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**Issue Date: 11 August 2004**

**BALCA Case No.: 2003-INA-219**  
ETA Case No.: P2002-MA-01325678

*In the Matter of:*

**CHANDU, INC.,**  
*Employer,*

*on behalf of*

**PARESH KUMAR PATEL,**  
*Alien.*

Appearances: Kevin R. Leeper, Esquire  
Framingham, Massachusetts  
For the Employer and the Alien

Certifying Officer: Raimundo A. Lopez  
Boston, Massachusetts

Before: Burke, Chapman and Vittone  
Administrative Law Judges

### **DECISION AND ORDER**

**PER CURIAM.** This case arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification for the position of Manager.<sup>1</sup> The CO denied the application and the Employer requested review pursuant to 20 C.F.R. § 656.26.

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<sup>1</sup> 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. We base our decision 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 27, 2001, the Employer, Chandu, Inc., filed an application for labor certification to enable the Alien, Paresh Kumar Patel, to fill the position of Manager. (AF 68). The position required two years of experience as a store clerk.

On February 24, 2003, the CO issued a Notice of Findings (“NOF”) proposing to deny certification. (AF 30-32). Therein, the CO questioned whether there was a bona fide job opportunity. The Employer was requested to provide the names and addresses of its corporate officers, their relationship to the Alien, their financial interest, duties and responsibilities, as well as the Employer’s Articles of Incorporation. The CO sought verification that a bona fide employer/employee relationship existed, given that the beneficiary and the sponsor possessed the same last name. The Employer was directed to provide documentation that the position was a bona fide position. The CO also questioned the minimum requirements of the position, given that the Alien only had three years of prior experience as a store clerk, yet the position was for a store manager. The CO also questioned the reasons for the rejection of U.S. workers. The Employer was directed to provide results of recruitment report, detailing the reasons the twelve U.S. applicants who applied for the position were rejected. (AF 31-32).

The Employer submitted rebuttal by cover letter dated March 17, 2003. (AF 23-29). The Employer set forth the results of its recruitment efforts and included the Employer’s Articles of Incorporation and an Annual Report, which listed five corporate officers with the last name of Patel.

A Final Determination (“FD”) was issued on April 15, 2003. (AF 21-22). The CO found that the Employer had failed to establish that a bona fide job opening existed to which qualified U.S. workers could be referred. The CO pointed out that the Employer failed to provide his and the corporate officers’ relationship to the Alien, their financial interest and responsibilities. The Employer also failed to provide any information, besides the Articles of Incorporation, documenting that a legitimate job opportunity

existed. (AF 22).

On May 16, 2003, the Employer filed a Request for Review and the matter was docketed in this Office on June 16, 2003. (AF 1-20). In its request for review, the Employer's President, Chandu Patel, asserted that he is not related to the Alien. The Employer also provided other documentation, not previously submitted herein, including a separate written statement that he is not related to the Alien, and a copy of his passport and certificate of naturalization. The Employer contends that "Patel" is the most common name in India and claims that while the Employer could have provided birth certificates for the Employer and the Alien, this would not have disproved a family relationship. (AF 2-3).

### **DISCUSSION**

The CO made it clear that the issue herein was that of alien ownership and control of the Employer, and specifically requested information regarding the relationship between the Employer and the Alien. The NOF clearly articulated the issue of a possible familial relationship between the Alien and the Employer. The CO requested information to rebut the finding; the Employer did not address the issue in rebuttal, other than providing the copy of the Articles of Incorporation. After the FD was issued, the Employer argued that he could not "prove a negative." This was the first time that the Employer addressed the issue of the potential relationship between the Employer and the Alien. In its rebuttal, the Employer failed to adequately address this issue or to establish that there was no such tie.

The Board's review of the denial of labor certification is based solely on the record upon which the denial was based, the request for review, and legal briefs. The Board does not consider additional evidence submitted in conjunction with a request for review. *Import S.H.K. Enterprises, Inc.*, 1988-INA-52 (Feb. 21, 1989)(*en banc*). Furthermore, where an argument made after the FD is tantamount to an untimely attempt to rebut the NOF, the Board will not consider that argument. *Huron Aviation*, 1988-INA-

431 (July 27, 1989). The Employer's belated attempt at rebuttal cannot be considered by the Board. The Employer's final chance to present evidence is during the rebuttal stage. The Employer missed this opportunity and as such, 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.