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U.S. Citizenship and Immigration Services

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[redacted]

FILE: WAC-04-186-51030 Office: CALIFORNIA SERVICE CENTER Date: JUL 25 2006

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: 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, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a motorcycle sales company. It seeks to employ the beneficiary permanently in the United States as an Asian Sales Manager. 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 the beneficiary had a bachelor's degree or the equivalent in Mechanical Engineering as required on the Form ETA 750, and denied the petition accordingly.

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 or seasonal nature, for which qualified workers are not available in the United States. Section 203(b)(3)(A)(ii) of the Act provides for the granting of preference classification to qualified immigrants who, at the time of petitioning for classification under this paragraph, are professionals.

A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971). The priority date is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). The priority date in the instant petition is September 5, 2002.

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 of this case is documented in the record and is incorporated into this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's December 21, 2004 decision denying the petition, the issue on appeal in this case is whether the evidence establishes that the beneficiary had the qualifications required on the ETA 750 as of the priority date.

The AAO reviews appeals on a *de novo* basis. *See Dorr v. I.N.S.* 891 F.2d 997, 1002, n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including any new evidence properly submitted on appeal.

On appeal, counsel submits a brief and no additional evidence.

Relevant evidence in the record includes an evaluation report dated October 25, 2004 from the Foundation for Educational Services, Inc., copies of various training certificates and school records of the beneficiary, and copies of work experience letters of the beneficiary.

Counsel states on appeal that a previous petition for the same beneficiary was submitted by another petitioner, Titan Motorcycle Company of America, which counsel states was approved. Counsel states that shortly thereafter, that company filed for bankruptcy. Counsel states that some of the bankrupt company's executives created a new entity, Hard Eight Holdings, which filed its own labor certification and eventually the instant I-140 petition. Counsel states that language on the ETA supporting the instant I-140 petition is identical to the relevant language on the ETA 750 supporting the previous I-140 petition which was approved.

Counsel also states that in some previous decisions CIS has recognized that a bachelor's degree is not essential to qualifying a beneficiary as a professional, if a beneficiary has sufficient relevant experience and non-institutional instruction. Counsel also states that the instant petition should also be evaluated as one for a skilled worker. Counsel states that the ETA 750 requires either a bachelor's degree or its equivalent. Counsel states that the evidence establishes that the beneficiary has the equivalent of a bachelor's degree and therefore establishes that the beneficiary qualifies as a skilled worker.

The regulation at 8 C.F.R. § 204.5(g)(1) states in pertinent part:

> Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

To determine whether a beneficiary is eligible for an employment-based immigrant visa as set forth above, CIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. The Application for Alien Employment Certification, Form ETA-750A, blocks 14 and 15, sets forth the minimum education, training and experience that an applicant must have for the position of Asian Sales Manager. On the ETA 750A submitted with the instant petition, blocks 14 and 15 describe the requirements of the offered position as follows:

14.	Education (number of years)		
	Grade School		[blank]
	High School		4
	College		4
	College Degree Required		Bachelor or equiv. Mech Engineering
	Major Field of Study		Motorcycle Mechanics
	Training - yrs		[blank]
	Experience		
	Job Offered	Yrs	4 or
	Related Occupation	Yrs	4
	Related Occupation (specify)		Service department in Japanese motorcycle co.
15.	Other Special Requirements		[blank]

The beneficiary states his or her qualifications on Form ETA 750B. On the ETA 750B submitted with the instant petition, in block 11, for information on the names and addresses of schools, colleges and universities attended (including trade or vocational training facilities), the beneficiary states the following:

Schools, Colleges and Universities, etc.	Field of Study	From	To	Degrees or Certificates Received
Motorcycle Mechanical Institute Phoenix, Arizona	Harley Davidson Motorcycles	03 1989	06 1989	Certificate
Lake Washington Voc. Tech. College Kirkland, Washington	Mtrcycle/Marine & Power Equip	06 1987	12 1988	Certificate
Shoreline Community College Seattle, Washington	English	09 1986	03 1987	Certificate
Icinomiya Higashi High School Japan	High School	04 1981	03 1984	Certificate

On the ETA 750A submitted with the instant petition, block 14 requires two years of experience in the offered position. No other requirements are stated in either block 14 or block 15.

The beneficiary states his or her qualifications on Form ETA 750B. On the ETA 750B submitted with the instant petition, in block 15, for information on the beneficiary's work experience the beneficiary states the following:

Name and Address of Employer	Name of Job	From	To	Kind of Business
Harley Davidson Japan [street address] Tokyo, Japan	Technical Service	10 1990	09 1995	Distributor of Harley Davidson Motorcycles
K&S Sturgis [street address] Aichi 491, Japan	Technical Mechanic	04 1990	09 1990	Motorcycle Sales and Service

[remaining blocks are blank]

The record contains an evaluation report dated October 25, 2004 by the Foundation for International Services, Inc., (F.I.S.) of Bothell, Washington. That report includes the following statement:

> In summary, it is the judgment of the Foundation that [the beneficiary] has 9 quarter university-level credits at a regionally accredited community college in the United States and has through the expert opinion letter by [redacted] of Rochester Institute of Technology, as a result of his education and progressively more responsible work experience, an educational background the equivalent of an individual with a bachelor's degree in mechanical engineering technology in the United States.

