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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529

U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: JUN 01 2007

SRC 03 117 50729

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.

Robert P. Wiemann, 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 galleries and investment company.[1] It seeks to employ the beneficiary permanently in the United States as a market research analyst. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. 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 October 7, 2004[2] 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 who requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate 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 U.S. Department of Labor. *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 U.S. Department

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[1] The petitioner did not identify its business activities on the initial I-140 petition. The petitioner identified itself as "galleries/investments" on a corrected I-140 petition. The sole proprietor's Schedules C, that accompany the Forms 1040 submitted on appeal, identify the sole proprietor as an importer of exercise equipment.

[2] This date appears to be a typographical error, as the record indicates that the director's request for further evidence also contained in the record is dated June 7, 2005. Citizenship and Immigration Services (CIS) computer record also establish the director's decision was issued on October 7, 2005.

of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on January 31, 2002. The proffered wage as stated on the Form ETA 750 is $21.52 an hour, or $44,761.60 per year. The Form ETA 750 states that the position requires two years of experience in the proffered position.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal[3]. On appeal, counsel submits the sole proprietor's Forms 1040, with accompanying Schedules C, for tax years 2002 and 2003. Counsel also submits a Form 1040 for [redacted] for tax year 2001 that contains no Schedule C. **Counsel also submits two letters dated September 16, 2003 from [redacted] who identifies himself as** an accountant with an enrolled agent's license from the U.S. Department of Treasury. [redacted] identified the petitioner as [redacted] doing business as Floralia Investment Associates, in one letter and then as [redacted] an individual, in the second letter. [redacted] stated that he had been requested to analyze [redacted]'s ability to pay the proffered wage of $44,761. [redacted] states that he utilizes the petitioner's Forms 1040 and his Prudential brokerage statement that contains [redacted]'s adjusted gross income, tax-exempt interest income, tax-exempt IRA distribution income, and non-taxable portion of social security to calculate the petitioner's "spendable cash flow income."

Finally counsel submits Forms 1099-R for [redacted] for annuities distributions from Metropolitan Life Insurance Company annuities, Tulsa, Oklahoma, for tax year 2001. Other evidence in the record includes a page of a Union Planters Bank checking account for the statement period ending in July 31, 2004 for a business identified as Floralia Investors and Associates doing business as Art Fusion Galleries, Miami, Florida. This document identifies an ending balance of $11,183 for the identified business. Counsel also submitted a document identified as "[redacted], Balance Sheet, June 30, 2005." The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

The evidence in the record of proceeding is inconsistent with regard to the petitioner's identity and business activity. As stated previously, the petitioner did not identify its business activities on the initial I-140 petition and then described its business as "galleries/investments" on a corrected I-140. The original Form ETA 750 submitted to the record indicates the petitioner is an investment company.

The petitioner on both the original and corrected I-140 petition is listed as Floralia Investment Associates. [redacted] listed on the Forms 1040 submitted on appeal as the dependent son of [redacted] signed both petitions for the petitioner. In response to the director's request for further evidence, counsel submitted documentation for a business identified as Floralia Investors and Associates, doing business as Art Fusion Galleries, and also a 2005 balance sheet for [redacted] The 2001 tax return submitted to the record contains no Schedule C business activities, even though the corrected I-140 petition submitted by the petitioner in response to the director's request for further evidence indicates that the

[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).

petitioner was established in October 2000. The 2002 and 2003 Forms 1040 tax returns submitted to the record on appeal do contain Schedules C that identify the sole proprietor's business as Floralia Company, and the business activity as "importers-exercise equipment." Thus the petitioner is either an art gallery, an investment company, or an importer of exercise equipment. The record is also inconsistent as to the actual petitioner. The relationship of [redacted] who is identified on a joint balance statement for June 2005 to the petitioner is also not established in the record. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) states: "Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition." *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) also states:

> It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

Without further evidentiary documentation as to the petitioner's actual identity and business activities, the petition shall be denied.

Furthermore, as the record indicates, the director issued a request for further evidence on June 7, 2005, and specifically requested either the petitioner's tax returns for 2003 and 2004, the petitioner's annual reports, or audited or reviewed financial statements for tax years 2003 and 2004. In response to this request, the petitioner submitted an unaudited balance sheet for two individuals for the first six months of 2005, and one bank statement dated July 31, 2004. The petitioner did not submit the requested tax forms with all schedules, or the petitioner's annual reports, or audited or reviewed financial statements.[4] On appeal, counsel submits Forms 1040 for [redacted] for tax years 2001, 2002, and 2003. Counsel also submits the statement by [redacted] and his analysis of the petitioner's financial assets, as either an individual or as an individual doing business as Floralia Investment Associates.

