PUBLIC COPY

U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20536

U.S. Citizenship and Immigration Services

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

B6

[redacted]

FILE: EAC 01 121 51057 Office: VERMONT SERVICE CENTER Date: MAR 30 2004

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: SELF-REPRESENTED

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

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

The petitioner is a physical therapy rehabilitation clinic. It seeks to employ the beneficiary permanently in the United States as a physical therapist. The petitioner, presumably, asserts that the beneficiary qualifies for certification pursuant to 20 C.F.R. § 656.10, Schedule A, Group I. On March 5, 2001, the petitioner submitted the titled Application for Alien Employment Certification (ETA 750) with the Immigrant Petition for Alien Worker (2001 I-140). 20 C.F.R. § 656.22 (a).

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.

Provisions of 8 C.F.R. § 204.5(g)(2) state:

> *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.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petition's priority date. Employment-based petitions depend on priority dates. For Schedule A petitions, the filing of the I-140 with Citizenship and Immigration Services (CIS), formerly the Service or the INS, establishes the priority date. 8 C.F.R § 204.5(d). The petition must be accompanied by the documents required by the particular section of the regulations under which it is submitted. 8 C.F.R. § 103.2(b)(1). For reasons discussed below, the petitioner has failed to establish its ability to pay the proffered wage.

At the outset, a notice (I-797) establishes that another petitioner, Ramapo Physical Medical Rehabilitation (Ramapo), filed an I-140 on October 22, 1997 for the beneficiary in EAC 98 116 50238 (1997 I-140). A later I-797 relates that the beneficiary's Application to Adjust to Permanent Resident Status (I-485) was filed on March 4, 1998, and CIS records show that the I-485 was abandoned on February 19, 2002.

When the petitioner filed the 2001 I-140 with another ETA 750, the beneficiary wrote:

> This application for I-140 is being submitted to your office under my new employer/petitioner, Ortho-Sport Rehabilitation who previously petitioned me last 1997.

The priority date of the 1997 I-140 appears to be October 22, 1997, though the director used January 28, 1998. More puzzling yet, the petitioner showed no connection between it and Ramapo, which previously petitioned. In any case, the beneficiary's salary as stated on the 2001 I-140 and ETA 750 is $28.90 per hour or $60,112 per year.

The petitioner, who is self-represented, initially offered no evidence of its ability to pay the proffered wage. In a request for evidence (RFE) dated August 21, 2001, the director required additional evidence 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 RFE exacted, for 2000, the petitioner's federal income tax return, specifying, if applicable, the sole proprietor's Form 1040, including Schedule C, U.S. Individual Income Tax Return.

The response to the RFE was, simply:

> This business commenced in the tax year 2001 [sic] Therefore there is no federal income tax return for the year 2000.

The director observed that, since the I-140 2001 petition conceded that the petitioner commenced business on February 1, 1998, the petitioner could have produced a 2000 federal income tax return. Because the petitioner did not offer evidence or an explanation, the director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage at the priority date, and continuing until the beneficiary obtains lawful permanent residence, and denied the petition.

The petitioner compounds the confusion on the appeal, received March 14, 2002, with reference to a wholly new entity, New Jersey Center for PT, otherwise called the N.J. Center for Physical Therapy, LLC (NJC):

> Regarding my petition filed last March 2001. [NJC] is a new company. No tax returns had been established at that time. The company has been operating for a year now. Attached are copies of bank statements showing the capability of the company to pay the offered wage.

Other data with the appeal included an I-797, issued by CIS on May 17, 2002. Somebody had scratched over the petitioner's name and address and added NJC's. Nobody signed or dated the alterations, which stated:

> Note: [The beneficiary] is <u>not</u>, I repeat <u>not</u>, employed by [the petitioner]. [The beneficiary] is employed by [NJC]. . . .
>
> Since 1-2-01. Thank you. Please make necessary changes to this notice. [Sic]
>
> *Third Notice* [Sic].

Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Also, on appeal, the petitioner submits commercial bank statements of NJC. They showed balances of $18,381.93 on December 31, 2001, $73,638.27 on January 31, 2002, and $79,767.67 on February 28, 2002. The petitioner submitted NJC's bank statements to demonstrate that the petitioner had sufficient cash flow to pay the proffered wage. There is no proof, however, that NJC's bank statements, somehow, relate to funds of the petitioner at the priority date. The petitioner admits that NJC did not exist until 2001, but withholds evidence of the petitioner's ability to pay the proffered wage in 2000, when the petitioner did exist. The petitioner withholds its tax returns and financial reports for a period that it conducted business.

*Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states:

> 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.

Since the petitioner silently withholds evidence of its 2000 federal income tax return, as requested in the RFE, bank statements of another, presented on appeal, cannot be considered. Where the petitioner is notified and has a reasonable opportunity to address the deficiency of proof, evidence submitted on appeal will not be

considered for any purpose, and the appeal will be adjudicated based on the record of proceedings before CIS. *Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988).

After a review of the bank statements, ETA 750, I-140, and statements in response to the RFE and on appeal, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence.

Beyond the decision of the director, the petition cannot be approved because neither the petitioner nor NJC met regulatory requirements for a labor certification under Schedule A. NJC filed no ETA 750 and no evidence of pre-arranged employment of the beneficiary, as found in Part A of Form ETA 750.

Regulations at 20 C.F.R. § 656.22 state:

> (a) An employer shall apply for a labor certification for a Schedule A occupation by filing an Application for Alien Employment Certification . . . with the appropriate [CIS] office. . . .
>
> (b) The Application . . . shall include:
>
> > (1) Evidence of prearranged employment for the alien beneficiary by having an employer complete and sign the job offer description portion of the application form. . . .
> >
> > (2) Evidence that notice of filing the application for Alien Employment Certification was provided to the bargaining representative or the employer's employees as prescribed in § 656.20(g)(3) of this part.

The proceedings do not document that either the petitioner or NJC, as employers, posted notice to their respective employees or the bargaining representative. The statute imposes the duty to post the notice in order to provide U.S. workers at the location of intended employment with a meaningful opportunity to compete for the job and to assure that the wages and working conditions of United States workers similarly employed will not be adversely affected by the employment of aliens in Schedule A occupations. *See* the Immigration Act of 1990, Pub.L. No. 101-649, § 122(b)(1), 1990 Stat. 358 (1990); *see also* Labor Certification Process for the permanent Employment of Aliens in the United States and Implementation of the Immigration Act of 1990, 56 Fed. Reg. 32,244 (July 15, 1991).

The regulation at 20 C.F.R. § 656.20(g)(1) mandates in respect to the notice:

> In applications filed under . . . [§] 655.22 (Schedule A), the employer shall document that notice of the filing of the Application for Alien Employment Certification was provided:
>
> (i) To the bargaining representative(s) (if any) of the employer's employees in the occupational classification for which certification of the job opportunity is sought in the employer's location(s) in the area of intended employment.
> (ii) If there is no such bargaining representative, by posted notice to the employer's employees at the facility or location of the employment. The notice shall be posted for at least 10 consecutive days.

This petition must be denied because the petitioner withheld the requested evidence to establish its ability to pay the proffered wage at the priority date and continuing until the beneficiary obtains lawful permanent residence. Consequently, this discussion need not belabor the petitioner's further omission to document the posting of the notice of the job opportunity. Likewise, the lack of NJC's I-140 or ETA 750 is moot.

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.