(Foundation for International Services, Inc., Evaluation Report, October 25, 2004, at 1).

Although on the ETA 750, Part B, the beneficiary claims only about four and one-half years of relevant experience, documents in the record show a series of relevant jobs beginning in April 1984 through April 2001, for a total of twelve and four months of relevant experience. (April 1984 to August 1986 = 2 yrs 4 mos; April 1990 to September 1990 = 5 mos; November 1990 to February 1995 = 4 yrs 3 mos; November 1995 to December 1996 = 1 yr 1mo; January 1997 to April 2001 = 4 yrs 3 mos).

The evaluation by F.I.S. relies on a formula that for every year of university studies three years of specialized work experience may be substituted.

CIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, CIS is not required to accept that evidence, or may give less weight to it. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988); *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988).

The formula employed by F.I.S. in substituting three years of specialized work experience for one year of university level studies is one which is found in the regulations governing H-1B nonimmigrant visas petitions. *See* 8 C.F.R. 214.2(h)(4)(iii)(D)(5). However, the nonimmigrant regulations governing H-1B visa petitions are not applicable to the instant immigrant petition.

The only regulation specifying the equivalent of a bachelor's degree in the context of immigrant petitions is one which pertains to professionals. The regulation at 8 C.F.R. § 204.5(l)(2) states in pertinent part

> *Professional* means a qualified alien who holds at least a United States baccalaureate degree or a foreign equivalent degree and who is a member of the professions.
>
> *Skilled worker* means an alien who is capable, at the time of petitioning for this classification, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States. Relevant post-secondary education may be considered as training for the purposes of this provision.

Concerning the evidence needed to support classification in the above preference categories, the regulation at 8 C.F.R. § 204.5(l)(3)(ii) states in pertinent part:

> (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.
>
> (C) *Professionals.* If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form of an official college or university record showing

> the date the baccalaureate degree was awarded and the area of concentration of study. To show that the alien is a member of the professions, the petitioner must submit evidence showing that the minimum of a baccalaureate degree is required for entry into the occupation.

In the definition of "professional," the regulation at 8 C.F.R. § 204.5(l)(2) uses a singular description of foreign equivalent degree. Thus, the plain meaning of the regulatory language sets forth the requirement that a beneficiary must have one degree that is determined to be the foreign equivalent of a U.S. baccalaureate degree in order to be qualified as a professional for third preference visa category purposes.

With regard to the preference category applicable to the instant petition, the instant petition was submitted with a mark in check box letter "e," for "A skilled worker (requiring at least two years of specialized training or experience) or professional." (*See* Form I-140). The Form I-140, Part 2, Petition Type, does not distinguish between skilled workers and professionals, for a single check box, letter "e," applies both to skilled workers and to professionals. (*See* Form I-140 Immigrant Petition for Alien Worker, Part 2, Petition Type).

Concerning petitions for skilled workers, no provision of the regulations specifies the equivalent of a bachelor's degree. Therefore if the petition is evaluated as one for a skilled worker, the petition would thereby lack any criteria in the regulations to evaluate what is to be considered equivalent to a bachelor's degree. The petitioner was free to specify on the Form ETA 750 the qualifications that it would accept as equivalent to a bachelor of science degree, but the petitioner did not do so.

The evaluation report in the record makes no finding that the beneficiary holds a foreign degree which is equivalent to a U.S. bachelor's degree. Regardless of whether the petition sought classification of the beneficiary as a skilled worker or as a professional, the beneficiary had to meet all of the requirements stated by the petitioner in block #14 of the labor certification as of the day it was filed with the Department of Labor.

It should also be noted that the ETA 750 specifically requires four years of college. Nothing in the record states that the beneficiary has four years of college.

Counsel asserts that a previous petition on behalf of the same beneficiary was submitted by Titan Motorcycle Company, which counsel states was approved. As noted above, counsel states that shortly thereafter, that company filed for bankruptcy and that some of the bankrupt company's executives created a new entity, Hard Eight Holdings, which filed its own labor certification and eventually the instant I-140 petition. Counsel states that language on the ETA supporting the instant I-140 petition is identical to the relevant language on the ETA 750 supporting the previous I-140 petition which was approved.

