U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 09579412

Date: NOV. 23, 2021

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Advanced Degree Professional or Alien of Exceptional Ability

The Petitioner, an entertainment, artist management and promotion business, seeks classification for the Beneficiary as an individual of exceptional ability in the performing arts. Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A). This second preference classification makes immigrant visas available to foreign nationals with a degree of expertise significantly above that normally encountered in the sciences, arts, or business.

The Director of the Texas Service Center denied the petition, concluding that the Petitioner did not establish that the Beneficiary was an individual of exceptional ability. The Director further found that the Petitioner did not comply with regulations requiring posting notice of the job opportunity, did not establish that it had the ability to pay the offered salary to the Beneficiary, and did not establish that the job offered to the Beneficiary was *bona fide*.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit by a preponderance of the evidence. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). The AAO reviews the questions in this matter *de novo*. *See Matter of Christo's Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon *de novo* review, we will dismiss the appeal.

I. LAW

Second preference immigrant visas are available for qualified individuals who are advanced-degree professionals or who, because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States. Section 203(b)(2) of the Act. An advanced degree is one above a baccalaureate.[1] 8 C.F.R. § 204.5(k)(2). Exceptional ability in the sciences, arts, or business means a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business. *Id.*

Generally, to pursue employment-based immigration and to permanently fill a position in the United States with a foreign worker, a prospective employer must first obtain certification from the U.S.

[1] The definition of advanced degree also includes a baccalaureate followed by at least five years of progressive experience. 8 C.F.R. § 204.5(k)(2).

Department of Labor (DOL). *See* section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5). DOL approval signifies that: (1) there are insufficient U.S. workers able, willing, qualified, and available for an offered position; and (2) the employment of a noncitizen in the position will not harm wages and working conditions of U.S. workers with similar jobs. *Id.*

If DOL approves a position, an employer must submit an approved labor certification with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Among other things, USCIS determines whether a noncitizen beneficiary meets the requirements of a certified position and a requested immigrant visa category. 8 C.F.R. § 204.5(k)(3)(ii). Upon approval of the petition, a foreign national may apply for an immigrant visa abroad, or if eligible, adjust status in the United States to lawful permanent resident. *See* section 245 of the Act, 8 U.S.C. § 1255.

This petition is for a Schedule A occupation. A Schedule A occupation is one codified at 20 C.F.R. § 656.5 for which DOL has already determined that there are not sufficient U.S. workers who are able, willing, qualified and available and that the wages and working conditions of similarly employed U.S. workers will not be adversely affected by the employment of noncitizens in such occupations. Petitions for Schedule A occupations do not require a petitioner to test the labor market and obtain a certified ETA Form 9089, Application for Permanent Employment Certification, from DOL prior to filing the petition with USCIS. Instead, the petition is filed directly to USCIS with an uncertified ETA 9089 in duplicate. *See* 8 C.F.R. § 204.5(a)(2); *see also* 20 C.F.R. § 656.15. The petition must also include a prevailing wage determination (PWD) in accordance with 20 C.F.R. § 656.40. *See* 20 C.F.R. § 656.15(b)(1).[2]

Occupations for individuals with exceptional ability in performing arts are designated as Schedule A, Group II occupations. This designation requires that a petitioner submit evidence that the beneficiary satisfies criteria demonstrating exceptional ability (for example, documentation of widespread acclaim and international recognition, play bills and star billings, published material about the beneficiary) as outlined in 20 C.F.R. § 656.15(d)(2)((i)-(vi)).[3] Beyond demonstrating the beneficiary's exceptional ability, the documentation presented must establish that the beneficiary worked for the past year in a position that requires an individual of exceptional ability and that the beneficiary's services are sought for a position that requires an individual of exceptional ability. 20 C.F.R. § 656.15(d)(2). As with most filings for an employment-based immigrant that requires a job offer, this petition must include evidence that the prospective United States employer has the ability to pay the proffered wage. 8 C.F.R. § 204.5(g)(2).

[2] A request for prevailing wage determination is submitted to DOL on Form ETA 9141, Application for Prevailing Wage Determination, which requires that an employer provide the details of the job offer, including the job title, job duties, work location (including whether work will be performed in multiple locations), and the minimum job requirements. After processing, DOL returns the ETA 9141 with a determination of the prevailing wage rate and level for the position described therein.

[3] In *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010), we held that, "truth is to be determined not by the quantity of evidence alone but by its quality."

