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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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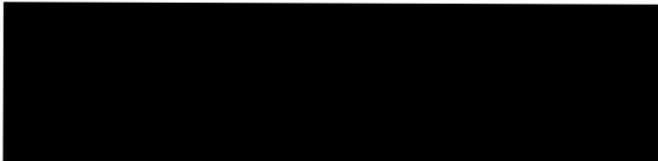


FILE: EAC 04 163 50287 Office: VERMONT SERVICE CENTER Date: AUG 25 2009

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

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:

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.

John F. Grissom  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The employment-based immigrant visa petition was denied by the Director, Vermont Service Center. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reopen/reconsider. The motion will be granted and the petition will be approved.

The petitioner's business is a restaurant. It seeks to employ the beneficiary permanently in the United States as a line cook. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U.S. 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 AAO affirmed the director's decision.

The record demonstrated that the motion was properly filed. 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 denial dated December 28, 2004, and the AAO's decision dated September 1, 2006, 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.

The regulation at 8 C.F.R. § 103.5(a)(3) states:

*Requirements for motion to reconsider.* A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

The motion qualifies as a motion to reconsider because counsel identifies erroneous conclusion of law or statement of fact for the appeal, and, he provides precedent decisions in support of his contentions.

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:

*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 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 DOL 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 2, 2004.<sup>1</sup> The proffered wage as stated on the Form ETA 750 is \$420.00 per week (\$21,840.00 per year).

Evidence in the record of proceeding indicates that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1980 and to currently employ 18 workers. No net annual income or gross annual income is stated on the petition. On the Form ETA 750, signed by the beneficiary on September 5, 2003, the beneficiary did not claim to have worked for the petitioner.

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 motion.<sup>2</sup>

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<sup>1</sup> It has been over five years since the Application for Alien Employment Certification has been accepted and the proffered wage established. According to the employer certification that is part of the application, ETA Form 750 Part A, Section 23 b., states "The wage offered equals or exceeds the prevailing wage and I [the employer] guarantee that, if a labor certification is granted, the wage paid to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work." However, the petitioner must show in accordance with the regulation at 8 C.F.R. § 204.5(a)(2) that it can pay the proffered wage from the time of the priority date and onwards.

<sup>2</sup> The submission of additional evidence is allowed by the instructions to the U.S. Citizenship and Immigration Services (USCIS) 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).

Relevant evidence in the record, up to the point of the request for evidence mentioned below, includes: the original Form ETA 750, Application for Alien Employment Certification, approved by DOL; cover letters by counsel dated May 5, 2004 and November 19, 2004; a statement by [REDACTED], dated April 29, 2004, that Sandwich Cat Inc. trades and does business as the Village Restaurant and Catering; two Internal Revenue Service (IRS) Form W-2 Wage and Tax Statements for 2002 and 2003 issued by Sandwich Cat Inc., 9224 Ashton Road, Philadelphia Pennsylvania to another employee (identified hereinafter as S.W.)<sup>3</sup> in the amounts of \$13,208.50 and \$27,215.00 respectively; and approximately 22 commercial banking statements of the petitioner for the period January 1, 2004, to March 31, 2004.

On August 23, 2004, the director requested additional evidence of the petitioner's ability to pay the proffered wage according to the regulation at 8 C.F.R. § 204.5(g)(2). The director requested the petitioner's U.S. federal corporate tax returns and the beneficiary's W-2 statements.

In response to the request for evidence, counsel submitted a legal brief and additional evidence including a printed copy of an Internet webpage,<sup>4</sup> and the Board of Alien Labor Certification Appeals (BALCA) case precedent *Ranchito Coletero*, 2002-INA-104 (2004 BALCA).

Despite the above request for evidence directing the petitioner to submit its tax returns, the petitioner declined to present such evidence or credit line information "because of confidentiality concerns." However, additional evidence submitted on appeal were W-2 Wage and Tax Statements from the petitioner to the beneficiary for wages paid in 2004 of \$21,084.92, and in 2005, \$21,380.81; and, the petitioner's U.S. federal Form 1120S tax returns for 2003<sup>5</sup> and 2004.

