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

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: JAN 12 2010

LIN 06 199 52866

IN RE: Petitioner: [redacted]
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:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. 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. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. § 103.5(a)(1)(i).

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 a dry cleaner. It seeks to employ the beneficiary[1] permanently in the United States as an alteration tailor. 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 2002 priority date of the visa petition. The director denied the petition accordingly.

The record shows that the appeal is properly filed and 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 June 21, 2007 denial, the single 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.

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.

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, Application for Alien Employment Certification, 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, Application for Alien Employment Certification, 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).

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[1] The beneficiary is substituted for [redacted], the original beneficiary.

Here, the Form ETA 750 was accepted on May 8, 2002.[2] The proffered wage as stated on the Form ETA 750 is $12.75 an hour, $26,520 per year. The Form ETA 750 states that the position requires two years of work experience in proffered job.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[3]

The evidence in the record of proceeding shows that the petitioner is structured as a sole proprietorship for tax years 2002 to 2005, and as an S corporation as of tax year 2006.[4] On the petition, the petitioner claimed to have been established on January 20, 2000, to have a gross annual income of $288,397, a net annual income of $37,543 and to currently employ three workers. On the Form ETA 750B, signed by the beneficiary on June 20, 2006, the beneficiary did not claim to have worked for the petitioner.

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 totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

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[2] The cover sheet for the Form ETA 750 states that June 8, 2002 is the date of acceptance for processing. However, the Form ETA 750, Part A indicates that the form was received on May 8, 2002.

[3] 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).

[4] The petitioner stated in its response to the director's RFE dated April 20, 2007 that the petitioner was incorporated as a S Corporation as of May 1, 2006, and submitted a Form 1120S, U.S. Tax Return for an S Corporation, for tax year 2006. This return is for [redacted] at the same address as the sole proprietor. If the petitioner pursues this matter further, it should provide such documentation of its incorporation as an S corporation to the record.

With the initial petition, the petitioner submitted unaudited balance sheets prepared by [redacted], for tax years 2002 to 2005. In these balance sheets, [redacted] combined the petitioner's accounts receivable and cash to calculate the petitioner's current assets. Counsel's reliance on unaudited financial records is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

Further, in its response to the director's RFE dated January 29, 2007, the petitioner submitted an itemized statements of household expenses for the years 2002 to 2005. For tax years 2002 to 2005, he then combined the net income, or adjusted gross income on the Forms 1040 with a sum he described as net current assets. This sum consists of the current assets and current liabilities listed on the balance sheets. For example, for tax year 2003, the petitioner calculated its combined available funds to pay the proffered wage as $63,080, and subtracted its annual household expenses of $35,040 from this figure. It then determined that it had $28,040 with which to pay the proffered wage.

In his decision dated June 21, 2007, the director used the petitioner's analysis of its net current assets from the unaudited balance sheets[5] and the petitioner's adjusted gross income figures from page 1, of the petitioner's Forms 1040 to determine that the petitioner had neither sufficient adjusted gross income nor sufficient net current assets to pay both his expenses and the proffered wage. On appeal, counsel states that current rules, policy and accounting standards dictate that the petitioner's combined adjusted gross income and current net assets, excluding the petitioner's personal expenses, determine the sole proprietor's ability to pay the proffered wage. Counsel further states net current assets and adjusted gross income are different and separate forms of financial interest that the petitioner can use to show its ability to pay the proffered wage. As stated above, the AAO will not utilize the information on the unaudited balance sheets in its determination of the sole proprietor's ability to pay the proffered wage.

In his response to the director's RFE, the sole proprietor also stated it was only considering its ability to pay the pro-rated proffered wage in the 2002 priority year, or $15,300. The AAO will not, however, consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than it would consider 24 months of income towards paying the annual proffered wage. While USCIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, the

[5] In addition to utilizing the figures on the petitioner's unaudited balance sheets, the AAO notes that the director confused the analysis for a C corporation with that of a sole proprietorship. Since the petitioner was a sole proprietor until it incorporated as an S Corporation, the AAO will examine both analyses in these proceedings.

petitioner has not submitted such evidence. Further, the record indicates that the petitioner did not employ the beneficiary during the relevant period of time from 2002 to 2006.

On appeal, counsel submits a copy of a District Court decision, *O'Connor vs. Attorney General, of the United States,* (1987 WL 18243 (D. Mass) September 29, 1987. Counsel states that this decision stands for the principle that the personal assets and income of petitioners who are sole proprietors could be considered in determining the petitioner's ability to pay the proffered wage. Counsel asserts that the AAO by not allowing the combination of the sole proprietor's net current asset and his adjusted gross income in its evaluation of the petitioner's ability to pay the proffered wage violates the governing rules laid out in *O'Connor.* Counsel's assertion is not persuasive. While the AAO is not bound to the findings of a district court, it does acknowledge that the financial assets of a sole proprietor, such as savings accounts, money market accounts or other funds can be utilized to establish the sole proprietor's ability to pay the proffered wage. The AAO notes that in *O'Connor* the petitioner had income from a consulting business, proceeds from a real estate sale, and also other reported unearned income. In the instant matter, the sole proprietor's tax returns reflect no additional income, other than the dry cleaning operations.

