U.S. Department of Homeland Security
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Washington, DC 20536

U.S. Citizenship and Immigration Services

B4

[redacted]

File: [redacted] Office: VERMONT SERVICE CENTER Date: SEP 17 2004

IN RE: Petitioner: [redacted]
Beneficiary:

Petition: Immigrant Petition for Alien Worker as a Skilled Worker Pursuant to Section 203(b)(3)(A)(i) of the Immigration and Nationality Act , 8 U.S.C. § 1153(b)(3)(A)(i)

IN 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, Director
Administrative Appeals Office

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy
PUBLIC COPY

DISCUSSION: The employment-based immigrant visa petition was initially approved by the director, Vermont Service Center. Subsequently, the beneficiary applied for adjustment of status. On the basis on new information received and on further review of the record, the director determined that the petitioner was not eligible for the benefit sought. Accordingly, the director properly served the petitioner with a notice of his intent to revoke the approval of the preference visa petition, and his reasons therefore. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reopen or reconsider. The motion will be granted, the previous decision of the AAO will be affirmed, and the petition will be denied.

The petitioner is a provider of physical therapy services and seeks to employ the beneficiary permanently in the United States as a physical therapist at an annual salary of $50,000. As required by statute, the petition was accompanied by Form ETA 750, labor certification application. The petitioner asserts that the beneficiary qualifies for blanket labor certification pursuant to 20 C.F.R. § 656.10, Schedule A, Group I. The director determined the petitioner had not established that it had the financial ability to pay the beneficiary's proffered wage as of the filing date of the visa petition.

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.

The regulation at 8 C.F.R. § 204.5(g)92) 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.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petition's filing date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. Here, the petition's filing date is February 25, 2000, the date the visa petition was submitted to Citizenship and Immigration Services. *See* 8 C.F.R. § 204.5(d).

In dismissing the petitioner's appeal, the AAO noted that the evidence contained in the record showed that the petitioner paid the beneficiary a salary of $49,653.50 and $21,471.36 in 2000 and 2001, respectively. On motion, counsel claims:

> Upon a more thorough examination of the various 1099-Misc documents issued to the [b]eneficiary for the year 2000, the latter has in her possession another 1099-Misc in the amount of $2,559.00 issued by the GA Physical Therapy, PC . . . Top Rehab, Inc. should

have paid the said amount of $2,559.00 directly to the [b]eneficiary by virtue of its contract with GA Physical Therapy, PC to provide the services of physical therapists, but for the reason of operational convenience, GA Physical Therapy, PC paid the [b]eneficiary directly. The said amount should have been made for and on behalf of Top Rehab, Inc.

* * *

During the year 2001, the [p]etitioner, Top Rehab [sic] paid the [b]eneficiary the total amount of $21,471.36. However, during the year 2001, the [b]eneficiary has already been issued by [CIS] her Employment Authorization Card, which would now allow her to work for other companies.

* * *

The total salary that the [b]eneficiary received from Top Rehab and/through its client facilites are as follows.

2001 W-2 Wage and Tax Statement (Top Rehab)	: $5,635.00
2001 1099-Misc (Top Rehab)	: $15,836.36
2001 1099 (New York Therapy Placement Services)	: $13,491.00
2001 1099 (Rehabcare & Wellness PT, PC)	: $57, 127.36

Counsel's motion to reopen or reconsider qualifies for consideration as a motion to reconsider because it asserts that the AAO's decision was based on an incorrect application of law. *See* 8 C.F.R. § 103.5(a)(3). However, counsel provides no documentation to establish the existence of a contractual relationship between the petitioner and its "client facilties."[1] The assertions of counsel do not constitute evidence. *Matter of Obaigbena,* 19 I&N Dec. 533 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Additionally, the record of proceeding containing the petitioner's prior submissions of evidence does not include a contract between the petitioner and GA Physical Therapy PC. 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).

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. That burden has not been met in this case. Accordingly, the motion will be granted, the previous decision of the AAO will be affirmed, and the petition will be denied.

ORDER: The motion is granted. The previous decision of the AAO, dated January 13, 2003, is affirmed.

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[1] We also note that the copy of the 2001 1099-Misc Form submitted by counsel as evidence of the beneficiary's salary of $13,491 is illegible. We are unable to verify the date, the payer and recipient's name, address, and identification number. Further, it appears that the name of the company, "New York Therapy Placement Svs," as well as the compensation amount of $13,491, have been handwritten.