According to the petition filed in May 2004, the beneficiary was residing in Brazil. In the appeal received January 28, 2005, counsel had submitted no evidence that the beneficiary was in the employ of the petitioner. However, according to evidence submitted with the subject motion, the beneficiary has been in the United States since 2002 and employed by the petitioner. The beneficiary's W-2 statements for 2004 and 2005 were introduced into evidence to support the motion.

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<sup>3</sup> Name withheld for confidentiality purposes.

<sup>4</sup> See ISD Liaison Minutes (6/27/02), posted on AILA InfoNet, Doc. No. 02071544 (July 15, 2002) at <http://www.aila.org/infonet/libraryViewer.aspx/docID=8060&st=ability+pay=wage+resolve>.

<sup>5</sup> Tax returns submitted for years prior to the priority date have little probative value in the determination of the ability to pay from the priority date. Further, counsel submitted W-2 Wage and Tax statements from the petitioner to another worker for years 2002 and 2003. Since they are submitted for years before the priority date, they also have little probative value. The regulation at 8 C.F.R. § 204.5(g)(2) provides other means to provide the ability to pay such the submission of audited financial returns. However, we will consider the petitioner's 2003 federal income tax return generally.

On March 26, 2008, the AAO requested further evidence. In response counsel submitted a cover letter dated June 13, 2008; the petitioner's IRS Form 940-EZ "Employer's Annual Federal Unemployment (FUTA) Tax Return" statements for 2003, 2004, 2005 and 2006 with a work sheet for 2007; IRS Form W-3 "Transmittal of Wage and Tax Statements" for 2003, 2004, 2005 and 2006; the beneficiary's U.S. visa issued September 12, 2001, his Form I-94 Departure Record showing entry into the United States on August 20, 2002, and a copy of the biographic pages from the beneficiary's Brazilian passports issued November 26, 1998, and re-issued December 2, 2004; the beneficiary's personal federal tax return Form 1040EZ for 2002; a listing of the beneficiary's residences in the United States stating that the beneficiary's first residence was at [REDACTED] Philadelphia, Pennsylvania from August 2002, to October 2004, then at [REDACTED] Philadelphia, Pennsylvania from October 2004 to present; a statement that the beneficiary was employed by the petitioner from December 3, 2002; W-2 Wage and Tax statements from the petitioner to the beneficiary for 2003 in the amount of \$16,680.75, for 2004 in the amount of \$21,084.92, for 2005 in the amount of \$21,380.81, and for 2006 in the amount of \$25,431.76; and a letter by the petitioner dated April 29, 2004, from [REDACTED]

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, U.S. 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 (BIA 1967).

Counsel submitted an "InfoNet" webpage of "ISD Liaison Minutes for June 27, 2002" for the proposition that the beneficiary's W-2 forms should be accepted as sufficient evidence of the employer's ability to pay the offered wage.

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. W-2 Wage and Tax statements were submitted from the petitioner to the beneficiary stating wages paid in 2004 of \$21,084.92, in 2005 wages of \$21,380.81 and for 2006 wages paid to the beneficiary in the amount of \$25,431.76. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage in 2004 and in 2005.<sup>6</sup> Since the proffered wage is \$21,840.00 per year, the petitioner must

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<sup>6</sup> In 2003 the petitioner paid the beneficiary in the amount of \$16,680.75. Since the wages were paid before the priority date of January 2, 2004, the wage payment has little probative value in this

establish that it can pay the beneficiary the difference between wages actually paid and the proffered wage, which are \$755.08 and \$459.19 respectively for 2004 and 2005. In 2006 the petitioner paid the beneficiary the proffered wage.

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 (1<sup>st</sup> 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). Reliance on the petitioner's gross sales and profits that exceeded the proffered wage is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

The petitioner's Form 1120S<sup>7</sup> tax return demonstrates the following financial information concerning the petitioner's ability to pay:

- In 2004, the Form 1120S stated net income of \$3,127.00.

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matter. However, we will consider the 2003 wage payment and petitioner's tax return for that year generally.

