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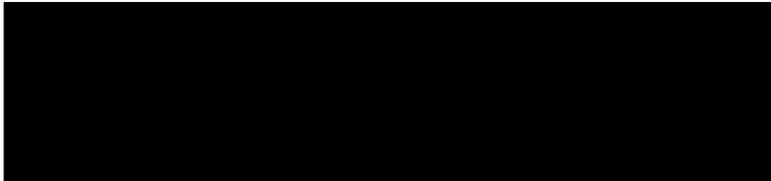
U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
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FILE:



Office: TEXAS SERVICE CENTER

**MAY 27 2010**  
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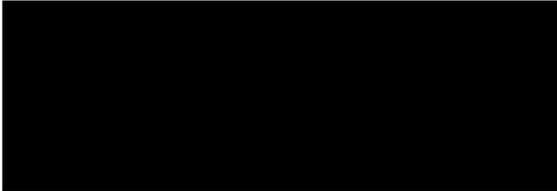
Petitioner:

Beneficiary:



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:



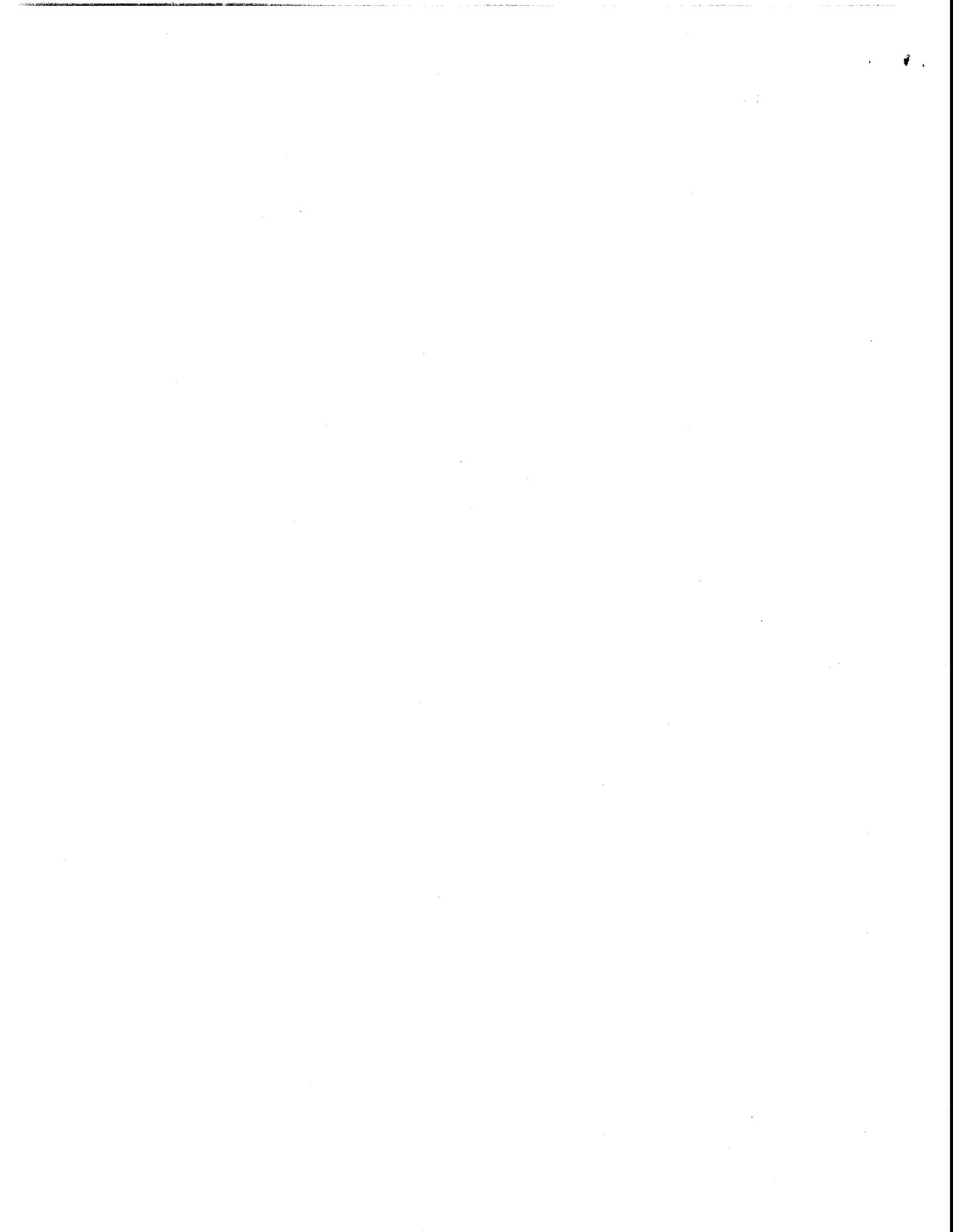
INSTRUCTIONS:

