



U.S. Citizenship
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Services

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FILE: EAC 03 266 53505 Office: VERMONT SERVICE CENTER Date: **JUL 05 2006**

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:



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, Vermont Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be summarily dismissed.

The petitioner¹ is a telecommunications services provider. It seeks to employ the beneficiary permanently in the United States as a cable splicer. 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. 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.

According to the petition, the petitioner was established in 1998, and, it has 1042 employees.² The signatory of the petition and Alien Employment Application is [REDACTED]. His title or job responsibilities with the petitioner is not stated.

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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

The regulation at 8 CFR § 204.5(l)(3)(ii) states, in pertinent part:

¹ The address of the employer in the labor certification is [REDACTED]. The address of the petitioner in the petition is [REDACTED].

²The regulation at 8 C.F.R. § 204.5 (g)(2) states:

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. *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.*[emphasis added]. 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 the Service.

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

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. 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 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 April 26, 2001. The proffered wage as stated on the Form ETA 750 is \$575.00 per week (\$29,900.00 per year). The Form ETA 750 states that the position requires two years experience.

On appeal, counsel submits additional evidence.

With the petition, counsel submitted copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, unaudited financial statements, and a prior employment verification.

The director denied the petition on October 14, 2004, finding that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

Counsel has submitted the following documents to accompany the appeal statement: the petitioner's U.S. federal tax returns for 2001, 2002 and 2003; and, consolidated financial statements for the same years.

In determining the petitioner's ability to pay the proffered wage during a given period, U.S. Citizenship and Immigration Services (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. No evidence was submitted to show that the petitioner employed the beneficiary.

Alternatively, in determining the petitioner's ability to pay the proffered wage, CIS will 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). In *K.C.P. Food Co., Inc. v. Sava*, the court held that the Service 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. *Supra* at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh*, *Supra* at 537. See also *Elatos Restaurant Corp. v. Sava*, *Supra* at 1054.

The tax returns³ demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$29,900.00 per year from the priority date of April 26, 2001:

- In 2001, the Form 1120 for Prince Telecom Holdings stated a taxable income loss⁴ of <\$4,857,962.00>⁵.
- In 2002, the Form 1120 for Prince Telecom Holdings stated taxable income of \$830,552.00.
- In 2003, the Form 1120 for Prince Telecom Holdings stated taxable income of \$2,045,307.00.

There is no statement in the record of proceeding identifying the petitioner as a corporation. Although there is a federal identification number filled into that FEIN space on the Form I-140 in pen in cursive, it appears to be a notation that occurred on CIS review. The petitioner under the name and address given on the labor certification and petition does not appear on the tax returns submitted, or on the consolidated financial statements. The AAO will not speculate which one, if any, of the member corporations or affiliates is the petitioner. Without substantiation, the AAO cannot accept the tax returns or financial statement submitted as evidence of the petitioner's ability to pay the proffered wage from the priority date. In any future proceeding the petitioner should specify which, if any, of these entities it is and provide competent evidence supporting its identity. Additionally, the petitioner should submit evidence as set forth at the regulation at 204.5(g)(2) showing its ability to pay, as distinct from its corporate parent.

On appeal, counsel asserts, "USCIS erred as a matter of fact and law." Counsel's statement on appeal contains no specific assignment of error. Alleging that the director erred in some unspecified way is an insufficient basis for an appeal.

8 C.F.R. § 103.3(a)(1)(v) states, in pertinent part: "An officer to whom an appeal is taken shall summarily dismiss any appeal when the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal."

³ The tax returns submitted are the returns for [REDACTED] New Castle Delaware 19720. According to the tax returns submitted, the member corporations are Prince Telecom Holdings, Inc., Prince Telecommunications Inc. and Prince Cable Inc. All of these corporations state the above Blevin Drive address. The affiliated corporations (i.e. Form 851 Affiliations Schedule) noted on the returns are Prince Telecommunications, Inc., Prince cable Inc. and American Cable services Inc. All of these corporations state the above [REDACTED] address.

IRS Form 1120, Line 28.

⁵ The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss, that is below zero.

Counsel has failed to identify specifically an erroneous conclusion of law or a statement of fact as a basis for the appeal.

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 summarily dismissed without prejudice.