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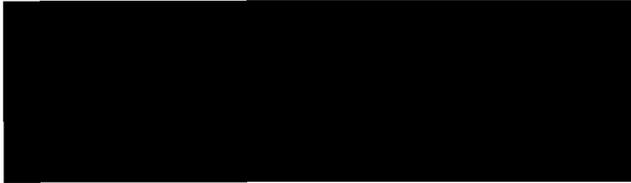
U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



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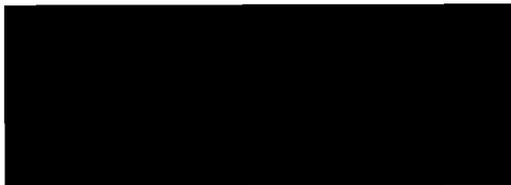
Office: NEBRASKA SERVICE CENTER

MAY 27 2010
Date:

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:



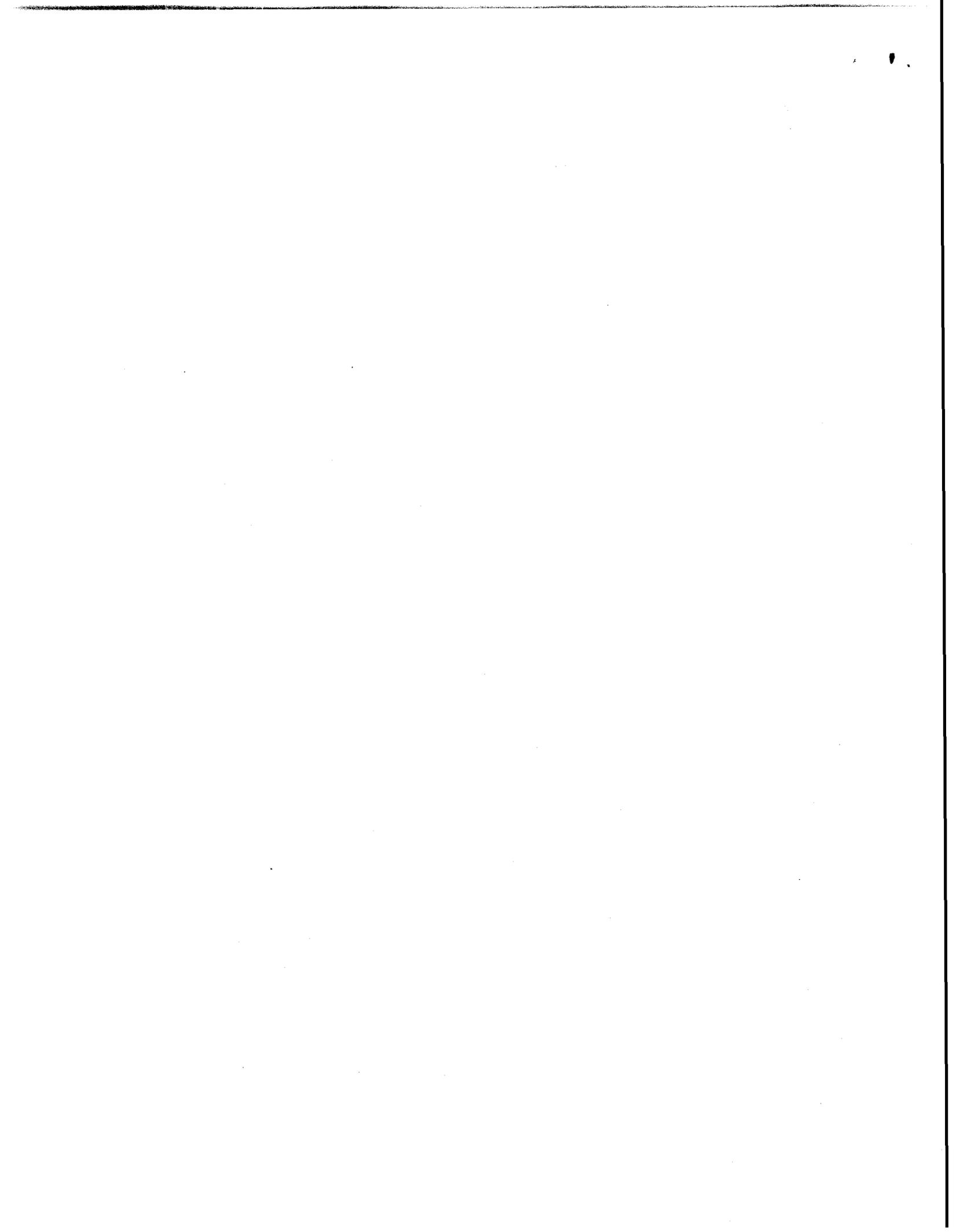
INSTRUCTIONS:

