



**Issue Date: 22 August 2003**

**BALCA Case No. 2002-INA-178**  
ETA Case No. P1997-CA-09058275/PW

*In the Matter of:*

**RICHARD DRUZ MUSIC,**  
*Employer,*

*on behalf of*

**ANTONIO DE SANT'ANNA,**  
*Alien.*

Certifying Officer: Martin Rios  
San Francisco, CA

Appearance: Ralph Ehrenpreis, Esquire  
Los Angeles, CA  
For Employer

Before: Burke, Chapman and Vittone  
Administrative Law Judges

### **DECISION AND ORDER**

**PER CURIAM.** This case arose from an application for labor certification on behalf of Antonio De Sant'Anna ("Alien") filed by Richard Druz Music ("Employer") pursuant to section 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the "Act") and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). The Certifying Officer ("CO") of the United States Department of Labor denied the application, and Employer requested review pursuant to 20 C.F.R. § 656.26. The following decision is based on the record upon which the CO denied certification and Employer's request for review, as contained in the Appeal File ("AF") and any written arguments of the parties.

## **STATEMENT OF THE CASE**

On December 15, 1996, Employer filed an application for labor certification on behalf of the Alien for the position of Musician, Instrumental. (AF 95-96).

On August 28, 2000, the CO issued a Notice of Finding (NOF) indicating intent to deny the application. The CO questioned Employer's ability to provide full time work for a bass player. The CO noted that the bass musician was normally self-employed and there was no record of any other musicians being employed at Employer's residential business address. The CO added that Employer had not reported any wages to the state agency. To cure the deficiency, Employer was asked to provide recording and live performance schedules to demonstrate that there was full time work on an on-going basis for the Alien. Additionally, Employer was asked to indicate what other band members were full time employees. Further, Employer was asked to provide evidence that there was an on-going payroll and to provide Employer's incorporation documents. (AF 20-23).

On November 3, 2000, Employer submitted its Rebuttal. (AF 12-81). Employer provided incorporation documents, a magazine article reviewing Employer's history as a recording artist/studio, some general information regarding the music business, and a few documents regarding compensation of employees and non-employees. Employer asserted that the Alien was going to provide both performance and arrangement services. Therefore, he was going to be a full time employee, as the Alien's job was not limited to performing. Employer alleged that the documentation it provided clearly indicated that Employer had an active business and could provide a full time job for the Alien.

On December 6, 2001, the CO issued a Final Determination (FD) denying certification. (AF 4-6). The CO found that Employer failed to indicate which members of the band were employees and which were self-employed, and failed to document the differences that entitled the bass player to be considered an employee, as requested in the

NOF. The CO noted that although there were some wages paid in 1997 and 1998, the salaries were not paid on a regular basis. Additionally, the payments made in 1999 were for non-employee compensation expenses. Further, the salary to be paid to the Alien is significantly greater than the amount Employer paid to himself and the employees in 1997, and greater than the total 1999 non-employee compensation. The CO concluded that as Employer did not show that the position would be a full time position and Employer did not have a record of offering full time employment to others, Employer's application had to be denied for failing to comply with 20 C.F.R. § 656.20(c)(8).

On January 17, 2002, Employer filed its Request for Review. (AF 1-3). In the Request for Review, Employer asserted that it complied with 20 C.F.R. § 656.20(c)(8) and that Employer has the ability to pay the Alien's salary.

The record does not reflect that a brief was filed.

## **DISCUSSION**

In the instant case, the CO made a factual finding that Employer had not established that the job opportunity was for full-time employment. Thus, it must be determined whether that conclusion is a reasonable inference from this record.

Under 20 C.F.R. § 656.3, "Employment" means permanent full time work by an employee for an employer other than oneself. The employer bears the burden of proving that a position is permanent and full time. *Mr. and Mrs. Stanley Tee*, 1994-INA-10 (June 27, 1995). Where an employer fails to demonstrate the volume of work necessary to support a full-time employee, it fails to establish full-time employment. *Tousi Rugs*, 1992-INA-374 (Sept. 29, 1993). As the employer bears the burden of proving that a position is permanent, full time certification may be denied if the employer's own evidence is not sufficient. It follows that while the CO's findings may not be based on speculation, undocumented statements of an employer which are inconsistent or illogical

are not compelling evidence of entitlement to certification. *Gerata Systems America, Inc.*, 1988 INA 344 (Dec. 16, 1988) (*en banc*).

In the NOF, Employer was asked to supply dates of studio recordings or live performances as documentation that Employer was offering continuous full time work. Employer, however, did not provide a schedule or any specific dates of engagement, nor did it provide alternative documents that would indicate that a full time bass player was required for its business. If the CO requests a document which has a direct bearing on the resolution of an issue and is obtainable by reasonable efforts, the employer must produce it. *Gencorp*, 1987-INA-659 (Jan. 13, 1988) (*en banc*). Denial of certification is proper when the Employer fails to provide reasonably requested information. *O.K. Liquor*, 1995-INA-7 (Aug. 22, 1996); *China Inn Restaurant*, 1993-INA-496, 497 (Aug. 26, 1994).

Employer attempted to justify the full time position by alleging that the Alien's job was not limited to performing, but also required creating arrangements, which created the full time position. In its Rebuttal, Employer supplied documents that indicated the sporadic hiring of musicians, and that there was an on-going music business. However, other than Employer's assertions, nothing in the record provides justification for the position of a full time musician. Although a written assertion constitutes documentation that must be considered, a bare assertion without supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof. *Gencorp*, 1987-INA-659 (Jan. 13, 1988) (*en banc*).

In applications for alien labor certification, the employer bears the burden of proving all aspects of the application. 20 C.F.R. § 656.2(b). Employer in its Rebuttal did not indicate a business activity level that would support a full time bass player and arranger position. In the Rebuttal, it was Employer's burden to rebut the CO's finding, as it was on notice that the CO found that Employer did not appear to have a full time position. Employer's burden was not met by its unsupported assertions. Therefore, Employer's failure to demonstrate that it had a full time job opportunity supports the CO's denial.

Consequently, for the above stated reasons we dismiss Employer's Request for Review and affirm the CO's denial.

**ORDER**

The CO's denial of labor certification in this matter 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 of Labor 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, NW, 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 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.