With regard to [redacted] statements and analysis, 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 [redacted] clearly states that he based his remarks on the petitioner's year-end tax returns and for tax year 2001, also on his Prudential brokerage statement, 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. Although the director's request for further evidence also mentioned that reviewed financial statements could be submitted to be record, there is not evidence that [redacted]'s reports were reviewed, or that they belong to the petitioner.[5] Therefore, [redacted]'s reports are given no weight in these proceedings.

Furthermore, the purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§

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[4] The record is not clear as to why the director did not request the tax return for the year in which the priority date was established, namely, 2002.

[5] Reviews are governed by the American Institute of Certified Public Accountants' Statement on Standards for Accounting and Review Services (SSARS) No.1., and accountants only express limited assurances in reviews. [redacted]'s reports are therefore not considered reviewed statements.

103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not, and does not, consider the sufficiency of the evidence submitted on appeal. Consequently, the appeal will be dismissed.

Nevertheless, the AAO will, for illustrative purposes, examine the tax returns submitted to the record and will determine whether they would have established a petitioner's ability to pay the proffered wage.

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, CIS 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).

In determining the petitioner's ability to pay the proffered wage during a given period, CIS 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. Thus the petitioner would have to establish its ability to pay the entire proffered wage in tax years 2002 and 2003.

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, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. 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. 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.

As stated previously, the AAO does not accept the tax returns submitted to the record on appeal. *See Soriano,* 19 I&N Dec. 764. However, if they had been accepted, the tax returns would establish that sole proprietor supports a family of two persons, himself and his son. As stated previously, the tax return for 2001 submitted to the record did not contain a Schedule C. Therefore the tax return appears to be submitted as an individual return, rather than as a sole proprietor tax return. It is also noted that the priority date for the instant petition is January 31, 2002. As such, the 2001 tax return is not dispositive in these proceedings. Therefore the AAO will only examine the tax returns for 2002 and 2003, if they had been accepted. The two tax returns reflect the following information for these two years:

	2002	2003
Proprietor's adjusted gross income (Form 1040)	$ 54,597	$ 44,615
Petitioner's gross receipts or sales (Schedule C)	$ 4,300	$ 5,475
Petitioner's wages paid (Schedule C)	$ 0	$ 0
Petitioner's net profit from business (Schedule C)	$ -$1,200	$ -$1,955

In 2002, the sole proprietor's adjusted gross income of $54,597 is sufficient to pay the proffered wage, while the sole proprietor's adjusted gross income of $44,615 in 2003 is not sufficient to pay the proffered wage of $44,615. The record contains no evidence of the sole proprietor's additional financial resources that would be available to pay the remaining proffered wage in tax year 2003. Furthermore, the record contains no information as to the sole proprietor's monthly household expenses that would have to be paid prior to paying the proffered wage in both tax year 2002 and 2003. Thus, the petitioner's ability to pay the proffered wage based on the tax returns submitted on appeal is not established. More importantly, the level of business activities documented by both Schedules C submitted on appeal, in combination with the inconsistent identification of the actual petitioner and the petitioner's business activities, raise significant questions as to the viability of the petitioner's business, and the realistic nature of the job offer.

On appeal, [redacted] also states that based on the Forms 1040 submitted on appeal, the petitioner, identified as either [redacted] doing business as [redacted] or [redacted] has "spendable cash flow income" that includes tax exempt interest of $83,870, tax exempt IRA distribution income of $64,423, and a non-taxable portion of social security benefits of $2,358.[6] As stated previously, the evidence submitted on appeal is not accepted into the record. The AAO does note that bank accounts such as savings accounts, money market accounts, certificates of deposits, or other similar accounts, should be considered to be available for a sole proprietor to pay the proffered wage and/or personal expenses. Thus, the investment interest figure noted on the 2002 Form 1040 submitted on appeal and other such additional income,

[6] [redacted] also examined the claimed sole proprietor's "spendable cash flow income" for tax year 2001; however, since 2001 is prior to the 2002 priority year, even if the evidence submitted on appeal had been accepted, the 2001 tax information is not dispositive in these proceedings. The AAO will not examine the Form 1040 2001 tax return any further.

accompanied by further evidentiary documentation such as the actual investment or Social Security reports, could be available to pay the proffered wage. However, as stated previously, in the instant petition, the petitioner's actual identity and business activities are not identified, and the evidence submitted to the record on appeal, including [redacted]s unaudited and unreviewed statements, was not accepted into the record. Thus, any information as to further financial assets based on the materials submitted on review is irrelevant to these proceedings.

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.