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



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

The petitioner is an information technology company, offering various network security products and services. It seeks to employ the beneficiary permanently in the United States as a programmer/analyst. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director denied the petition, finding that the beneficiary had not been paid the proffered wage since the priority date and that the petitioner did not have sufficient net income or net current assets to pay the promised wage, specifically in 2001, 2002, and 2003. The director also questioned the validity of the beneficiary's 4-year bachelor's degree.

The record shows that the appeal is properly filed, timely and makes a specific 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.

As set forth in the director's February 5, 2008 denial, the chief issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. A secondary issue is whether the beneficiary possesses the relevant 4-year degree to qualify for the prospective job identified by the director.

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. In addition, Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), grants 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(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 priority date, which is the date the Form ETA 750 was accepted for processing by any office within



the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

In the instant proceeding, the priority date fell on October 15, 2001, as that was the date when the Form ETA 750 was accepted for processing by the DOL.¹ The proffered wage stated on that form is \$79,830.40 per year. The Form ETA 750 further states that the position requires a minimum of a 4-year degree in computer system engineering and 2 years of work experience in the job offered. Further, the beneficiary reported on the Form ETA 750B that he has been working for the petitioner since April 2001.

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 appeal.²

The record includes the following evidence of ability to pay:

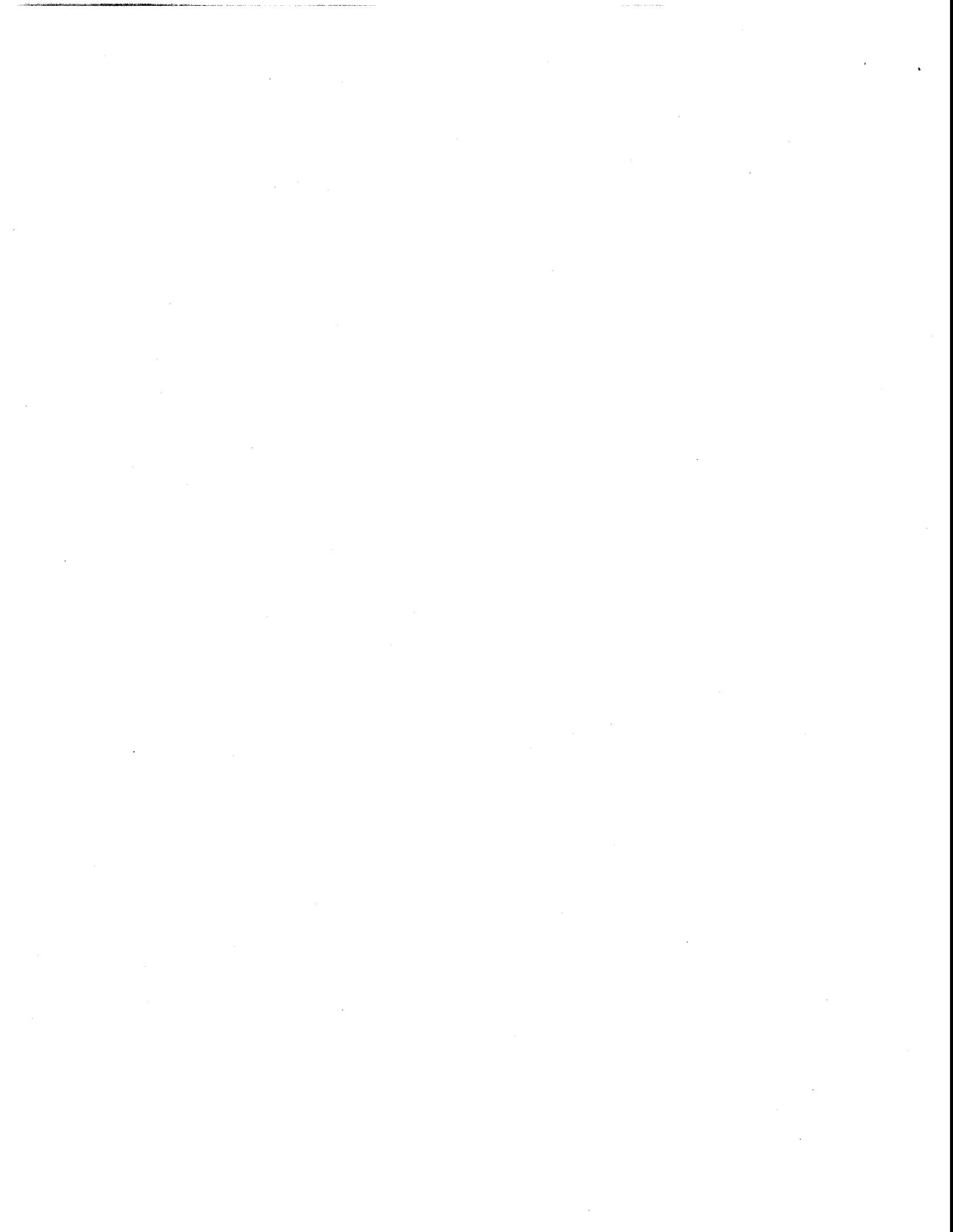
- A photocopy of the petitioner's certificate of incorporation³;
- Photocopies of IRS Forms 1120S, U.S. Income Tax Return for an S Corporation, for the years 2001 through 2006;⁴

¹ The AAO notes that the petitioner changed its name to [REDACTED] from [REDACTED] on the Form ETA 750 on September 22, 2003 and filed the instant petition using the new name. The DOL acknowledged this name change before certifying the Form ETA 750. The corporate tax return indicates that [REDACTED] owned 100% of the [REDACTED] shares in 2001 and the same Mr. [REDACTED] also signed the Form ETA 750 as the CEO/Founder of [REDACTED]. The current petition was signed in 2006 by Mr. [REDACTED], the sole owner and shareholder of [REDACTED] Inc. since 2003. In 2002, Mr. [REDACTED] became the President of the company and owned 75% of the company's shares.

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). 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).

³ The AAO observes that the petitioner filed an amendment with the New Jersey Department of Treasury, Division of Commercial Recording, on July 30, 2002 changing its business name from [REDACTED] to [REDACTED].

⁴ The AAO observes that the 2001 – 2005 tax returns herein submitted were filed by [REDACTED]. The petitioner's 2006 tax return was filed by [REDACTED]. A review of the tax returns indicates that both [REDACTED] and [REDACTED] use the same federal employer identification number. For purposes of determining whether the petitioner has the ability to pay the proffered wage, based



- Photocopies of the company's balance sheets for 2003, 2004, and 2005;
- Photocopies of the beneficiary's W-2s for the years 2001 through 2006⁵;
- Photocopies of the beneficiary's pay stubs for 2007; and
- Photocopy of an academic equivalency evaluation dated January 5, 2006.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1997 and to currently employ 27 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the Form 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 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).

