(b)(6)

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

DATE OCT 1 0 2012 Office: NEBRASKA SERVICE CENTER FILE:

IN RE: 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:

SELF-REPRESENTED

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to 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 a bridal shop. It seeks to employ the beneficiary permanently in the United States as a hand embroiderer. As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent 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 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 July 8, 2009 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 ETA Form 9089, Application for Permanent 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 ETA Form 9089, Application for Permanent Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

Here, the ETA Form 9089 was accepted on April 30, 2001. The proffered wage as stated on the ETA Form 9089 is $10.77 per hour ($22,401.60 per year based on 40 hours per week). The ETA Form 9089 states that the position requires 24 months of experience in the job offered of hand embroidery.

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.[1]

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 1994 and to currently employ four workers. On the ETA Form 9089, which was not signed by the beneficiary or the petitioner, the beneficiary does 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 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA 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'l Comm'r 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'l Comm'r 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 case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date in 2001 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); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10,

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[1] 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).

2011). 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, 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'r 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. *See 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 petitioner 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.

The record before the director closed on June 4, 2009, with the receipt of the proprietor's submissions in response to the director's request for evidence (RFE) issued April 24, 2009. The proprietor submitted evidence that she requested an extension to file the 2008 tax return. Therefore, the 2007 tax return is the most recent return available.

In the instant case, the sole proprietor supported a family of five in 2001 and 2002 and a family of four from 2003 to 2007. The proprietor's tax returns reflect the following information for the following years:

- In 2001, the Form 1040 stated adjusted gross income[2] of $67,608.00
- In 2002, the Form 1040 stated adjusted gross income of $36,632.00
- In 2003, the Form 1040 stated adjusted gross income of $41,602.00
- In 2004, the Form 1040 stated adjusted gross income of $58,637.00
- In 2005, the Form 1040 stated adjusted gross income of $68,760.00
- In 2006, the Form 1040 stated adjusted gross income of $57,553.00

[2] The adjusted gross income on the proprietor's Forms 1040 is found on line 33 in 2001, line 35 in 2002, line 34 in 2003, line 36 in 2004, and line 37 in 2005 – 2007.

- In 2007, the Form 1040 stated adjusted gross income of $41,101.00

The sole proprietor's adjusted gross income exceeds the proffered wage of $22,401.60 in each year; however, the proprietor's monthly household expenses must be considered in determining whether or not the proprietor has the ability to pay the proffered wage. In the instant case, it is improbable that the sole proprietor could support herself and her family on a deficit, which is what remains after reducing the adjusted gross income by the amount required to pay the household expenses. The proprietor provided a list of monthly household expenses according to the table below.

Year	Adjusted Gross Income	Household Expenses	Balance Available to Pay Proffered Wage
2001	$67,608.00	$72,240.00	$0
2002	$36,632.00	$55,530.00	$0
2003	$41,602.00	$66,412.00	$0
2004	$58,637.00	$67,661.00	$0
2005	$68,760.00	$81,002.00	$0
2006	$57,553.00	$78,940.00	$0
2007	$41,101.00	$81,172.00	$0

The proprietor's adjusted gross income remaining after the payment of household expenses is not sufficient to pay the proffered wage of $22,401.60.

The proprietor's listing of expenses was accompanied by a personal financial statement listing her assets for each year from 2001 to 2008. These statements indicate that the proprietor has additional income available to pay the proffered wage including gambling income in 2001, cash in checking accounts in 2001 through 2008, a line of credit loan in 2002, and a prior year carry over in 2003 through 2008.

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.

The AAO also notes that the proprietor's claims of additional funds are not supported by evidence such as bank account statements, loan statements, or other probative evidence of the claimed additional financial resources. Further, the gambling income in 2001 included on the statement is already reported on the proprietor's 2001 Form 1040, and thus was considered in the analysis of adjusted gross income above.

In regard to the line of credit, USCIS will not augment the proprietor's adjusted gross income by adding in the proprietor'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* John Downes and Jordan Elliot Goodman, *Barron's Dictionary of Finance and Investment Terms* 45 (5th ed. 1998).

Since the line of credit is a "commitment to loan" and not an existent loan, the proprietor has not established that the unused funds from the line of credit are available at the time of filing the petition. 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'r 1971). Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset. Finally, USCIS will give less weight to loans and debt as a means of paying salary since the debts will increase the proprietor liabilities and will not improve her overall financial position. Although lines of credit and debt may be 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'l Comm'r 1977).

