

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 14 July 2004

BALCA Case No.: 2003-INA-172
ETA Case No.: P2002-NY-02485028

In the Matter of:

YA RUB INC.,

Employer,

on behalf of

DASMANE BANDAOGO,

Alien.

Appearance: David Blum, Esquire
Woodside, New York
For the Employer and the Alien

Certifying Officer: Delores Dehaan
New York, New York

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

This case arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of her application for alien labor certification. Permanent alien labor certification is governed by § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in title 20. The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in the appeal file ("AF") and any written arguments. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On April 24, 2001, Ya Rub Inc. (“the Employer”) filed an application for labor certification on behalf of Dasmane Bandaogo (“the Alien”) to fill the position of Sales Manager of African Garments. (AF 8-11). The duties require dealing with various suppliers of specialty African textiles and clothing, sales of African textiles and garments to the local African community, and handling of cash, banking, and receiving. A forty hour work week, with hours from 11 a.m. to 7 p.m. was indicated. The position required knowledge of West African languages, including French, specialized knowledge of West African culture, fashion and textiles and one year of experience in sales.

The CO issued a Notice of Findings (“NOF”) on September 25, 2002, proposing to deny certification pursuant to 20 C.F.R. § 656.20(c)(8). (AF 30-32). The CO questioned whether a permanent bona fide full time position existed for a Manager, specifically because the Employer has only one employee. The CO requested documentation of the existence of a bona fide job opening to which a qualified U.S. worker could be referred. The CO requested the Employer’s tax returns, promotional material, receipts, personnel records and any other documentation to establish that a permanent bona fide full-time position for a manager existed. (AF 30-31).

The Employer submitted rebuttal on November 5, 2002. The Employer did not provide any of the requested documentation, but amended the ETA 750A to delete the managerial duties. The Employer also provided a letter from the Alien’s former employer, detailing the Alien’s previous experience. (AF 39-42).

The CO issued a Final Determination (“FD”) on November 8, 2002, denying certification on the ground that the Employer failed to successfully rebut the CO’s finding that the job opportunity be clearly open to any qualified U.S. worker. (AF 41).

The Employer requested review of this denial on December 11, 2002. The matter was docketed in this Office on April 11, 2003; the Employer did not file a brief.

DISCUSSION

The Employer has the burden of proving under 20 C.F.R. § 656.20(c)(8) that a bona fide job opportunity has been and is clearly open to any qualified U.S. worker. The failure to produce relevant specific documentation is grounds for the denial of certification. *Gencorp*, 1987-INA-659 (Jan. 13, 1988) (*en banc*); *Britt's Antique Importers Exporter*, 1990-INA-276 (Dec. 17, 1990).

The CO, questioning the existence of a bona fide job opportunity, requested information from Employer concerning whether a position for a Manager existed. The CO had reason to believe that a bona fide job opportunity did not exist because the Employer only has one employee. In the NOF, the CO properly requested documentation, such as tax returns, promotional materials, receipts, and personnel records to fully establish that a bona fide job opening exists for a qualified U.S. worker.

The Employer failed to provide the suggested or any other documentation in its rebuttal of the NOF. Instead, the Employer amended the job description and duties in the ETA 750A to remove the managerial duties in favor of retail sales activities. (AF 36). The fact that the Employer supplied a letter of reference from the Alien's employer documenting his five years of experience selling textiles and managing the textile division does not cure this deficiency. (AF 37). As the CO noted, amending the job duties was not an option in the NOF. By removing the managerial duties, the Employer has completely changed the nature of the position. An employer must respond specifically to reasonable and relevant requests by the CO, and will not succeed if it produces only selected documentation. *See Rainbow Imports, Inc.*, 1988-INA-289 (Oct. 27, 1988). The Employer's failure to submit the requested documentation, and last minute attempts to reword the job title and description, failed to establish that a bona fide job opening was in fact available to U.S. workers.

For the foregoing reasons, labor certification was properly denied.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

**Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002**

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within ten days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.