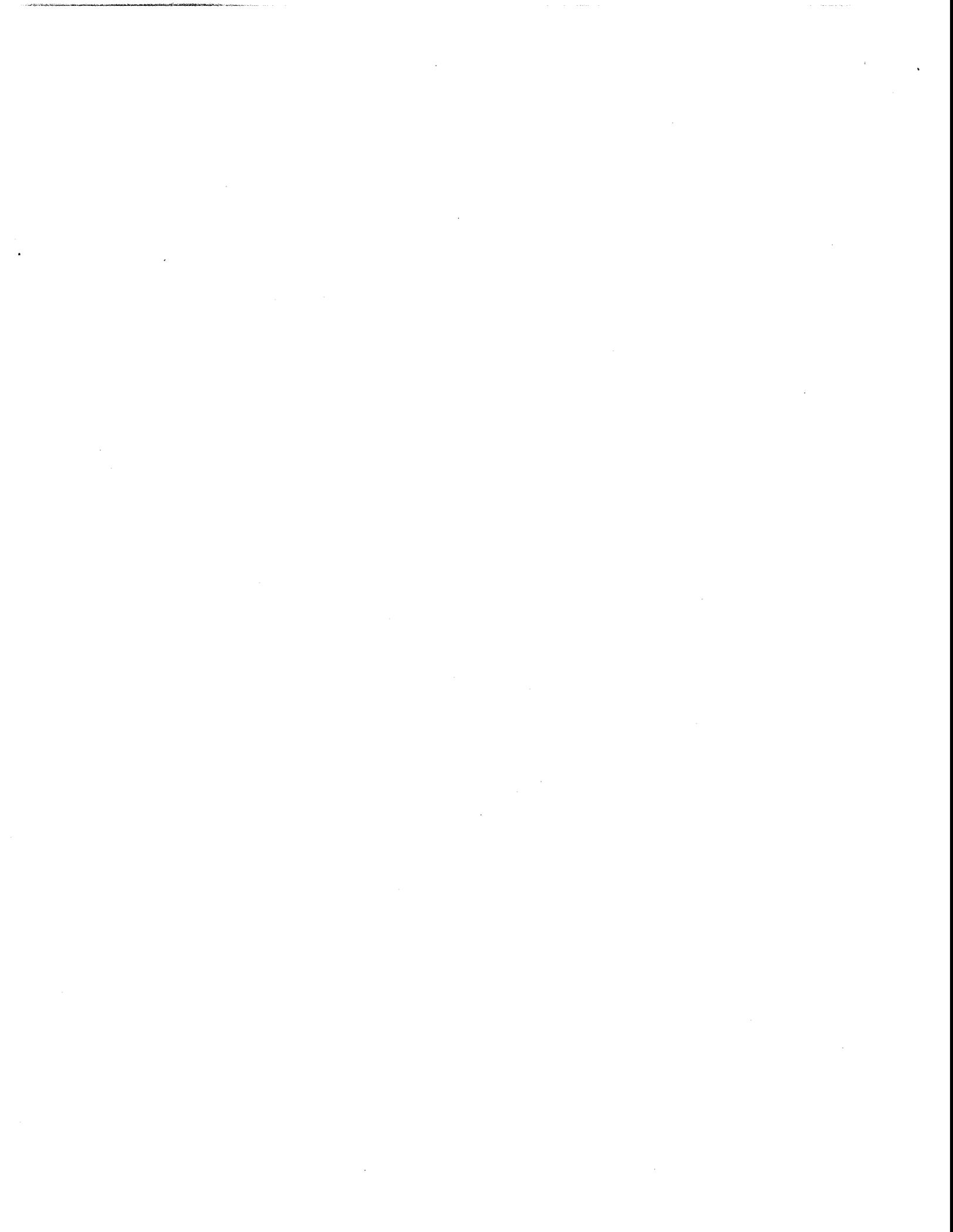
In determining the petitioner's ability to pay the proffered wage during a given period, the AAO will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to 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, although the petitioner has established that it employed the beneficiary continuously from 2001, it has not established that it paid the beneficiary his full proffered wage or \$79,830.40 per year during any relevant timeframe except in 2007. The W-2 forms submitted show that the beneficiary received the following wages from the petitioner:

- In 2001, the beneficiary received \$36,538.52 (\$43,291.88 less than the proffered wage).
- In 2002, the beneficiary received \$50,000.08 (\$29,830.32 less than the proffered wage).
- In 2003, the beneficiary received \$50,000.08 (\$29,830.32 less than the proffered wage).

on the evidence currently of record in this case, the AAO accepts that [REDACTED] and Imaginex, Inc. are the same corporate entity.