<sup>7</sup> Where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K form related to the Form 1120 states that an S corporation's total income from its various sources are to be shown not on page one of the Form 1120S, but on lines 1 through 6 of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. *See* Internal Revenue Service, Instructions for Form 1120S, 2003, at <http://www.irs.gov/pub/irs-03/i1120s.pdf>, Instructions for Form 1120S, 2002, at <http://www.irs.gov/pub/irs-02/i1120s.pdf>, (accessed February 15, 2005).

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 17e (2004-2005), and line 18 (2006) of Schedule K. *See* Instructions for Form 1120S, at <http://www.irs.gov/> (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 additional income, credits, deductions, other adjustments shown on its Schedule K for 2004, the petitioner's net income is found on Schedule K of its tax return.

The petitioner did have sufficient net income to pay the difference between wages actually paid and the proffered wage in 2004.<sup>8</sup> In 2005 the difference between the wage actually paid and the proffered wage was \$459.19. In 2006, the petitioner paid the beneficiary the proffered wage.

Counsel asserts in his brief accompanying the appeal that there are other ways to determine the petitioner's ability to pay the proffered wage from the priority date. According to regulation,<sup>9</sup> copies of annual reports, federal tax returns, or audited financial statements are the means by which the petitioner's ability to pay is determined.

Counsel states that a prior employee, S.W., retired from the subject restaurant, and that his employment position is vacant. In 2003, the petitioner paid S.W. \$27,215.00 which is more than the proffered wage of \$21,840.00. According to counsel, wage payments to S.W. are proof of the petitioner's ability to pay the proffered wage. Since the priority date is January 2, 2004, the wage payment the petitioner paid S.W. in 2003 is not probative of its ability to pay the proffered wage.

In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Counsel cites *Ranchito Coletero*, 2002-INA-104 (2004 BALCA) generally to support his contention. *Ranchito Coletero* concerns entities in an agricultural business that regularly failed to show profits and typically relied upon individual or family assets. Counsel does not state how the DOL's BALCA precedent is binding on the AAO. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, BALCA decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). Moreover, *Ranchito Coletero* deals with a sole proprietorship and is not directly applicable to the instant petition, which deals with a corporation.

Counsel also cites the case precedents of *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. at 1054. already addressed above, and *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966).<sup>10</sup>

Counsel submitted approximately 22 commercial banking statements of the petitioner for the period January 1, 2004 to March 31, 2004. Counsel's reliance on the balances in the petitioner's bank account is 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

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<sup>8</sup> Since the petitioner could pay the proffered wage in 2004, the petitioner's net current assets will not be discussed.

<sup>9</sup> 8 C.F.R. § 204.5(g)(2).

<sup>10</sup> In the case of *Matter of Brantigan* the court held that the burden of proof in these proceedings rests solely with the petitioner.

evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds.

The petitioning entity in the case reported as *Matter of Sonegawa*, 12 I&N Dec. 612 (BIA 1967) 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 consideration of the *Matter of Sonegawa*, USCIS may consider the petitioner's longevity, the number of employees, the petitioner's business reputation as well as the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. According to the petition, the petitioner has been in business since 1980, was incorporated in 1984, and had a payroll in 2006 of \$890,941.61.

In 2003 and 2004, the petitioner's tax returns reflect gross incomes that increased from \$2,063,087.00 to \$2,217,772.00. The petitioner submitted IRS Form W-3 "Transmittal of Wage and Tax" Statements for 2003-\$687,568.37, 2004-\$773,769.92, 2005-\$808,718.98 and 2006-\$880,275.89. As is evident from the payroll information, the petitioner could and did pay increasingly higher payroll expenses for the four years for which statements were provided. There is evidence that the petitioner's business activity and revenue were increasing, and that but for the nominal difference of \$459.19 between the wage paid to the beneficiary in 2005 and the proffered wage, the petitioner has the continuing ability to pay the proffered wage beginning on the priority date.

The totality of the circumstances, including other information in the record stated above, supports the fact that the petitioner is a profitable enterprise. Therefore, based on the petitioner's almost thirty years in business, increasing gross receipts, wage payments, as well as wages already paid to

the beneficiary, the evidence submitted establishes that the petitioner has 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 met that burden.

**ORDER:** The motion will be granted and the petition will be approved.