II. ANALYSIS

A. The Beneficiary as an Individual of Exceptional Ability

The petition here was filed on November 30, 2018, seeking to classify the Beneficiary as an individual of exceptional ability in the performing arts to fill the offered job of singer/musician. The ETA 9089 states that the position requires 10 years of experience as a singer/musician. The Petitioner submitted evidence that the Beneficiary is an international recording artist with more than 25 years of experience as a singer of Pakistani songs in various musical genres, including multiple popular hits in the 1980s and 1990s, and recordings of cultural and religious music.

Pursuant to 20 C.F.R. § 656.15(d)(2):

> An employer seeking labor certification on behalf of an alien of exceptional ability in the performing arts must file documentary evidence that the alien's work experience during the past twelve months did require, and the alien's intended work in the United States will require, exceptional ability; and must submit documentation to show this exceptional ability, …

The Director did not contest that the Petitioner submitted evidence that met the listed criteria to demonstrate the Beneficiary's exceptional ability under the regulations, including published material about the Beneficiary, and playbills and star billings listing the Beneficiary. *See* 20 C.F.R. § 656.15(d)(2)(ii), (iv). Nor does he contest that the Beneficiary possesses the required 10 years of experience as a singer/musician. However, the Director found that the Beneficiary's work during the year prior to filing the petition did not require exceptional ability, nor will the intended work in the United States require exceptional ability. The Director noted that the Beneficiary's most acclaimed song was released in 1993 and the record did not demonstrate the Beneficiary's current exceptional ability.

The submission of evidence under 20 C.F.R. § 656.15(d)(2)(i)-(vi) does not, by itself, establish eligibility for the benefit. The regulation at 20 C.F.R. § 656.15(d)(2) further requires that the petitioner's documentation show that both a beneficiary's work during the past year, and the intended work in the United States, require exceptional ability. As noted above, the petition here was filed on November 30, 2018. The record demonstrates that in the year before the filing of the petition, the Beneficiary was employed for approximately six months in the same position for which the Petitioner seeks to employ him, that of singer/musician.[4]

In response to the Director's notice of intent to deny (NOID) the petition, counsel for the Petitioner stated that it should be "self-evident" that the offered position requires exceptional ability because "the public would not pay good money to attend a concert given by an unknown singer who is not as

[4] Part K of the ETA 9089 submitted in support of the petition states that the Beneficiary was employed in this position with the Petitioner from August 16, 2016 to June 5, 2018. No other employment listed on the ETA 9089 falls within the 12-month period prior to filing the petition.

talented and well known as [the Beneficiary]." The Petitioner did not provide any additional evidence of the Beneficiary's work experience in the year before filing the petition.[5]

On appeal, counsel for the Petitioner states that "[the] Beneficiary remains a major recording artist with significant promotional contracts." However, the Petitioner did not provide evidence to corroborate this statement. Unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988) (citing *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980)).

The only additional evidence submitted on appeal are two "itineraries" for what the Petitioner asserts are two events it purportedly managed for the Beneficiary, with performance dates in 2016, 2017 and 2018. However, the "itineraries" appear to be a typed list of dates and venues, with no supporting evidence that these performances actually occurred as scheduled or what was performed. The Petitioner does not provide supporting evidence to establish that it was contracted to manage these events, that the Beneficiary was contracted to perform or promote these events, or the nature of the events such that it required an individual of exceptional ability. We note that only one of the "itineraries" identifies the Beneficiary, while the other is titled [redacted]' Assertions made without supporting documentation are of limited probative value and do not carry the weight to satisfy the Petitioner's burden of proof. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998).

As noted by the Director, it is understandable that the Petitioner desires a recognized musician with established talent to perform at its events, and that the Beneficiary's past fame would likely draw a larger audience, making the event more profitable. However, the Petitioner's desire to be profitable does not demonstrate that the position requires exceptional ability. Managing and promoting successful, well-attended events is the goal of any entertainment management business. The record does not substantiate that these factors are unique to the Petitioner and would justify a requirement of ability beyond that normally required for singers/musicians.

The record does not include evidence of the Beneficiary's work experience in the 12 months before filing the petition, or that this work required exceptional ability. Neither the evidence in the record, nor the minimum requirements listed on the ETA 9089, are indicative of any requirements above those normally expected of a singer/musician. Thus, the Petitioner has not established that the Beneficiary's work during the year prior to filing the petition required exceptional ability, or that the intended work in the United States requires exceptional ability. Therefore, the appeal will be dismissed on this basis.