⁵ The AAO observes that [REDACTED] issued the Forms W-2 to the beneficiary between 2001 and 2003 and [REDACTED] issued the Form W-2 from 2003 onward, consistent with the corporation change of name in 2002.



- In 2004, the beneficiary received \$49,458.08 (\$30,372.32 less than the proffered wage).
- In 2005, the beneficiary received \$56,365.93 (\$23,464.47 less than the proffered wage).
- In 2006, the beneficiary received \$71,293.68 (\$8,536.72 less than the proffered wage).
- In 2007, the beneficiary received \$85,769.31.

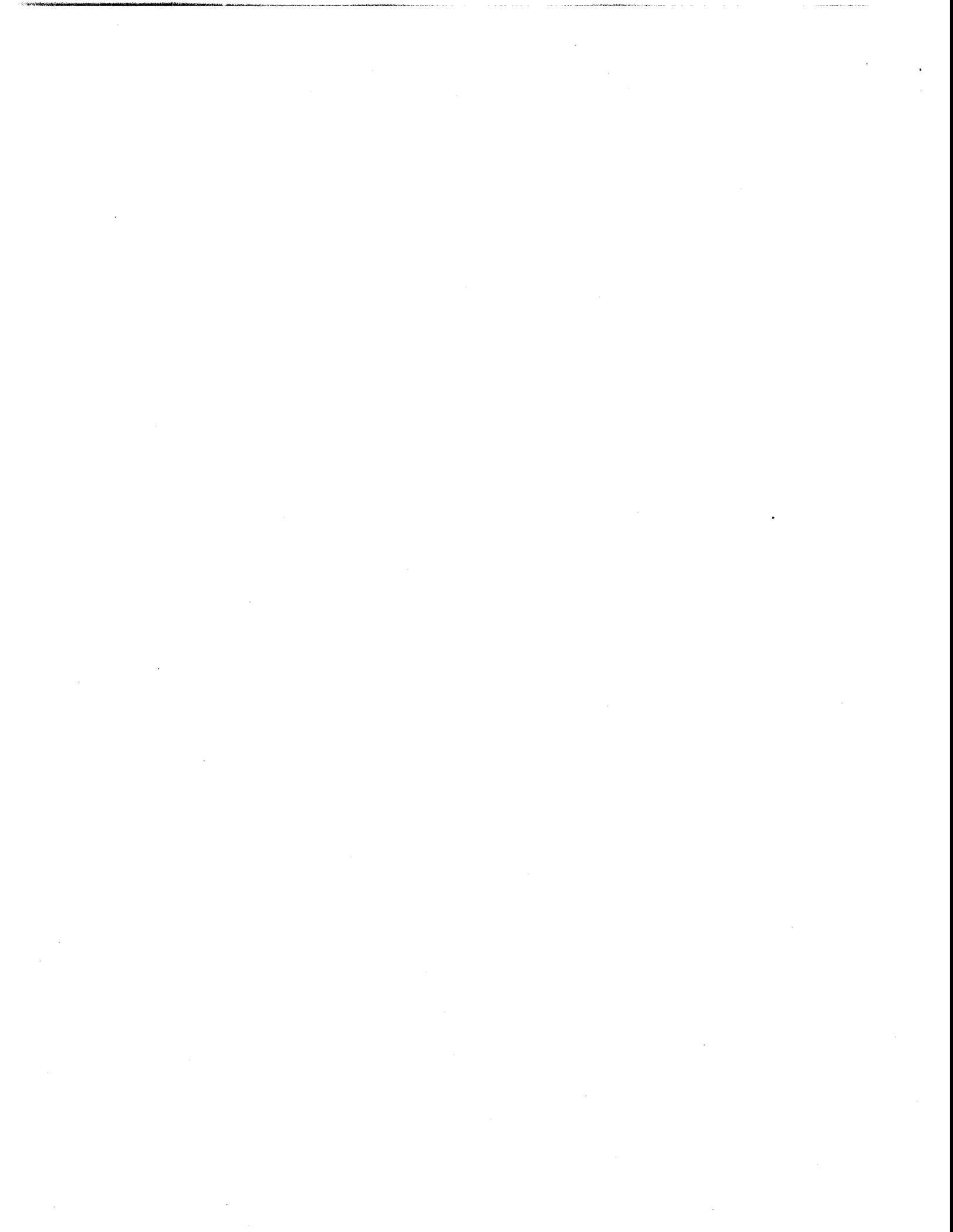
As stated earlier, failing to pay the amount equal to or greater than the proffered wage at any time period during the qualifying period, from the priority date through the date the beneficiary obtains a lawful permanent residence status, is *prima facie* evidence of the petitioner's inability to pay the proffered wage. However, the AAO recognizes that the petitioner has paid partial wages since the priority date, and therefore, must establish that it can pay the difference between the wages actually paid to the beneficiary and the proffered wage, which is \$43,291.88 in 2001, \$29,830.32 in 2002 and 2003, \$30,372.32 in 2004, \$23,464.47 in 2005, and \$8,536.72 in 2006. The petitioner can close these gaps through its net income or net current assets.

