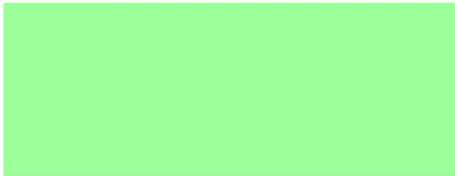


(b)(6)

U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090

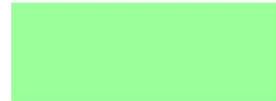


U.S. Citizenship  
and Immigration  
Services

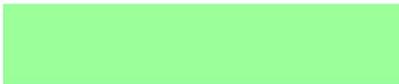


DATE: **SEP 28 2012** OFFICE: TEXAS SERVICE CENTER

FILE:

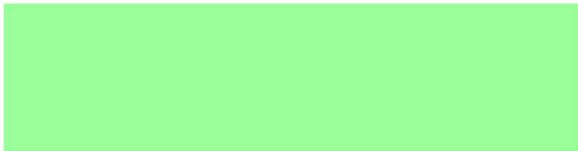


IN RE: Petitioner:  
Beneficiary:



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:

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

The petitioner describes itself as a manufacturer of metal and stone. It seeks to employ the beneficiary permanently in the United States as an experimental welder. The petitioner requests classification of the beneficiary as a professional or skilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A).<sup>1</sup>

The petition is accompanied by a copy of an ETA Form 750, Application for Alien Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL). The priority date of the petition is April 30, 2001.<sup>2</sup> The director requested a duplicate labor certification from the DOL.

The director's decision of May 13, 2009 denying the petition concluded that the petitioner had fraudulently altered the copy of the labor certification, and director invalidated the labor certification accordingly pursuant to 20 C.F.R. § 656.30(d).<sup>3</sup>

The record shows that the appeal is properly filed 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.

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

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<sup>1</sup> Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), grants preference classification to qualified immigrants who are capable 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. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), also grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

<sup>2</sup> The priority date is the date the DOL accepted the labor certification for processing. See 8 C.F.R. § 204.5(d).

<sup>3</sup> The regulation at 20 C.F.R. § 656.30(d) (2004) provides:

(d) After issuance labor certifications are subject to invalidation by the INS or by a Consul of the Department of State upon a determination, made in accordance with those agencies, procedures or by a Court, of fraud or willful misrepresentation of a material fact involving the labor certification application. If evidence of such fraud or willful misrepresentation becomes known to a RA or to the Director, the RA or Director, as appropriate, shall notify in writing the INS or State Department, as appropriate. A copy of the notification shall be sent to the regional or national office, as appropriate, of the Department of Labor's Office of Inspector General.

properly submitted upon appeal.<sup>4</sup>

On appeal, counsel asserts that the director incorrectly concluded that the petitioner fraudulently altered the labor certification. Upon a review of the record of proceeding, it is concluded that the inconsistencies between the labor certification copy submitted with the petition and the duplicate copy of the labor certification issued to the director by the DOL is due to typographical errors in the duplicate labor certification generated by the DOL, and not due to any fraudulent alteration of the document by the petitioner. Therefore, the director's decision invalidating the labor certification is withdrawn.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the director 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 failed to establish its ability to pay the proffered wage, and failed to establish that the beneficiary possessed the required experience for the offered position.<sup>5</sup>

Regarding the petitioner's 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 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.

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<sup>4</sup> The submission of additional evidence on appeal is allowed by the instructions to Form I-290B, Notice of Appeal or Motion, which are incorporated into the regulations by 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).

<sup>5</sup> During the adjudication of this appeal, the AAO issued a request for evidence instructing the petitioner to submit evidence addressing these two issues. As is discussed in detail below, the evidence submitted in response failed to establish the petitioner's continuing ability to pay the proffered wage from the priority date and the beneficiary's qualifying experience for the offered position.

§ 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 April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$32,267.70 per year. The copy of the certified Form ETA 750 states that the position requires four years of experience as an experimental welder, or four years of experience in the related occupation of welder.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 1988, did not state its gross annual income, and currently employs 80 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 July 16, 2003, the beneficiary claimed to have worked for the petitioner since August 1999.