B. Notice of the Job Opportunity

One of the requirements to meet Schedule A eligibility is that the petitioner is required to post the position in accordance with 20 C.F.R. § 656.10(d).[6] With the initial filing, the Petitioner provided

[5] Although counsel for the Petitioner asserts that the Beneficiary hosts a highly rated radio program, no evidence of the Beneficiary's employment in this position in the 12 months before filing the petition was submitted.
[6] 20 C.F.R. § 656.10(d) states:

evidence that it posted notice of the filing at the location of employment, which is listed as its address in New Jersey. Both the ETA 9089 and the PWD also list the work location as the Petitioner's address in New Jersey.[7] The notice of filing also states, "Travel required to perform concerts in the United States and Pakistan."

In the NOID, the Director noted inconsistencies in the work location as listed in the petition and the ability to perform the job duties at this location. Specifically, the Director stated that an online search for the Petitioner's main office address revealed that this is a "duplex-style family residence" and does not appear equipped to support a musical performance. He also noted that the record included evidence that the Beneficiary performed in other locations, including California and Georgia.

In response to the NOID and also on appeal, the Petitioner states that it properly posted the notice at its headquarters, which is a home office. It explained that the "sole job [of the Beneficiary] is to perform at concerts," and because there are no set hours or locations, the most appropriate place to post the notice of filing was its headquarters.

The regulations at 20 C.F.R. § 656.10(d) do not require a Schedule A Petitioner to include the exact work location for the job opportunity on the notice of filing.[8] However, the issue here is not whether the notice of filing included the exact work location, but rather whether it was properly posted *in the location of*

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(1) In applications filed under § 656.15 (Schedule A) ... the employer must give notice of the filing of the Application for Permanent Employment Certification and be able to document that notice was provided, if requested by the certifying officer as follows:

(i) To the bargaining representative(s) (if any) of the employer's employees ...

(ii) If there is no such bargaining representative, by posted notice to the employer's employees at the facility or location of the employment ... In addition, the employer must publish the notice in any and all in-house media, whether electronic or printed, in accordance with the normal procedures used for the recruitment of similar positions in the employer's organization. The documentation requirement may be satisfied by providing a copy of the posted notice and stating where it was posted, and by providing copies of all the in-house media, whether electronic or print, that were used to distribute notice of the application in accordance with the procedures used for similar positions within the employer's organization.
. . .

(3) The notice of the filing of an Application for Permanent Employment Certification must:

(i) State the notice is being provided as a result of the filing of an application for permanent alien labor certification for the relevant job opportunity;
(ii) State any person may provide documentary evidence bearing on the application to the Certifying Officer of the Department of Labor;
(iii) Provide the address of the appropriate Certifying Officer; and
(iv) Be provided between 30 and 180 days before filing the application.
. . .

(6) If an application is filed under the Schedule A procedures . . . the notice must contain a description of the job and rate of pay, and must meet the requirements of this section.

[7] In answer to question 7 on the ETA 9141, "Will work be performed in multiple worksites within an area of intended employment or a location(s) other than the address listed above?" the Petitioner answered "No."

[8] 20 C.F.R. § 656.10(d)(6) states that the notice "must contain a description of the job and rate of pay."

employment. According to Question 12 in the *Notice of Filing* section of the Department of Labor's PERM Frequently Asked Questions portion of its website:[9]

> If the employer knows where the Schedule A employee will be placed, the employer must post the notice at that work-site(s) where the employee will perform the work and publish the notice internally using in-house media--whether electronic or print--in accordance with the normal internal procedures used by the employer to notify its employees of employment opportunities in the occupation in question. The prevailing wage indicated in the notice will be the wage applicable to the area of intended employment where the worksite is located.
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> If the employer does not know where the Schedule A employee will be placed, the employer must post the notice at that work-site(s) of all of its current clients, and publish the notice of filing internally using electronic and print media according to the normal internal procedures used by the employer to notify its employees of employment opportunities in the occupation in question. The prevailing wage will be derived from the area of the staffing agencies' headquarters.
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> If the work-site(s) is unknown and the staffing agency has no clients, the application would be denied based on the fact that this circumstance indicates no bona-fide job opportunity exists. The employer cannot establish an actual job opportunity under this circumstance. A denial is consistent with established policy in other foreign labor certification programs where certification is not granted for jobs that do not exist at the time of application.

Here, the Petitioner's notice of filing states that notice was posted "at the facility or location of employment" and the worksite is listed as the Petitioner's home office address in New Jersey. The job duties are to perform "classic Pakistani music including Sufi music." The Petitioner asserts that "it is inappropriate to designate the Beneficiary's concerts and performance as 'worksites' as they are more akin to one-off meetings rather than a regular place of work." Using the Petitioner's own analogy, the Petitioner's home office address could be considered the "regular place of work," while the concert venues would be "one-off meetings." However, the Petitioner has not submitted evidence to establish that any job duties will be performed at the "regular place of work," which is the location where the notice of filing was posted. In fact, the Petitioner does not claim that the Beneficiary, who resides in Texas, will actually physically visit its New Jersey location at any time to perform any duty.