If it chooses to close the gap by using its net income, the petitioner cannot include 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).

Based on the tax returns submitted, the petitioner’s net income (loss) is:

- -\$10,632.00 in 2001;⁶
- -\$39,324.00 in 2002;
- -\$146,080.00 in 2003;
- \$1,209.00 in 2004;
- -\$782,427.00 in 2005; and
- \$517,220.00 in 2006.

Therefore, the petitioner had sufficient net income to pay the difference between the wages actually paid to the beneficiary and the proffered wage only in 2006.

As an alternate means of determining the petitioner’s ability to pay the proffered wage, the AAO may review the petitioner’s net current assets. Net current assets are the difference between the petitioner’s current assets and current liabilities.⁷ A corporation’s year-end current assets are shown

⁶ The S Corporation’s net income (loss) is generally found on line 21 of IRS Form 1120S. However, if an S Corporation has income, credits, deductions, or other adjustments from sources other than a trade or business, USCIS should not use the figure on line 21 of the Tax Form 1120S as net income, but rather, consider net income to be the figure shown on line 23 (1997-2003), line 17e (2004-2005), or line 18 (2006) of Schedule K. See Instructions for Form 1120S, 2006, at <http://www.irs.gov/pub/irs-prior/i1120s--2006.pdf> (accessed on April 26, 2010) (indicating that Schedule K is a summary schedule of all shareholder’s shares of the corporation’s income, deductions, credits, etc.). In this case, the net income is found on line 21 of the Form 1120S for 2001, 2002, 2003, and 2005; line 17e, Schedule K for 2004; and line 18, Schedule K for 2006.

⁷ According 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



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 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 petitioner's tax returns demonstrate its end-of-year net current assets (liabilities) for the years 2001 through 2006, as shown in the table below.

- In 2001, the Form 1120S stated net current assets of \$0.00.
- In 2002, the Form 1120S stated net current assets of -\$78,122.00.
- In 2003, the Form 1120S stated net current assets of -\$262,806.00.
- In 2004, the Form 1120S stated net current assets of \$785,028.00.
- In 2005, the Form 1120S stated net current assets of \$937,032.00.

Based on that analysis, the AAO finds that the petitioner had sufficient net current assets to cover the difference between the proffered wage and the wages actually paid to the beneficiary in 2004 and 2005. Nevertheless, the petitioner had not established that it had the continuing ability to pay the beneficiary his proffered wage as of the priority date, specifically in 2001, 2002, and 2003.

