

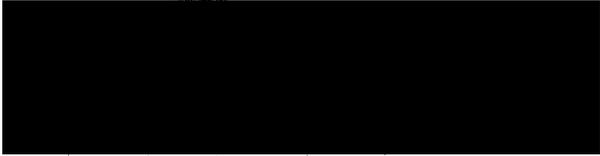
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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services



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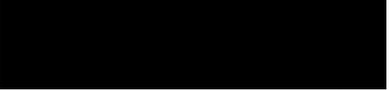
Office: CALIFORNIA SERVICE CENTER

Date:

SEP 30 2004

IN RE:

Petitioner:

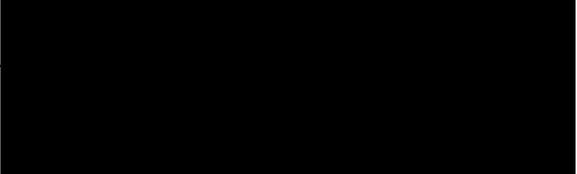


Beneficiary:

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, Director
Administrative Appeals Office

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DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The director's decision will be affirmed in part and withdrawn in part.

The petitioner is a window covering installer/cleaner. It seeks to employ the beneficiary permanently in the United States as a supervisor. 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 that the beneficiary was not qualified for the position, and denied the petition accordingly.

On appeal, counsel submits a brief statement and additional evidence.

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 first issue to be discussed in this case is whether or not the petitioner established its ability to pay the proffered wage. 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 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 March 21, 1997. The proffered wage as stated on the Form ETA 750 is \$21.62 per hour, which amounts to \$44,969.60 annually.

The record of proceeding contains evidence from the instant visa petition, WAC 03 110 51127, as well as from a previously denied petition, WAC 02 147 50710. All of the evidence from both petitions will be considered and discussed below.

The record of proceeding contains a 1997 Form 1065, U.S. Return of Partnership Income, for an entity called "Victorian Drapery Service" with an employment identification number (EIN) not matching the petitioner's EIN as listed on the visa petition, and 1997 through 2000 Forms 1065 for an entity called "MSL1 Enterprises, LLC," with a matching EIN to the petitioner but a different address.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the director requested additional evidence pertinent to that ability, both for this petition and the previously filed petition, on April 22, 2003 and May 23, 2002, respectively. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. In the April 22, 2003 request, the director specifically requested copies of W-2 wage and compensation forms issued to the beneficiary as well as IRS-generated tax returns and an explanation of the petitioning entity's structure, names, and EIN, including an explanation of its various businesses and how they are related.

In response, the petitioner submitted its proof of publication of a fictitious business name and articles of incorporation for three companies showing a common owner. The fictitious business name publication shows that the petitioner is run by MSL Industries, Inc., and may also go by the name [REDACTED] Coverings." There are W-2 forms in the record of proceeding issued to the beneficiary from "Home View Products, Inc.," at the petitioner's address but with a different EIN, for the years 2000 through 2002; from "MSL 1 Enterprises LLP," at the petitioner's address and the same EIN, for the years 1998 through 2000; and from [REDACTED] Cleaners," at the petitioner's address but a different EIN for the years 1994 through 1997. Additionally, there are IRS-generated tax returns in the record of proceeding for "Home View Products" and for "MSL 1 Enterprises LLC."

Counsel also submitted copies of quarterly wage reports for [REDACTED] for the quarters ending March 31, 2003, December 31, 2001, and for "MSL Industries, Inc." for the quarter ending September 30, 2002. The quarterly wage reports do not show that either of these entities paid any wages to the beneficiary during the various quarters covered by the reports. Finally, the petitioner submitted banking records from 1998 through 2002 for [REDACTED]

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 August 10, 2003, denied the petition. The director stated the following:

The record initially contained IRS computer generated printouts of the returns for Home View Products LLC in addition to copies of the beneficiary's Form W-2. However, the record contained no evidence to establish the relationship between the aforementioned company and the petitioning entity. Furthermore, the Form ETA 750 Part B indicates that the beneficiary has been employed with the petitioner, A Allbright, whose IRS Tax number is [REDACTED] since October of 1994. However, the submitted copies of the beneficiary's Form W-2 for the years 1994 through 2001 indicate the following:

Years	Employer's Name	Employer Identification Number
1994 through 1997	[REDACTED]	[REDACTED]
1998 through 2000	[REDACTED]	[REDACTED]
2000 through 2001	[REDACTED]	[REDACTED]

.....

