U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20529

U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date:

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, Director
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 landscape and stonework design firm. It seeks to employ the beneficiary permanently in the United States as a stonemason. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. 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 and denied the petition accordingly.

On appeal, counsel submits additional evidence and asserts that the petitioner has the continuing financial ability to pay the proffered wage.

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 at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

> 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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 30, 2001. The proffered wage as stated on the Form ETA 750 is $36.47 per hour based on a 40-hour week, which amounts to $75,857.60 annually. The visa petition states that the petitioner was established in 1991 and has ten employees. Part B of the ETA 750, signed by the beneficiary, reflects that he has worked for the petitioner since 1999.

The petitioner is structured as a sole proprietorship. With the petition, the petitioner submitted an unaudited profit and loss statement covering a period from January 1, 2002 through August 16, 2002, and one page of a 2001 individual tax return.

Because the evidence submitted was deemed insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on February 13, 2003, the director requested additional evidence pertinent to that ability. The director advised the petitioner that it must submit evidence establishing its ability to pay the proffered wage as of April 30, 2001 and continuing to the present. The director also instructed the petitioner to submit audited financial statements, the latest annual report, or its most recent federal tax return.

In response, the petitioner, through counsel, submitted copies of the sole proprietor's Form 1040, U.S. Individual Income Tax Return for 2000 and 2001.

The tax returns reflect the following information for the following years:

	2001	2000
Proprietor's adjusted gross income (Form 1040)	- $ 7,793	- $ 32,497
Petitioner's gross receipts or sales (Schedule C)	$ 548,747	$ 410,823
Petitioner's wages paid (Schedule C)	$ 189,768	$ 126,478
Petitioner's net profit from business (Schedule C)	$ 36,544	$ 18,194

Counsel also submitted unaudited financial statements for the period from January through December 2002, copies of the petitioner's federal quarterly tax returns for 2002, a copy of its bank account register with Wells Fargo covering the period from January through December 2002, copy of its bank account register with Pacific Continental covering a period from August through December 2002, and a copy of a letter from the sole proprietor stating that the 2002 tax returns were still being prepared.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on April 3, 2003, denied the petition. The director noted that CIS records reveal that the petitioner has petitioned for five other beneficiaries besides the beneficiary named in this matter. The director found that the sole proprietor's tax returns failed to show that the petitioner had the ability to pay one beneficiary.[1]

On appeal, counsel asserts that the director erred in his determination of the petitioner's ability to pay the proffered wage of $75,857.60. Counsel objects to the criteria employed to analyze a petitioner's ability to pay a proffered wage. She asserts that it does not reflect actual business practices. First, counsel states that the current petitioner is not yet obliged to actually pay the proffered wage, so she concludes that the test of whether a petitioner is actually paying the proffered wage is inapplicable, because it does not take into account part-time employment. While counsel's assertion is correct that current regulations do not actually require the petitioner to pay the wage offered in the ETA -750A until the alien adjusts his or her status in the United States or enters the country using an immigrant visa issued on the basis of an approved employment based petition and approved labor certification, this does not foreclose the existence of separate legal obligations to prove an ability to pay the proffered wage or to pay at least the prevailing wage pursuant to different regulatory provisions applying to aliens with non-immigrant status.

To the extent that a petitioner has paid wages to a beneficiary, whether part-time or full-time, credit will be given to those amounts. If the documentary evidence happens to establish that the petitioner actually employed the beneficiary full-time and paid the full proffered wage to the beneficiary, 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 provided no proof of any wages paid to the beneficiary.

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[1] The director states that all of the beneficiary's proffered wages are $36.47 per hour, except one, which is $39.47 per hour.

Counsel's second assertion that examining a petitioner's net income is unrealistic, because companies hire new employees to stimulate growth, is not persuasive in this case, and is not supported by the record. Counsel's example of a large company's inability to show net profits equal to the proffered wage is well-taken, but is already recognized by the regulatory scheme set forth in 8 C.F.R. § 204.5(g)(2). As noted above, the regulation at 8 C.F.R. § 204.5(g)(2) allows organizations which employ at least 100 workers to submit a statement from a financial officer relevant to the U.S. employer's ability to pay the proffered wage. This provision was adopted in the final regulation in response to public comment favoring a less cumbersome way to allow large, established employers to utilize a more simplified route through adjudication. *See* Employment-Based Immigrants, 56 Fed. Reg. 60897, 60898 (Nov. 29, 1991). This alternative recognizes that large employers may have large net losses but remain fiscally sound and retain the ability to pay the proposed wage offer, although the director retains the discretion to reject an employer's assurances. The regulations explicitly limit this procedure to organizations with at least 100 employees.

In determining a petitioner's continuing ability to pay a proffered wage, CIS generally examines 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). If a petitioner's net income demonstrates that it can pay the proffered wage out of its net income during the relevant period beginning as of the priority date, then it has satisfied the requirements of 8 C.F.R. § 204.5(g)(2).

Counsel states that other additional evidence may be submitted in support of a petitioner's ability to pay the proffered wage. Counsel claims that the petitioner had gross revenues of $548,747 in 2001 and has experienced significant growth. Counsel submits copies of Schedule C of the sole proprietor's individual tax returns for 2000 and 2001, as well as an accountant's compilation of the petitioner's financial position for the three months ending March 31, 2003, in support of this argument. Counsel also provides four copies of customers' letters of intent to engage the petitioner's services for landscape work in 2003, representing $233,520 in potential revenue, and three copies of estimates that the petitioner has generated in the first quarter of 2003. Counsel asserts that the petitioner's ability to pay the proffered wage is supported by this evidence.

Counsel's assertions are not persuasive. A visa petition may not be approved based on speculation of future eligibility or after the petitioner becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Further, in *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that CIS had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service, now CIS, should have considered income before expenses were paid rather than net income. While the regulation at 8 C.F.R. § 204.5(g)(2) allows additional material "in appropriate cases," it has not been convincingly 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. It is further noted that the unaudited financial statements submitted with the petition and on appeal cannot be considered as probative of the petitioner's ability to pay the proffered wage. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage.

Finally, it is noted that the average 2002 monthly bank balance shown by the petitioner's Wells Fargo bank register was approximately -$16,475. The average monthly bank balance reflected by the Pacific Continental account was approximately $15,315. Taken in aggregate, these figures do not represent a sustainable source out of which the proffered wage may be paid and cannot constitute convincing evidence of the petitioner's ability to pay the proffered wage.

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 this case, even without considering any reasonable individual expenses, the petitioner's adjusted gross income in 2001 was -$7,793. This figure is insufficient to demonstrate that the petitioner had the continuing ability to pay the proffered wage of $75,857.60 beginning as of the priority date of April 30, 2001. The record of proceeding does not contain any other evidence or source of the petitioner's ability to pay the proffered wage in 2001.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001 or subsequently. Therefore, the petitioner has not established that it 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.