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 petitioner's ability to pay the proffered wage. In the instant case, the petitioner submitted evidence to establish it employed and paid the beneficiary from the priority date of April 30, 2001, as shown in the table below.

- In 2001, the W-2 Form stated Wages, tips and other compensation of \$21,408.00.
- In 2002, the W-2 Form stated Wages, tips and other compensation of \$27,323.90.
- In 2003, the W-2 Form stated Wages, tips and other compensation of \$27,412.93.
- In 2004, the W-2 Form stated Wages, tips and other compensation of \$29,889.50.
- In 2005, the W-2 Form stated Wages, tips and other compensation of \$37,824.50.
- In 2006, the W-2 Form stated Wages, tips and other compensation of \$37,537.00.

- In 2007, the W-2 Form stated Wages, tips and other compensation of \$35,666.25.
- In 2008, the W-2 Form stated Wages, tips and other compensation of \$38,379.38.
- In 2009, the W-2 Form stated Wages, tips and other compensation of \$34,363.13.
- In 2010, the W-2 Form stated Wages, tips and other compensation of \$38,578.13.
- In 2011, the W-2 Form stated Wages, tips and other compensation of \$38,096.64.

Therefore, for the years 2001 through 2004, the petitioner did not pay the beneficiary at a salary equal to or greater than the proffered wage.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1<sup>st</sup> Cir. 2009); *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 sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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 the Service 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).

For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. The record before the AAO closed on August 16, 2012 with the receipt by the AAO of the petitioner's submissions in response to the AAO's request for evidence. As of that date, the petitioner's 2011 federal income tax return was due and requested. However the petitioner failed to submit its 2011 federal tax return.<sup>6</sup>

The petitioner's tax returns demonstrate its net income for 2001 through 2010, as shown in the table below.

- In 2001, the Form 1120 stated net income of -\$157,913.
- In 2002, the Form 1120 stated net income of -\$178,190.
- In 2003, the Form 1120 stated net income of \$44,110.
- In 2004, the Form 1120 stated net income of \$121,128.
- In 2005, the Form 1120 stated net income of \$400,932.
- In 2006, the Form 1120 stated net income of \$109,866.
- In 2007, the Form 1120 stated net income of \$69,858.
- In 2008, the Form 1120 stated net income of -\$122,333.
- In 2009, the Form 1120 stated net income of -\$282,196.
- In 2010, the Form 1120 stated net income of -\$13,418.

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<sup>6</sup> As is noted above, the petitioner must demonstrate its continuing ability to pay the proffered wage from the priority date and continuing until the beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay "shall be in the form of copies of annual reports, federal tax returns, or audited financial statements." *Id.* The beneficiary has not yet obtained lawful permanent residence. The petitioner's failure to provide complete annual reports, federal tax returns, or audited financial statements for each year from the priority date is sufficient cause to dismiss this appeal. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Therefore, for the years 2001, 2002, 2008, 2009, and 2010, the petitioner did not have sufficient net income to pay the proffered wage.

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, USCIS will review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>7</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. 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's tax returns demonstrate its end-of-year net current assets for 2001 through 2010, as shown in the table below.

- In 2001, the Form 1120 stated net current assets of -\$93,413.
- In 2002, the Form 1120 stated net current assets of -\$20,026
- In 2003, the Form 1120 stated net current assets of \$5,031.
- In 2004, the Form 1120 stated net current assets of -\$274,251.
- In 2005, the Form 1120 stated net current assets of \$6,606.
- In 2006, the Form 1120 stated net current assets of \$49,655.
- In 2007, the Form 1120 stated net current assets of \$155,134.
- In 2008, the Form 1120 stated net current assets of \$262,850.
- In 2009, the Form 1120 stated net current assets of \$50,386.
- In 2010, the Form 1120 stated net current assets of -\$24,555.

Therefore, for the years 2001 through 2005, and 2010, the petitioner did not have sufficient net current assets to pay the proffered wage.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, except for years 2001 and 2002, the petitioner 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.