Although the Proof of Publication indicates that [REDACTED] is doing business as [REDACTED] Industries, Inc. at [REDACTED], the evidence of record is insufficient to establish the relationship between Home View Products, LLC and the petitioner, A Allbright.

On appeal, counsel asserts the following on the Form I-290B Notice of Appeal to the [AAO]: "Ability to pay the proffered wage: We are attaching a letter from the [p]etitioner's corporate attorney. The corporate attorney is compiling documentation to show that the [p]etitioner is able to pay the wage. This will be forwarded within 30 days, as requested above." Counsel ticked a box on the form indicating that additional evidence and a brief would be submitted within 30 days of filing the appeal. The appeal was filed on September 12, 2003. Almost a year has passed and no further documentation has been submitted by the petitioner or counsel. Thus, the record of proceeding will be evaluated as it is currently constituted.

The letter from the petitioner's corporate attorney submitted on appeal is written by [REDACTED] of Burgee & Abramoff, P.C. The letter states that they are corporate legal counsel for Mr. [REDACTED] and his various businesses. [REDACTED] states the following:

Several years ago, [REDACTED] established [REDACTED] as a general partnership, which he operated for some time. In May of 1997, [REDACTED] formed MSL1 [REDACTED] through which he operated this business. In November of 1998, [REDACTED] formed Home [REDACTED] to operate a different, but related business. In December of 2001, our firm formed Home View Products, Inc. and MSL Industries, Inc., two new corporations through which [REDACTED] operated related businesses. Each business has a different ownership structure, either with other partners or, in some cases, owned solely by Mr. [REDACTED]

The letter clearly establishes that the corporate entities involve different ownership structures and specifically states that "Home View Products, LLC" operates a different business than the petitioner's business. Citizenship and Immigration Services (CIS), formerly the Service or CIS may not "pierce the corporate veil" and look to the assets of the corporation's owner or his various businesses to satisfy the petitioning corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." Consequently, assets of the petitioner's shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. While the petitioner has generated a great deal of confusion and uncertainty concerning the petitioner's business structure, it appears that only "A-Allbright" or "MSL Industries" may be considered the employing entity responsible for sponsoring the beneficiary in this visa petition.

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, "A-Allbright" or "MSL Industries," did not establish that it employed and paid the beneficiary the full proffered wage in 1997 through 2002. The forms W-2 wage and compensation records contained in the record of proceeding reflect wages paid in the following amounts by "A-Allbright" or "MSL Industries": \$16,659.44 in 1997; \$14,697.30 in 1998; \$25,444.20 in 1999; \$5,980.00 in 2000; and nothing in 2001 or 2002. The proffered wage is \$44,969.60. Thus, the petitioner must show it can pay the remaining wages owed for each year of \$28,310.16 in 1997; \$30,272.30 in 1998; \$19,525.40 in 1999; \$38,989.60 in 2000; and the full proffered wage for 2001 and 2002.

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's tax returns for "MSL 1 Enterprises LLC" reflect the following information for the following years¹:

	<u>1998</u>	<u>1999</u>	<u>2000</u>	<u>2001</u>
Net income ²	\$65,715	-\$38,519	-\$54,326	-\$19,092
Current Assets	\$11,723	\$93,698	n/a	n/a
Current Liabilities	\$58,182	\$71,601	n/a	n/a
Net current assets	-\$46,459	\$22,097	n/a	n/a

The petitioner's net income for 1998 of \$65,715 is sufficient to cover the remaining wages owed by the petitioner in 1998. Thus, the petitioner established its ability to pay the proffered wage in 1998 out of its net income. The petitioner's net income in 1999, 2000, and 2001 were negative, however, and cannot illustrate the ability to pay the proffered wage for those years.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the

¹ There are no tax returns for "A-Allbright" in the record of proceeding.

