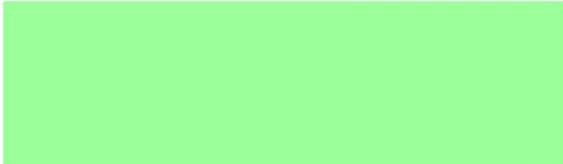




U.S. Citizenship  
and Immigration  
Services

(b)(6)



DATE: JUN 27 2012

OFFICE: NEBRASKA SERVICE CENTER

FILE: [REDACTED]

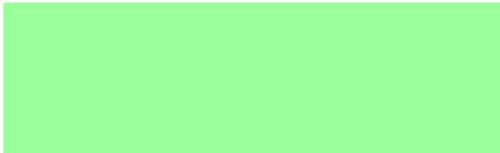
IN RE:

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Nebraska Service Center (the director), and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an automotive repair, maintenance and restoration facility. It seeks to employ the beneficiary permanently in the United States as a service director and race car technician. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States 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 record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. 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 January 27, 2009 denial, 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.

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 the 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 the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

Here, the Form ETA 750 was accepted on January 24, 2005. The proffered wage as stated on the Form ETA 750 is \$22.50 per hour (\$46,800 per year). The Form ETA 750 states that the position requires three years of experience in the job offered or in the related occupation of fabrications and moldings.

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>1</sup>

On appeal, counsel submits a brief but no additional, supporting documentary evidence.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1989 and currently to employ three workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on December 15, 2004, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel asserts that the director erred in his calculation of the petitioner's assets. Counsel asserts that the petitioner is owned by one individual and that the director should have taken into consideration the sole owner's personal assets when determining the petitioner's ability to pay. Counsel also asserts that the director should have taken into consideration the totality of the petitioner's financial circumstances.

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'l Comm'r 1977); see also 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States 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 (Reg'l Comm'r 1967).

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

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<sup>1</sup> The submission of additional evidence on appeal is allowed by the instructions to the 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).

petitioner's ability to pay the proffered wage. In the instant case, the beneficiary has not claimed to have worked for the petitioner and the petitioner has provided no evidence of having paid the beneficiary any wages at any time. Therefore, the petitioner has not established that it employed and paid the beneficiary the full proffered wage during any relevant timeframe including the period from the priority date in 2005 or subsequently.

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); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). 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 receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, 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 USCIS should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding

depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

*River Street Donuts* at 118. "[USCIS] and judicial precedent support the use of tax returns and the net income figures in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added).

The record before the director closed on January 2, 2009 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. As of that date, the petitioner's 2008 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2007 would be the most recent return available. However, though requested to provide its 2007 federal income tax return, the petitioner did not do so.

The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Although specifically and clearly requested by the director, the petitioner declined to provide copies of its 2007 tax returns. The 2007 tax return would have demonstrated the amount of taxable income the petitioner reported to the IRS and further reveal its ability to pay the proffered wage. The petitioner's failure to submit these documents cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. See 8 C.F.R. § 103.2(b)(14).

Therefore, the petitioner's tax returns demonstrate its net income for 2005 and 2006, as shown in the table below.

- In 2005, the Form 1120S stated net income<sup>2</sup> of \$13,668.51.
- In 2006, the Form 1120S stated a net loss of \$5,726.94.
- The petitioner provided no tax return or other regulatory-prescribed evidence for 2007.

Therefore, for the years 2005, 2006 and 2007, the petitioner did not have sufficient net income to pay the proffered wage.

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<sup>2</sup> 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 (2006-2011) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed May 15, 2012) (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.). Because the petitioner had no additional income, credits, deductions or other adjustments shown on its Schedule K for 2005 or 2006, the petitioner's net income is found on Line 21 of Form 1120S of its tax returns.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>3</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner provided no Schedule L for 2006. Therefore, the petitioner's tax returns demonstrate its end-of-year net current assets for 2005 only, as shown in the table below.