The Petitioner does not submit evidence that the notice of filing met the requirements of 20 C.F.R. § 656.10(d)(1)(ii).[10] The evidence submitted on appeal does not overcome the Director's decision and we will dismiss the appeal on this basis as well.

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[9] *See* OFLC Frequently Asked Questions and Answers, https://www.foreignlaborcert.doleta.gov/faqsanswers.cfm#q!234.

[10] Although not discussed by the Director, we find that the notice of filing is also deficient in that it does not include a statement regarding the use of in-house media, as required by 20 C.F.R. § 656.10(d)(1)(ii). This requirement is of particular importance where the Petitioner claims that its posting location is a home office, presumably where it will not be visible to most employees, and where employees would look to in-house media for employer notices.

C. The Petitioner's Ability to Pay the Proffered Wage

A petitioner must demonstrate its continuing ability to pay a proffered wage, from a petition's priority date until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must include copies of annual reports, federal tax returns, or audited financial statements. *Id.*

In determining ability to pay, USCIS examines whether a petitioner paid a beneficiary the full proffered wage each year from a petition's priority date. If a petitioner did not annually pay the full proffered wage, USCIS next examines whether it generated sufficient annual amounts of net income or net current assets to pay any difference between the proffered wage and wages paid. If net income and net current assets are insufficient, USCIS may consider other factors affecting a petitioner's ability to pay a proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).[11]

This petition has a priority date of November 30, 2018 and the annual proffered wage, as stated on the ETA 9089, is $125,000.[12] With the initial filing, the Petitioner provided a PWD issued by DOL on October 1, 2018, with a prevailing wage rate of $124,946 per year.

The record includes Internal Revenue Service (IRS) Form 1099, Miscellaneous Income, that the Petitioner issued to the Beneficiary in 2018. The Form 1099 reflects nonemployee compensation to the Beneficiary in the amount of $52,000, which is below the proffered wage. Therefore, the Petitioner must demonstrate its ability to pay the difference between the proffered wage and wages already paid to the Beneficiary, which was $73,000 in 2018.

If a petitioner does not establish that it has paid the beneficiary an amount equal to or above the proffered wage from the priority date onward, USCIS will examine the net income and net current assets figures recorded on the petitioner's federal income tax return(s), annual report(s), or audited financial statements(s). If either of these figures, net income or net current assets, equals or exceeds the proffered wage or the difference between the proffered wage and the amount paid to the beneficiary in a given year, the petitioner would ordinarily be considered able to pay the proffered wage that year.

For a C Corporation, like the Petitioner, net income (or loss) is recorded on page 1, line 28, of the Form 1120, and net current assets (or liabilities) are recorded in Schedule L as the difference between current assets listed on lines 1-6 and current liabilities listed on lines 16-18.

The record includes a copy of the Petitioner's 2018 Form 1120, U.S. Corporation Income Tax Return, reflecting a net income of $12,291. Schedule L of the Petitioner's 1120 is blank, reflecting no net current assets. Accordingly, the Petitioner had not established its ability to pay the proffered wage from the 2018 priority date based on its tax return.

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[11] Federal courts have upheld our method of determining a petitioner's ability to pay a proffered wage. *See, e.g., River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Estrada-Hernandez v. Holder*, 108 F. Supp. 3d 936, 942-43 (S.D. Cal. 2015); *Rizvi v. Dep't of Homeland Sec.*, 37 F. Supp. 3d 870, 883-84 (S.D. Tex. 2014), *aff'd*, 627 Fed. App'x. 292 (5th Cir. 2015).

[12] The petition's priority date is the date the DOL accepted the accompanying labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

On appeal the Petitioner asserts that the prevailing wage for a singer in its geographic location is $41,267 per year, and the Beneficiary was paid more than this amount in nonemployee compensation in 2018. First, the Petitioner does not provide any supporting documentation for the prevailing wage data it cites.[13] Second, a petitioner is required to demonstrates its ability to pay the proffered wage. 8 C.F.R. § 204.5(g)(2). The proffered wage is the rate of pay listed on the ETA 9089, which is $125,000. This is also the rate of pay listed on the posting notice. The Petitioner provides no legal basis for permitting consideration of a lower wage. The lower rate of pay will not be considered.