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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a scientist who owns a research and testing business. The business tests and certifies certain consumer-products and industrial-equipment to meet safety standards. The business also offers expert opinion on the cause of various traffic and industrial accidents. The petitioner additionally provides expert witness services in criminal proceedings involving murder, shootings, drowning, child abuse, drunk driving, hit and run, and assault with a deadly weapon. It seeks to employ the beneficiary permanently in the United States as a mechanical engineer and manager. 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 determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

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 March 19, 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.

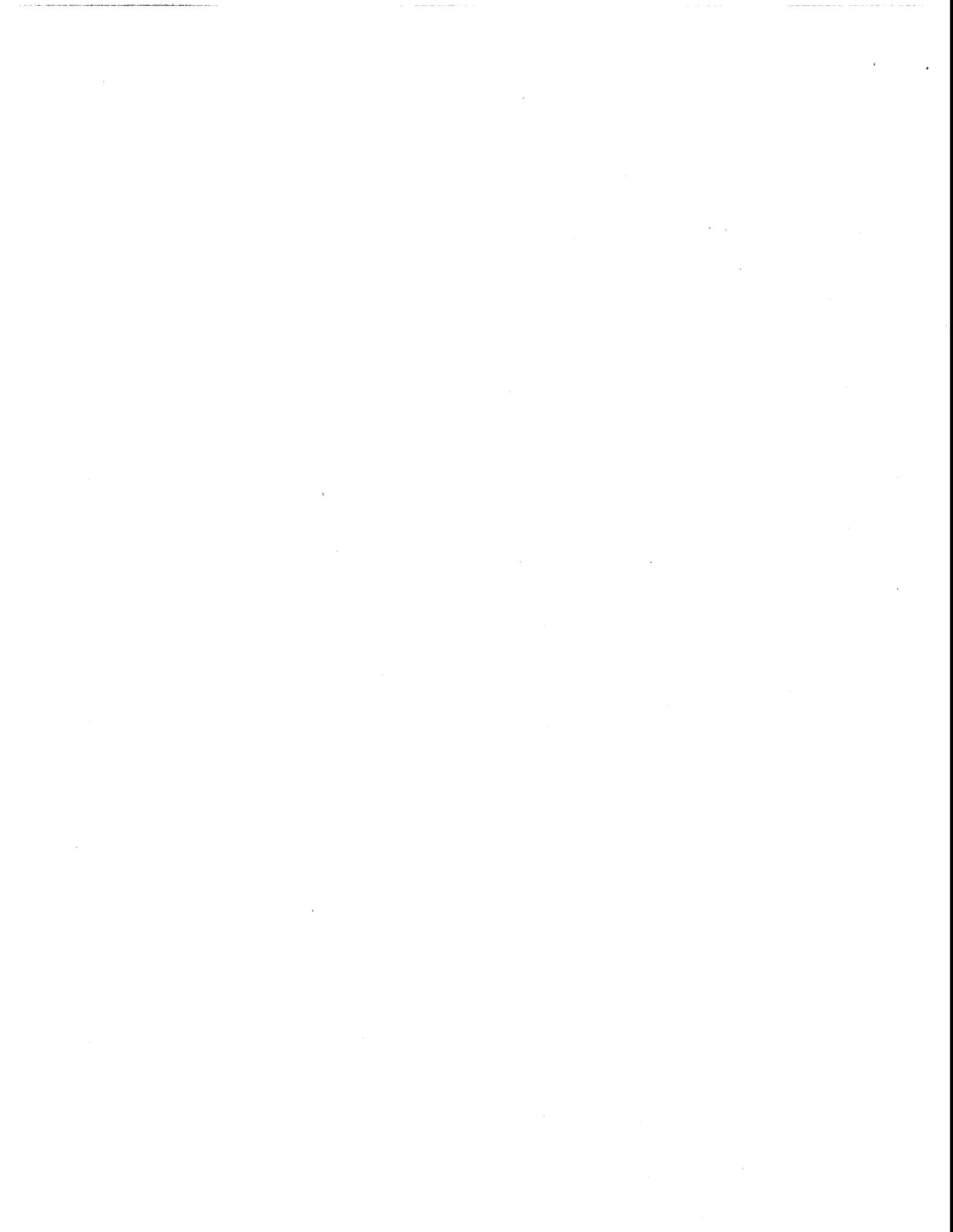
The facts of this case can be summarized as follows. The Institute of Risk and Safety Analyses or the petitioner filed a Form ETA 750 with the DOL on December 26, 2001. On June 21, 2007 the petitioner filed an Immigrant Petition for Alien Worker (Form I-140),<sup>1</sup> requesting classification of the beneficiary as a professional pursuant to Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii). Accompanying the petition was the approved Form ETA 750 that the petitioner had previously filed in December 2001. As evidence of ability to pay, the petitioner submitted photocopies of federal tax returns of the Laboratory of Risk and Safety Analyses ("the Laboratory") from 2001 to 2006.<sup>2</sup> The petitioner also submitted copies of the beneficiary's individual federal tax returns from 2001 through 2007 along with the W-2s that the beneficiary received from the Laboratory for those years.