- In 2005, the Form 1120S, Schedule L stated net current assets of \$235.86.
- The petitioner provided no Schedule L for 2006.
- The petitioner provided no tax return or other regulatory-prescribed evidence for 2007.

Therefore, for the years 2005, 2006 and 2007 the petitioner did not demonstrate sufficient net current assets to pay the proffered wage.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

On appeal, counsel asserts that the director erred in calculating the petitioner's assets. Specifically, counsel asserts:

A sole proprietor's personal assets (as well as liabilities) may be taken into account by USCIS in evaluating the petitioner's ability to pay. Likewise, the same should presumably hold true for most partnerships and a sole shareholder in a closely-held corporation when considering the ability to pay.

Counsel cites to *O'Conner v. Atty. Gen.*, 1987 WL 18243 (D.Mass. Sept. 29, 1987) and *Ohsawa America*, 1988-INA-240 (BALCA, Aug. 30, 1988) in support of his assertions. *O'Conner v. Atty. Gen.* indicates that the personal assets and income of the sole proprietors are relevant to a determination of the ability of the sole proprietorship to pay the proffered wage. *Ohsawa* is precedent issued by DOL's Board of Alien Labor Certification Appeals (BALCA). Counsel does not state how DOL precedent is binding in these proceedings. 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

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<sup>3</sup>According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

Moreover, counsel also does not state that the BALCA panel in *Ohsawa America* also considered the fact that the petitioning entity showed increased revenue and decreased operating losses in addition to one of its shareholder's willingness to fund the company. In the instant petition, the petitioner shows decreased revenue. Thus, in addition to not being binding precedent, *Ohsawa America* is distinguishable from the facts of the instant petition.

As evidence of his personal assets, [REDACTED] the sole shareholder of the petitioning corporation, provided a certificate of title for a 1989 Lotus which is registered in his name.

Notwithstanding counsel's assertions, the petitioner is not a sole proprietorship; it is an S Corporation. 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'r 1984). A sole proprietor's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. The same is not true for a corporation. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 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 [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

Therefore, USCIS will not consider the personal assets of any of the petitioning entity's shareholders for determining the ability to pay, even if there is only one such shareholder.

In response to the director's November 21, 2008 request for evidence, the petitioner provided pictures of five automobiles which it claims are owned by the petitioner and [REDACTED]: 1) a yellow Mazda GTU Sports car which it claims is worth \$60,000, 2) a blue and white Mazda RX 7 which it claims is worth \$22,000, 3) a yellow foreign toys race car which it claims is worth \$25,000, 4) a yellow Mazda RX8 GTU which it claims is worth \$45,000 and 5) a green Mazda RX7 which it claims is worth \$20,000. The petitioner asserts that the value of these automobiles constitutes assets which would be available to pay the beneficiary the proffered wage.

Though the petitioner claims that it owns the five cars identified in the pictures, it provided no evidence of such ownership, by way of titles, purchase orders or bills of sale.

Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

Counsel's assertions that these vehicles belong to the petitioner do not constitute evidence. *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIOA 1983).

Further, counsel provided neither appraisals for the vehicles identified nor even Kelly Blue Book valuations which would support the petitioner's claims regarding the value of these vehicles. Moreover, if the vehicles pictured belong to the petitioning entity, such vehicles would constitute inventory which would have been reported on the petitioner's federal income tax return. These vehicles would not constitute some additional source of revenue for the petitioner's business. If, however, the vehicles are owned by [REDACTED] as an individual and constitute his personal assets, USCIS would not consider such assets for purposes of paying the beneficiary the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980).

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the DOL.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). The petitioning entity in *Sonegawa* 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 the instant case, though the petitioner claims to have been in business for 18 years at the time the instant petition was filed, it provided tax documentation for only two of these years. The tax documentation provided shows modest to marginal gross sales, officer compensation and salaries paid for both of the two years. The evidence does not establish the 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 or whether the beneficiary is replacing a former employee or an outsourced service. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9<sup>th</sup> Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

Beyond the decision of the director, the petitioner has also not established that the beneficiary is qualified for the offered position. The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the 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'l Comm'r 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm'r 1986). *See also, Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1<sup>st</sup> Cir. 1981).