The Petitioner also states that the Beneficiary's albums "generate residuals, or fees paid an artist each time his or her songs are played on the radio, or for album and song sales." However, it does not explain how residuals paid to the Beneficiary by other entities playing his music can be used to demonstrate its ability to pay the proffered wage. Because a corporation is a separate and distinct legal entity, the assets 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 Restaurant 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."

USCIS may also consider the totality of the Petitioner's circumstances, including the overall magnitude of its business activities, in determining the Petitioner's ability to pay the proffered wage. *See Sonegawa,* 12 I&N Dec. at 612. USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of its net income and net current assets. We 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 petitioner's reputation within its industry, the overall number of employees, whether the beneficiary is replacing a former employee or an outsourced service, the amount of compensation paid to officers, the occurrence of any uncharacteristic business expenditures or losses, and any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

The Petitioner asserts that its 2018 tax return reflects salaries and wages paid of more than $1.3 million, and its quarterly tax returns reflect average wages per quarter of more than $250,000 to at least nine employees. While these are substantial amounts, the record does not include the Petitioner's tax returns outside of 2017 and 2018.[14] Although it claims over 20 years of successful business operations, the Petitioner's unsupported testimonial evidence does not establish its claims or overcome evidence of two years of net losses and negative assets. The record lacks corroborating documentation of the Petitioner's historical growth, such as financial reports or tax records beyond the two years of tax returns in the record showing only losses. Nor does the record include evidence of unusual or unexpected business expenses or losses in any year. The record therefore does not support the Petitioner's assertion and we cannot affirmatively conclude that, in the totality of the circumstances,

[13] In response to the NOID, the Petitioner provided a revised PWD. The revised PWD was issued by DOL on June 19, 2019, which is after the filing of this petition. The revised ETA 9141 lists the minimum job requirements as 60 months of experience, which is inconsistent with the 120 months of experience listed on the ETA 9089. The DOL assigned a prevailing wage rate on the revised PWD is $39,582, which is not the wage of $41,267 that the Petitioner quotes.

[14] We note that the Petitioner's 2017 tax return reflects net loss of -$182,887 and net current assets of -$2,869,424.

the Petitioner has the continuing ability to pay the proffered wage. Therefore, we will also dismiss the appeal on this basis.

D. The *Bona Fides* of the Job Offer

In his decision, the Director found that because the Petitioner does not have any ongoing contracts for the Beneficiary's performances and does not know specific events or venues where the Beneficiary will perform, the Petitioner did not make a *bona fide* job offer to the Beneficiary and does not intend to employ the Beneficiary in the offered position.

On appeal, the Petitioner asserts that because the offered position is future employment for the Beneficiary, upon his obtaining lawful permanent residence, its lack of clients and contracts is irrelevant. The Petitioner states, "the Service ignores the reality that Petitioner cannot book performances for Beneficiary until it is sufficiently established that Beneficiary will be available at those events."

Although we agree that the offered position is for future employment and that there is no requirement that the Beneficiary be currently employed in the offered position, a petitioner must establish that a job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until a beneficiary obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977). Here, the Petitioner has not demonstrated that, as of the November 30, 2018 priority date, it would have been able to offer the Beneficiary employment as a singer/musician. It has not submitted evidence of other events it had scheduled where the Beneficiary might have performed.

As noted in the above referenced DOL Frequently Asked Question (https://www.foreignlaborcert.doleta.gov/faqsanswers.cfm#q!234):

> If the work-site(s) is unknown and the staffing agency has no clients, the application would be denied based on the fact that this circumstance indicates no bona-fide job opportunity exists. The employer cannot establish an actual job opportunity under this circumstance. A denial is consistent with established policy in other foreign labor certification programs where certification is not granted for jobs that do not exist at the time of application.

Thus, as the Petitioner has not established that an actual job opportunity exists, the Petitioner has not made a *bona fide* job offer for which it intends to employ the Beneficiary. The appeal will also be dismissed on this basis.

III. CONCLUSION

In considering the totality of the Petitioner's evidence, the Petitioner has not demonstrated that the Beneficiary's work in the last year required, and prospective employment will require, exceptional ability. Nor has the Petitioner demonstrated by a preponderance of the evidence that it met the regulatory requirements in posting the notice of job opportunity, that it has the ability to pay the proffered wage, or that the job offer is *bona fide*. It is the Petitioner's burden to establish eligibility

for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Skirball Cultural Ctr.*, 25 I&N Dec. 799, 806 (AAO 2012).

ORDER: The appeal is dismissed.