However, USCIS records indicate that the petitioner has filed 16 petitions since 1995, including nine I-129 petitions, and seven I-140 petitions. The petitioner would need to demonstrate its ability to pay the proffered wage for each I-140 beneficiary from the priority date until the beneficiary obtains

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<sup>7</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.

permanent residence. *See* 8 C.F.R. § 204.5(g)(2). However, the petitioner does not need to establish its ability to pay the additional I-140 beneficiaries for each year that the beneficiary of the instant petition was paid the full proffered wage. In the instant case, the beneficiary was paid at or above the proffered wage from 2005 through 2011. Therefore, the only years the ability to pay the additional beneficiaries will be considered are from 2001 through 2004.

For 2001 and 2002, the petitioner was unable to establish its ability to pay the beneficiary of the instant petition, let alone the proffered wages of the additional beneficiaries. For 2003 and 2004, the petitioner had to establish its ability to pay a total of six I-140 beneficiaries.<sup>8</sup> The combined proffered wage for the four beneficiaries listed by the petitioner in its response to the AAO's request for evidence is \$197,554.70. The petitioner did not provide any evidence of wages paid to the additional beneficiaries. Therefore, the petitioner did not have sufficient net income or net current assets in 2003 and 2004 to pay the proffered wage to the beneficiary and the additional I-140 beneficiaries.

In summary, the petitioner failed to establish its continuing ability to pay the proffered wage for 2001, 2002, 2003, and 2004.

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 Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). The petitioning entity in *Sonogawa* 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 *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, 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.

The record does not contain any newspapers or magazine articles, awards, or certifications indicating the company's milestone achievements. Unlike *Sonegawa*, the petitioner in this case has not shown any evidence reflecting the company's reputation or historical growth since its inception in 1997. Nor has the petitioner presented evidence of any uncharacteristic business expenses or losses contributing to its inability to pay the proffered wage.

Assessing the totality of the evidence submitted and under the circumstances as described above, the AAO finds that the petitioner has not demonstrated by a preponderance of the evidence that it has the continuing ability to pay the proffered wage beginning on the priority date.

Also beyond the decision of the director, the petitioner has 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 four years of experience in the offered position or in the related occupation of a welder. On the labor certification, the beneficiary claims to qualify for the offered position based on experience as an experimental welder for the petitioner from August 1999 to the present<sup>9</sup> and as a welder for [REDACTED] from April 1985 to January 1995.

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). When filing the Form I-140, the petitioner submitted a letter from [REDACTED] Administrator, on [REDACTED] letterhead, stating the company employed the beneficiary for 15 years.

In its request for evidence, the AAO instructed the petitioner to explain discrepancies this letter created with regard to the beneficiary's age and date of entry into the United States. Counsel asserted the discrepancies were created due to a language barrier, and explained the beneficiary

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<sup>9</sup> The beneficiary's experience in the offered position with the petitioner can only be considered for meeting the requirements of the labor certification in very limited circumstances, and such circumstances are not asserted by the petitioner in the instant case. See e.g., *Delitizer Corp. of Newton*, 88-INA-482, May 9, 1990 (BALCA).

began working for [REDACTED] at 15 years of age.

The petitioner submitted another letter from [REDACTED] Administrator, on [REDACTED] letterhead, stating the company employed the beneficiary, and he performed the duties of a machine professional and welder for 15 years; a letter from [REDACTED] Administrator General, on [REDACTED] letterhead, stating the company had employed the beneficiary as a professional welder from January 1990 to February 1995; and a letter from [REDACTED] General Accountant, on [REDACTED] letterhead, stating the company employed the beneficiary as a welder from 1981 to 1989.

None of these letters state the specific duties performed by the beneficiary. The letter from [REDACTED] does not give the specific dates of employment. The letters from [REDACTED] and [REDACTED] do not contain a translation. 8 C.F.R. § 103.2(b)(3) states:

*Translations.* Any document containing foreign language submitted to [USCIS] shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

Further, the beneficiary did not list [REDACTED] as employers on the labor certification. *See Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976)(a claim to possess experience that is not listed on the labor certification is less credible). The instructions for Form ETA 750B state that the beneficiary must list all jobs held during the last three years as well as "any other jobs related to the occupation for which the alien is seeking certification." The failure to list this newly claimed employment on the labor certification creates an inconsistency. The petitioner must resolve any inconsistencies in the record by independent, objective evidence. *See Matter of Ho*, 19 I&N Dec. at 591-92.

Therefore, 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.