do not describe any of the same duties as the ones set forth for the certified position. Rather, the beneficiary appeared to perform administrative duties as she states the job duties as, "[A]dmit patients and obtain clinical history. Keep medical record of patient. Refer patients needing further diagnostics and management by other agencies."

Finally, the record does not contain any documentation that the beneficiary possessed the required educational credentials for the certified position. Part H-4 of the Form ETA 9089 states that a high school education is the minimum educational requirement for the job. Part J-11 of the Form ETA 9089 states that the beneficiary possesses an associate's degree. However, no diploma(s) and corresponding grade transcript(s) is contained in the record. 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)).

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 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 Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(AAO's *de novo* authority supported by federal courts).

The petitioner has not established that it has had the continuing financial ability to pay the proffered wage. Further, the petitioner has not established that the beneficiary possessed the requisite work experience or education beginning as of the priority date.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER:** The appeal is dismissed.