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, 2004, 2005, and 2006.

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<sup>1</sup> The Employer Identification Number (EIN) of the Institute of Risk and Safety Analyses or the petitioner is [REDACTED]

<sup>2</sup> The EIN of the Laboratory is [REDACTED]



Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

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 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).

Here, the priority date fell on December 26, 2001, as that was the date when the Form ETA 750 was accepted for processing by the DOL. The proffered wage stated on that form is \$44.39 per hour, \$1,775.60 per week,<sup>3</sup> or \$92,331.20 per year. The Form ETA 750 further states that the position requires a bachelor's degree in mechanical engineering.

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).

The evidence in the record of proceeding shows that the petitioner is structured as a sole proprietorship. On the petition, the petitioner claimed to have been established in 1974 and to currently employ 25 workers. On the Form ETA 750B, signed by the beneficiary on November 30, 2001, the beneficiary claimed to have worked for the petitioner since November 1999.

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

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<sup>3</sup> The petitioner listed this figure as the beneficiary's wages per week on the Form I-140 part 6.



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, 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.

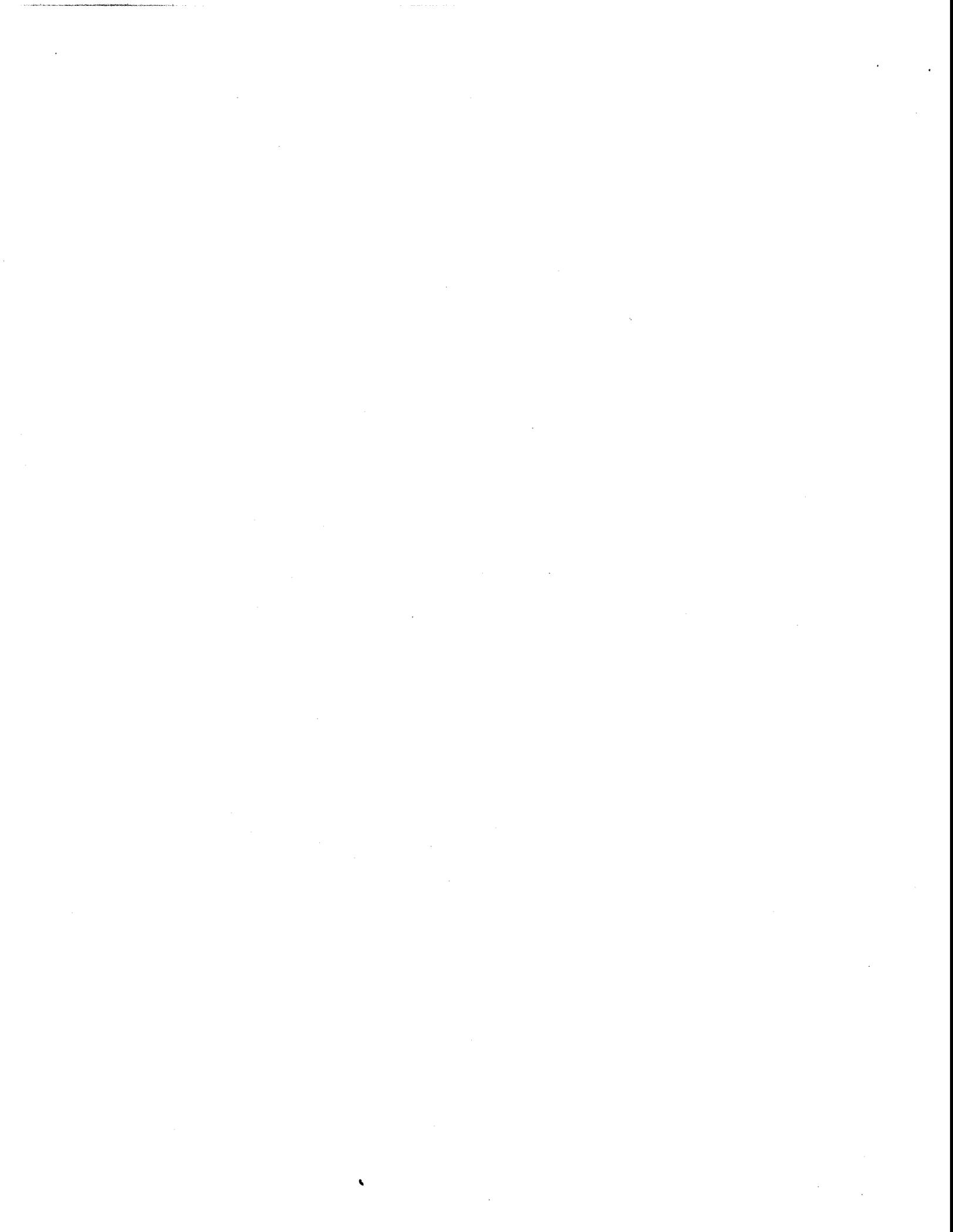
In the instant proceeding, the AAO finds that the petitioner has failed to establish that it employed and paid the beneficiary since the priority date in December 2001. Based on the evidence submitted, although the petitioner or the Institute of Risk and Safety Analyses filed the Form ETA 750 and the Form I-140 petition on behalf of the beneficiary, the petitioner submitted no evidence of its ability to pay the beneficiary the proffered wage. The beneficiary has been paid by the Laboratory of Risk and Safety Analyses, a corporation originally established by Mr. ██████████ in 1997,<sup>4</sup> since 2001.