In the instant petition, the petitioner submitted a copy of its Bank of America line of credit loan dated January 2007 and copies of the petitioner's Wachovia checking account statements for August 2006 to January 31, 2007. The AAO does not find these documents probative of the petitioner's ability to pay the proffered wage either structured as a sole proprietor or as an S corporation. First, the documents pertain to tax years 2006 or 2007, when the petitioner claims to be structured as an S corporation. Further, even while structured as an S corporation, USCIS will not augment the petitioner's net income or net current assets by adding in the corporation's credit limits, bank lines, or lines of credit. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. *See Barron's Dictionary of Finance and Investment Terms,* 45 (1998).

Since the line of credit is a "commitment to loan" and not an existent loan, the petitioner has not established that the unused funds from the line of credit are available at the time of filing the petition. As noted above, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak,* 14 I&N Dec. 45, 49 (Comm. 1971). Moreover, the petitioner's existent loans will be reflected in the balance sheet provided in the tax return or audited financial statement and will be fully considered in the evaluation of the corporation's net current assets. Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset. However, if the petitioner wishes to rely on a line of credit as evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position. Finally, CIS will give less weight to loans and debt as a means of paying salary since the debts will increase the firm's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation,USCIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer

and has the overall financial ability to satisfy the proffered wage. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

The petitioner's 2006 and 2007 bank statements reflect financial activities while the petitioner is structured as an S corporation, not as a sole proprietorship. Even if the petitioner had submitted financial instruments, such as bank savings statements or money market accounts, for tax years 2002 to 2005 while structured as a sole proprietorship, these available funds would have to be sufficient to cover the full or remaining proffered wage each month.

Counsel's reliance on the 2006 balances in the petitioner's bank account is also misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's 2006 bank statements somehow reflect additional available funds that were not reflected on its 2006 tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date in 2002 onwards.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

The petitioner is a sole proprietorship in tax years 2002 to 2005, 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 (7th 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, the sole proprietor supports a family of three. The proprietor's tax returns reflect the following information for the following years:

	2002	2003
Proprietor's adjusted gross income (Form 1040, lines 34 to 37)	$29,818	$33,413
	2004	2005
	$31,133	$34,891

In tax years 2002 to 2005, the sole proprietor's adjusted gross income covers the proffered wage of $26,230; however, the petitioner has minimal funds available to support him and two dependents, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage. It does not appear probable that the sole proprietor could both pay the proffered wage and pay annual household expenses based on its adjusted gross income. As stated previously, the record does not contain evidence of any further available funds during the period of time the petitioner was structured as a sole proprietor. Thus, the petitioner has not established its ability to pay the proffered wage in tax years 2002 to 2005.

In tax year 2006`, the petitioner is structured as an S corporation. As stated previously, if the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009).

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, 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).

The record before the director closed on April 20, 2007 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. The petitioner submitted its Form 1120S for tax year 2006 in its response to the director's RFE. The petitioner's income tax return for 2006 is the most recent return available. The petitioner's tax returns demonstrate its net income for 2006, as shown in the table below.

- In 2006, the Form 1120S stated net income[6] of $87,410.

[6] Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 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-pdf/i1120s.pdf (accessed *) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Because the petitioner had no additional income, credits, deductions, or other adjustments shown on its Schedule K for 2006, the petitioner's net income is found on line 21 of the Form 1120S.

Therefore, for tax year 2006, the petitioner did have sufficient net income to pay the proffered wage.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the 2002 priority date through an examination of wages paid to the beneficiary, or its adjusted or net income except for tax year 2006.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the DOL.

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 (BIA 1967). 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.

In the instant case, the sole proprietor was in business for two years prior to filing the instant Form ETA 750, and six years prior to filing the instant petition. The record has not further evidence as to the business's profile or reputation with in the industry, or other factors such as evidence that the beneficiary is replacing another employee with similar paid wages.[7] With regard to the tax years in

[7] The AAO notes that on appeal, counsel also submits the petitioner's Form 941, Employer's Quarterly Federal Tax Return for the last quarter of 2005. This document reflects that four employees earned $17, 360 for the quarter. An additional document entitled "State Unemployment Report" dated December 27, 2005 breaks down the quarterly wage figure and indicates that the four employees earned either $4,200 or $4,800 that quarter. These wages suggest that as of the last quarter of 2005, no employees were paid at the proffered wage level. Thus the record does not

which the petitioner was structured as a sole proprietor, the record contains no further evidence with regard to any additional funds available to pay the proffered wage. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

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.

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support the beneficiary replacing an employee who earns the same salary as the proffered wage.