In the instant case, the labor certification states that the offered position requires three years of experience in the job offered: Service Director/Race Car Technician, or in the related occupation of fabrications and moldings. On the labor certification, the beneficiary claims to qualify for the offered position based on experience as a 1) Manager for [REDACTED] in [REDACTED] Florida from February 2001 through at least December 15, 2004, 2) Service Manager for [REDACTED] Florida from September 1991 until February 2001, 3) night shift manager/site foreman for Ilkley [REDACTED] England from April 1987 until April 1991, 4) General Manager for [REDACTED] England from May 1985 until March 1987 and 5) automotive clerk for [REDACTED] England from April 1983 until April 1985.

The beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. *See* 8 C.F.R. § 204.5(l)(3)(ii)(A).

The record contains three letters attesting to the beneficiary's experience. The first letter is from [REDACTED], Owner of [REDACTED] in [REDACTED], England. The letter is not dated and fails to identify the position which the beneficiary was supposed to have held and the duties

which the beneficiary was supposed to have performed for this employer. Further, the letter does not identify the supposed dates of employment and whether the beneficiary worked on a full-time basis. The second letter is dated December 5, 2004 and is from [REDACTED] Proprietor of [REDACTED] in [REDACTED], England. Though [REDACTED] indicates that the beneficiary was employed as a "mechanic's labourer and car dismantler," he does not specify the duties which the beneficiary performed. Further, [REDACTED] does not specify the beneficiary's dates of employment and whether he worked on a full-time basis. The third letter is dated June 26, 2007 and is from [REDACTED], Director of [REDACTED] in Fort Lauderdale, Florida. In his letter, [REDACTED] states that the beneficiary began working for his company in 2002, whereas the beneficiary indicated on Form ETA 750B, that he began working for [REDACTED] in February 2001.

It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

[REDACTED] states that the beneficiary worked as a Director of Research and Development and attributes duties to the beneficiary which correspond with the duties included for this employer on Form ETA 750. However, [REDACTED] does not indicate when in 2002 the beneficiary began working for his company and does not indicate whether the beneficiary worked on a full-time basis. The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its labor certification application, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

Because, the letter from [REDACTED] does not specify the date in 2002 on which the beneficiary began working and none of the other letters identify dates of employment for the beneficiary, the petitioner has not demonstrated that the beneficiary obtained the three years of required experience prior to the priority date on January 24, 2005.

Further, the only letter which articulates the duties which the beneficiary performed is the letter from [REDACTED]. None of the duties specified in this letter correspond with the duties for which the beneficiary would be responsible while working for the petitioner. According to [REDACTED] of [REDACTED] the beneficiary was the Director of Research and Development "and uses innovative new products and new techniques to evolve the technology of Stone Henge and its products. [The beneficiary] oversees the design and construction in the factory in which the molds are made and oversees the day to day operations of the company" (emphasis added). The petitioner not only requires the prospective Service Director and Race Car Technician to "supervise day to day operations" but also requires him to restore, plan, schedule repairs, rebuild, reline, adjust and replace framing on cars. Additionally, the prospective race car technician is required to repair electrical and/or mechanical parts, "construct composite molds for materials such as Carbon Kevlar, fiberglass and carbon fiber for various exterior body panels." Further, the prospective race car technician would have to "repaint and refinish automotive bodies, straighten frames and replace damaged glass." Neither the letter from [REDACTED] nor any of the other letters provided indicate that the beneficiary has experience performing such duties.

The evidence in the record does not establish that the beneficiary possessed the required experience set forth on the labor certification by the priority date. Therefore, the petitioner has also failed to establish that the beneficiary is qualified for the offered position.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER:** The appeal is dismissed.