On appeal, counsel states the director erred in that he failed to consider the totality of the petitioner's circumstances. For instance, the director failed to consider the company's abundant cash reserves as shown in the balance sheets submitted, expansion to Europe and Southern markets, structure, and flexibility in compensating its officer. Further, the director ignored the fact that the petitioner is and has been a successful, ongoing business that has employed and currently employs numerous workers and has always met its payroll obligations.

The AAO may also 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. 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.

Concerning the balance sheets submitted, the AAO observes that none of the balance sheets is audited. The regulation at 8 C.F.R. § 204.5(g)(2) specifically requires that the petitioner submit audited financial statements to show that it has ability to pay the promised wage. Because none of the balance sheets submitted conforms with the regulation, the AAO cannot accept these documents as evidence of the petitioner's ability to pay. Further, the petitioner's reliance on cash available in the business' checking and savings accounts are misguided. First, money available in the business checking and savings accounts 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, money available in the checking and savings accounts only show a snapshot of cash readily available 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 balance sheets 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 were considered above in determining the petitioner's net current assets.

The AAO notes that the company was first incorporated in 1998 and has been growing since 2001. The company recorded gross receipts of \$1.16 million in 2001, \$1.71 million in 2002, \$2.93 million in 2003, \$6.53 million in 2004, \$12.74 million in 2005, and finally \$16.96 million in 2006. With the steady rise in gross receipts, the company similarly steadily increased its expenditures on employees' wages/salaries during that period. However, the company does not report a similar increase in net income; instead the company reported substantial net losses from 2001 to 2005 before it reversed and had a significant profit in 2006.⁸ The financial performance of the company does not establish its ability to pay the proffered wage since the filing of the individual labor certification.

Responding to the director's request for additional evidence, Mr. [REDACTED] Inc., in addition to paying the beneficiary his annual salary, has made regular payments to Genera.⁹ Mr. [REDACTED] states that these payments, if added to the beneficiary's salary, are more than sufficient to cover the difference between the wages actually paid to the beneficiary and his proffered wage. The AAO cannot accept Mr. [REDACTED] assertion. First, no evidence has been presented to show that

⁸ In 2006, the company recorded \$517,220.00 net income. In 2001, 2002, 2003, 2004, and 2005 the company recorded \$10,632.00 net loss, \$39,324.00 net loss, \$146,080.00 net loss, \$1,209 net profit, and \$782,427.00 net loss, respectively.

⁹ Genera, according to Mr. [REDACTED] is a partner company that the beneficiary brought with him when he was initially hired. It received \$30,000, \$35,000, \$10,000, \$5-9,000 in 2001, 2002, 2003, and from 2004 to 2007, respectively, according to Mr. [REDACTED]



Genera exists. Further, no evidence has been submitted to establish that Genera's income should be treated as income to the beneficiary.

The petitioner also states that the company has expanded its business to Southern and European markets and has poured a substantial six-figure investment into these efforts. No concrete evidence of this expansion and investment, however, has been presented. The record does not contain any newspapers or magazine articles, awards, or certifications indicating the company's milestone achievements. Further, no evidence noting the company's reputation has been submitted. Unlike *Sonegawa*, the petitioner in this case has not shown any evidence reflecting the company's reputation or historical growth since its inception in 1998. Nor has it included any evidence of its milestone achievement. 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 director also determined that the record does not reflect that the beneficiary has the equivalent of a four-year college degree from an accredited university in the United States. The director stated that the record contains a copy of a certificate reading "degree" in computer and information system engineering. The director determined that the credential evaluation was not reliable without a copy of a diploma and transcript indicating that the beneficiary was awarded the equivalent of a bachelor's degree. The AAO agrees.

USCIS uses an evaluation by a credentials evaluation organization of a person's foreign education as an advisory opinion only. Where an evaluation is not in accord with previous equivalencies or is in any way questionable, it may be discounted or given less weight. *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988).

Looking at the totality of the evidence submitted and under the circumstances as described above, the AAO finds that the petitioner has not demonstrated by preponderance of the evidence that it has continuing ability to pay the proffered wage beginning on the priority date or that the beneficiary is qualified to perform the duties of the position. 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.