Further, the amounts listed as prior year carry over are not reflected on any of the tax returns and are not supported by any probative evidence.

On appeal, the proprietor asserts that: 1) the gross income of the business is sufficient to pay the proffered wage; 2) wages were included as Schedule C expenses; 3) she had more than enough funds to pay her personal expenses; 4) the line of credit was misclassified and was actually an accumulation of personal savings.

The AAO notes that the consideration of gross income without regard to expenses is not a reliable method of determining the proprietor's ability to pay the proffered wage. In addition, the analysis of the proprietor's adjusted gross income above fails to demonstrate sufficient funds to pay the proffered wage. The AAO also notes that the evidence in the record does not demonstrate that the proprietor's expenses in any year included the payment of wages to the beneficiary. The AAO further notes that the funds from the line of credit which the proprietor now claims is personal savings have not been demonstrated through the submission of probative evidence. Moreover, the proprietor's personal tax returns did not reflect substantial amounts of taxable interest earned. The 2001 Form 1040 reflected $18.00 in taxable interest, and none was reflected on the tax returns for 2002 through 2007, thus indicating that the proprietor did not have significant personal savings.

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 (Reg'l Comm'r 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 proprietor's gross receipts during the relevant years varied. The proprietor indicated on the Form I-140 that she employs four people. Salaries and wages have been decreasing each year from 2001 to 2007. While the proprietor has been in business over twelve years, she does not earn substantial compensation. Further, the proprietor did not submit evidence sufficient to demonstrate that she was willing and able to forego compensation in order to pay the beneficiary the proffered wage. In addition, there is no evidence in the record of the historical growth of the proprietor's business, of the occurrence of any uncharacteristic business expenditures or losses from which it has since recovered, or of the proprietor's reputation within its industry. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the proprietor has not established that she had the continuing ability to pay the proffered wage.

Beyond the decision of the director, the petition may not be approved due to the failure of the petitioner and the beneficiary to sign the ETA Form 9089. 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).

The regulation at 20 C.F.R. § 656.17(a)(1) states that: "DHS will not process petitions unless they are supported by an original certified ETA Form 9089 that has been signed by the employer, alien, attorney and/or agent."

The labor certification was filed on April 30, 2001, and approved by the DOL on August 1, 2007. The Form I-140 was filed on November 7, 2007, with the ETA Form 9089.[3] Neither the petitioner nor the beneficiary signed the ETA Form 9089 as required.

[3] The regulatory scheme governing the alien labor certification process contains certain safeguards to assure that petitioning employers do not treat alien workers more favorably than U.S. workers. New United States Department of Labor (DOL) regulations concerning labor certifications went into

The director in his RFE of April 24, 2009, noted the lack of a signed ETA Form 9089 and requested that a new page 8 and 9 of the ETA Form 9089 with the required original signatures of the petitioner and the beneficiary be submitted. In response, the petitioner submitted an expired ETA Form 9089 containing the signatures of the petitioner and the beneficiary. The petitioner's signature was not dated. The AAO notes that the petitioner and the beneficiary's signatures were attesting to the contents of the expired ETA Form 9089 given ETA Case Number by DOL which was filed on January 17, 2007; approved on February 13, 2007; and expired on March 31, 2008, prior to its submission to USCIS on June 4, 2009. The petitioner and the beneficiary by signing that labor certification were not attesting to the contents of the certified ETA Form 9089 given ETA Case Number that was filed with the Form I-140. Therefore, USCIS cannot accept the signatures on the signature pages of ETA Case Number since the case number does not match the underlying ETA Form 9089.

As the appeal was not accompanied by a labor certification signed by the petitioner and the beneficiary, the appeal may not be approved.

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.

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effect on March 28, 2005. The new regulations are referred to by DOL by the acronym PERM. *See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). The PERM regulation was effective as of March 28, 2005, and applies to labor certification applications for the permanent employment of aliens filed on or after that date. In this case, the PERM regulations apply because the petitioner filed a labor certification application on ETA Form 9089 seeking to convert the previously submitted ETA Form 750 to an ETA 9089 under the special conversion guidelines set forth in PERM. 20 C.F.R. § 656.17(d) sets forth the requirements necessary for the converted labor certification application to retain the priority date set forth on the former ETA 750.