² Ordinary income on Line 22.

petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.³ A partnership's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 15 through 17. If a petitioner's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The petitioner's net current assets in 1999 were \$22,097, which is enough to cover the remaining wages owed for that year of \$19,525.40. Thus, the petitioner established its ability to pay the proffered wage in 1999 out of its net current assets. The petitioner's net current assets in 2000, however, were unavailable. As such, the petitioner cannot establish its ability to pay the proffered wage in 2000 out of its net current assets.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 1997 or 2002. The petitioner has also not provided tax returns to show its net income or net current assets for those years. In 2001, the petitioner's net income was negative. The petitioner has not demonstrated that any other funds were available to pay the proffered wage. Bank records were submitted into the record of proceeding; however, 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 evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the cash specified on Schedule L that was considered above in determining the petitioner's net current assets.

Thus, although the petitioner has established its ability to pay the proffered wage in 1998 and 1999, the petition must fail for the petitioner's inability to illustrate its ability to pay the proffered wage in 1997, 2001, and 2002 because the petitioner has not established that it had the *continuing* ability to pay the proffered wage beginning on the priority date. Thus, the director's decision that the petitioner had failed to establish its continuing ability to pay the proffered wage beginning on the priority date is affirmed.

The second issue to be discussed in this case is whether or not the beneficiary is qualified for the proffered position. To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date, which as noted above, is March 21, 1997. See *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

To determine whether a beneficiary is eligible for an employment based immigrant visa, CIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. The Application for Alien

³ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of pattern maker. In the instant case, item 14 describes the requirements of the proffered position as follows:

14.	Education	
	Grade School	C ⁴
	High School	C
	College	NA
	College Degree Required	NA
	Major Field of Study	N/A

The applicant must also have two years of employment experience in the job offered or in the related occupation of window installer/fabricator.

The beneficiary set forth his credentials on Form ETA-750B. On Part 15, eliciting information of the beneficiary's work experience, he indicated that he was employed by the petitioner as an installer and fabricator from October 1994 to the present, and by [REDACTED] dry cleaning business, in North Hollywood, California as a Presser from August 1986 through April 1992. The beneficiary provides no further information concerning his employment background on this form, which is signed by him under a declaration under penalty of perjury that the information was true and correct.

With the initial petition, the petitioner submitted no evidence of his qualifications. The director specifically requested a letter of employment verification from the beneficiary's past or present employers. The director's request for evidence set forth the regulatory requirements governing the evidentiary standards for proving the beneficiary's qualifications for a "skilled worker" visa petition as follows.

The regulation at 8 C.F.R. § 204.5(I)(3) provides:

(ii) *Other documentation—*

(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.

⁴ Presumably this means "completed."

The director's request for evidence notes that an attachment to the petitioner's labor certification application signed by the petitioner's owner discusses the beneficiary's experience, however, fails to fully conform to the regulatory requirements.

In his decision rendered on August 10, 2003, the director ultimately determined that the petitioner did not establish the beneficiary's qualifications because the only evidence is the attachment to the Form ETA 750, which "lacks [the] beneficiary's duties, dates of employment/experience, and number of hours worked per week." The director determined that since the petitioner never rectified the deficiency in the evidence noted by the director in his request for evidence, the evidence in the record of proceeding was insufficient to establish that the beneficiary satisfied the requirements of the proffered position before the priority date.

On appeal, counsel states she will submit a detailed letter confirming the prior experience. To date, the record of proceeding does not contain any additional evidence pertaining to the beneficiary's past employment experience.

The AAO find the letter attachment to the Form ETA 750 pertaining to the beneficiary's qualifications to be acceptable evidence of his past employment. According to the guiding regulation, the experience letter must provide the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien. The letter in the record of proceeding provided the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien. Thus, the part of the director's decision finding that the beneficiary was not qualified for the proffered position is withdrawn.

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.