It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. *See Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D. Mass. Sept. 18, 2003) stated, "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."

By submitting the Laboratory's tax returns as evidence of the petitioner's ability to pay, Mr. ██████████ essentially requested the director to look into his corporation's income and assets to show that the corporation has sufficient income and assets to pay the beneficiary's proffered wage. However, because a corporation such as the Laboratory in this case is a separate and distinct legal entity from its owner – Mr. ██████████ – the assets and income of the corporation cannot be considered in determining the petitioning individual's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D. Mass. Sept. 18, 2003) stated, "nothing in the governing

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<sup>4</sup> The AAO observes that the Laboratory is a separate and distinct entity from the petitioner or the Institute of Risk and Safety Analyses. Both the petitioner and the Laboratory have different EINs. A search of the California Secretary of State's website reveals that the Laboratory was incorporated on April 24, 1997. On appeal, Mr. ██████████ states that the Laboratory is a corporation operating under the Institute of Risk and Safety Analyses, the petitioner in this case.



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.”

Similar to the *Sitar* decision, because the Laboratory is not the petitioner, it has no legal obligation to pay the wage. Therefore, the AAO finds that the evidence from the Laboratory is not relevant and cannot be used to support the petitioner’s ability to pay the proffered wage, and that the petitioner has not established that it employed or paid the beneficiary continuously from 2001.

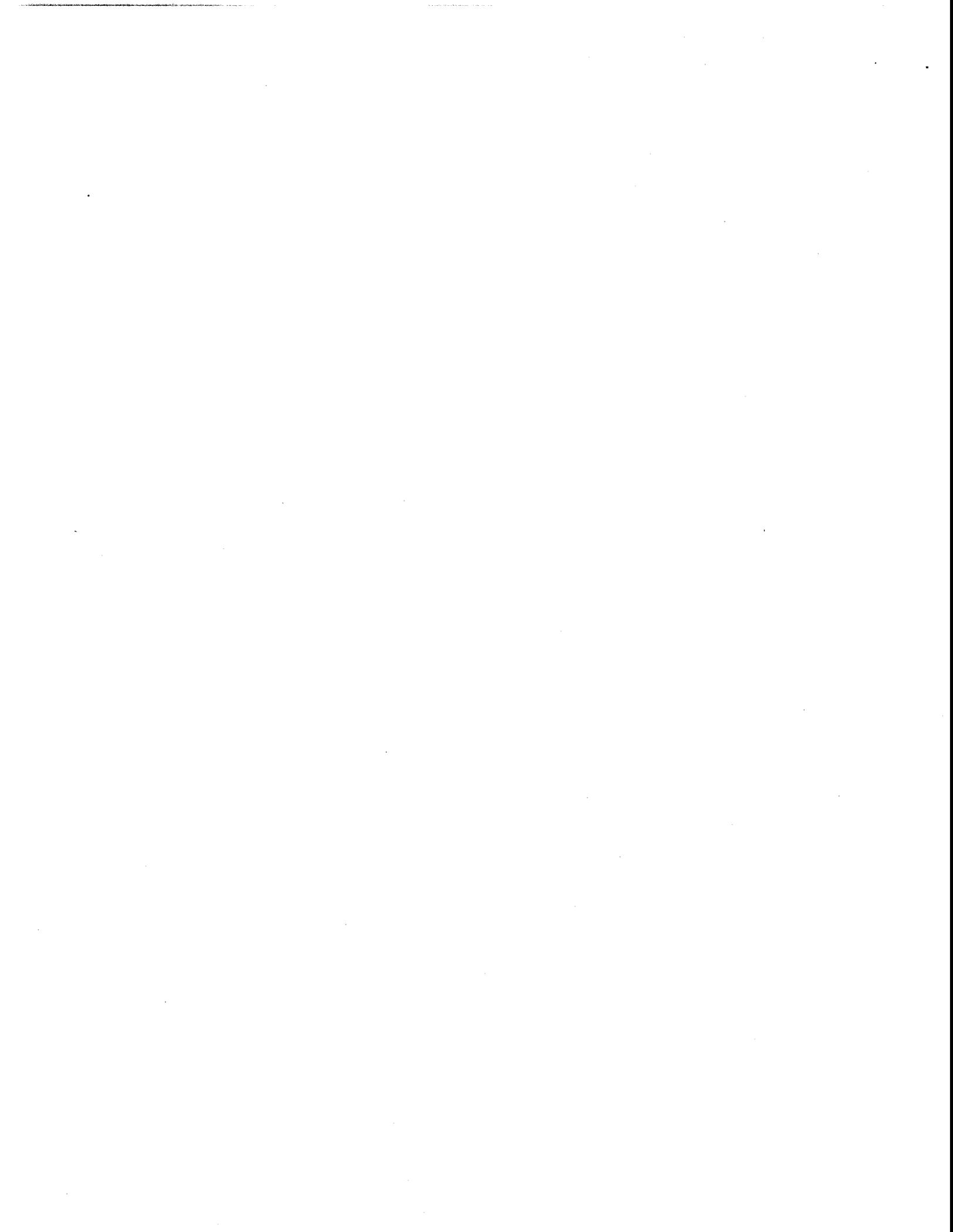
An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff’d*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