Nonetheless, CIS, through the AAO, is not bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 44 F. Supp.2d 800, 803 (E.D. La. 2000), *affd*, 248 F.3rd 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

Counsel states that CIS has recognized that a bachelor's degree is not essential to qualifying a beneficiary as a professional, if a beneficiary has sufficient relevant experience and non-institutional instruction. Counsel cites *Matter of Portugues Do Atlantico Informatio Bureau, Inc.*, Interim Dec. 2982 (September 27, 1984) in support of his assertion. However, although that case contains some language in the nature of dicta supporting counsel's assertion, the holding in that case was that the beneficiary's position was not a professional one. Therefore the commissioner made no ruling on whether the beneficiary had a bachelor's degree. Counsel cites no other authority in support of his assertion on this point.

In his decision, the director correctly declined to consider the combination of the beneficiary's education and work experience as equivalent to a bachelor's degree. The decision of the director to deny the petition was correct. The assertions of counsel on appeal fail to overcome the director's decision.

Beyond the decision of the director, the evidence fails to establish to establish the petitioner's 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. § 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. 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 [CIS].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). The priority date in the instant petition is September 5, 2002. The proffered wage as stated on the Form ETA 750 is $55,000.00 per year.

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). For each year at issue, the petitioner's financial resources generally must be sufficient to pay the annual amount of the beneficiary's 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, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750B, signed by the beneficiary on January 14, 2003, the beneficiary did not claim to have worked for the petitioner and no other evidence in the record indicates that the beneficiary has worked for the petitioner.

As another means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return for a given year, 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. Tex. 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.*, the court held that the Immigration and Naturalization Service, now 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. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *See Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The name of the petitioner ends with the abbreviation "LLC," indicating that the petitioner is a limited liability company. (I-140 petition, Part I.) LLC's which have more than one member file partnership tax returns, Form 1065. *See* Internal Revenue Service, Tax Issues for Limited Liability Companies, Publication 3402 (Rev. 7-2000), at 2, *available at* http://www.irs.gov/pub/irs-pdf/p3402.pdf.

The record contains copies of the petitioner's Form 1065 U.S. Returns of Partnership Income for 2001, 2002 and 2003. The I-140 petition was submitted on June 18, 2004. As of that date the petitioner's federal tax return for 2003 was the most recent return available.

Where a partnership's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 22 of page one of the petitioner's Form 1065. Where a partnership has income from sources other than from a trade or business, that income is reported on Schedule K. Similarly, some deductions appear only on the Schedule K. *See* Internal Revenue Service, Instructions for Form 4562 (2003), at 1, *available at* http://www.irs.gov/pub/irs-prior/i4562--2003.pdf.

Where the Schedule K has relevant entries for either additional income or additional deductions, net income is found on Schedule K, Form 1065, page 4, Analysis of Net Income (Loss), line 1.

In the instant petition, the petitioner's tax returns indicate no income from activities other than from a trade or business and no additional relevant deductions. Therefore the figures for ordinary income on line 21 of page one of the petitioner's Form 1120S tax returns may be considered as the petitioner's net income. Those figures are shown in the table below.

Tax year	Net income or (loss)	Wage increase needed to pay the proffered wage	Surplus or (deficit)
2001	$(8,033.00)	not applicable	not applicable
2002	$2,425.00	$55,000.00*	$(52,575.00)
2003	$2,418.00	$55,000.00*	$(52,582.00)

* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary.

The above information fails to establish the petitioner's ability to pay the proffered wage in either of the years at issue in the instant petition.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are a partnership taxpayer's current assets less its current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A partnership's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 15 through 17. If a partnership's 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 net current assets are expected to be converted to cash as the proffered wage becomes due. Thus, the difference between current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, evidences the petitioner's ability to pay.

Calculations based on the Schedule L's attached to the petitioner's tax returns yield the amounts for year-end net current assets as shown in the following table.

Tax year	Net current assets	Wage increase needed to pay the proffered wage	Surplus or (deficit)
2001	$12,128.00	not applicable	not applicable
2002	$14,819.00	$55,000.00*	$(40,181.00)
2003	$36,065.00	$55,000.00*	$(18,935.00)

* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary.

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in either of the years at issue in the instant petition.

The record also contains a copy of a quarterly payroll report of the petitioner for the second quarter of 2004 and a copy of a payroll statement of the petitioner dated July 1, 2004. However, those documents contain no significant additional evidence relevant to the petitioner's ability to pay the proffered wage.

The record contains no other evidence relevant to the petitioner's financial situation.

Based on the foregoing analysis, the evidence in the record fails to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

In summary, the issue on appeal is whether the beneficiary met all of the requirements stated by the petitioner in block 14 of the labor certification as of the day it was filed with the Department of Labor. The petitioner has not established that the beneficiary had four years of college and a bachelor's degree in mechanical engineering on September 5, 2002 or a foreign equivalent degree. Therefore, the petitioner has not overcome the director's decision. Beyond the decision of the director, the evidence fails to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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.