When the petitioner fails to 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).

As stated earlier, the petitioner in this case is a sole proprietorship, a business in which one person operates the business in his or her personal capacity. Black’s Law Dictionary 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. *See Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). Therefore the sole proprietor’s adjusted gross income, assets and personal liabilities are also considered as part of the petitioner’s ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff’d*, 703 F.2d 571 (7<sup>th</sup> Cir. 1983).

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of slightly more than \$20,000 where the beneficiary’s proposed salary was \$6,000 or approximately thirty percent (30%) of the petitioner’s gross income.

In the instant case, it is not clear how many people the sole proprietor has to support, as he has not



submitted his complete individual tax returns from 2001 to 2007. It is also not clear what his adjusted gross income, assets, and personal liabilities were during that period since the petitioner or the sole proprietor only submits the Schedule C for the Institute of Risk and Analyses for the 2001 – 2006 period. Therefore, the AAO concludes that the petitioner has failed to establish by a preponderance of the evidence that it has the continuing ability to pay the proffered wage.

On appeal, Mr. [REDACTED] maintains that he has the continuing ability to pay the proffered wage. He asserts that his business, the Institute of Risk and Safety Analyses, has been generating sufficient funds to pay the proffered wage of the beneficiary since the priority date. Submitted as evidence are copies of Mr. [REDACTED] 2001 – 2006 Form 1040, Schedule C for the Institute of Risk and Analyses.<sup>5</sup> Because the petitioner has failed to submit the Forms 1040 in their entirety, it cannot be determined that it has the ability to pay the proffered wage. The sole proprietor's adjusted gross income, assets, and personal liabilities must also be considered as part of the petitioner's ability to pay. These figures do not appear on Schedule C.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. See *Matter of Sonegawa*, 12 I&N Dec. 612. 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.

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<sup>5</sup> The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal. 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).



In the instant case, no evidence, however, has been presented to show that the petitioner has as sound and outstanding reputation as in *Sonegawa*. Unlike *Sonegawa*, the petitioner in this case has not shown any evidence reflecting the business' reputation or historical growth. Nor does it include any evidence or detailed explanation of its milestone achievements. The petitioner does not show any uncharacteristic business expenses or losses contributing to its inability to pay the proffered wage. Its argument that the beneficiary can be paid from the profits of the petitioner's business as reflected on Schedule C is erroneous in that such argument ignores the reality that Schedule C income may only be considered as part of the sole proprietor's gross income, assets, and personal liabilities as reflected on the complete Form 1040 tax returns for the years in question.

Therefore, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage. The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. 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.

