



Issue Date: 03 March 2004

BALCA Case No.: 2003-INA-14
ETA Case No.: P2001-NY-02468819

In the Matter of:

WAAKO RECORDS, INC.,
Employer,

on behalf of

SAMIR ALSHAMI,
Alien.

Appearance: Earl S. David, Esquire
New York, New York
For Employer and the Alien

Certifying Officer: Dolores Dehaan
New York, New York

Before: Burke, Chapman, and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from an application for labor certification on behalf of Samir Alshami (“the Alien”) filed by Waako Records, Inc. (“Employer”) pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (“the Act”), and the regulations promulgated thereunder, 20 C.F.R. Part 656. The Certifying Officer (“CO”) 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. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On October 16, 2000, Employer filed an application for labor certification on behalf of the Alien for the position of Market Research Analyst. The job duties for the position were research and analysis of market conditions, prices, sales, methods of marketing and distribution for a record label. The only stated requirement was two years of experience in the job offered. (AF 22).

In a Notice of Findings (“NOF”) issued on March 16, 2002, the CO proposed to deny certification on the grounds that Employer had not established that a bona fide position existed for the job offered, noting that in April 2001, Employer received a permanent labor certification on behalf of another alien for the same position of Market Research Analyst. Accordingly, the CO directed Employer to provide documentation to establish that a bona fide position existed for an additional Market Research Analyst position. (AF 26-28).

On April 19, 2002, Employer filed rebuttal, consisting of Employer counsel’s statement regarding the growth of the company, together with duplicate copies of Employer’s tax returns for the years 2000 and 2001. (AF 29-64). Upon consideration of Employer’s initial rebuttal, the CO issued an amended NOF, dated June 4, 2002, which provided more specific instructions to Employer regarding the documentation required to establish that the position offered was bona fide. (AF 65-67). Following the granting of Employer’s extension request, Employer submitted its rebuttal to the supplemental NOF on July 15, 2002. (AF 68-73).

The CO found the rebuttal unpersuasive and issued a Final Determination (“FD”), dated August 6, 2002, denying certification on the same basis. (AF 80-81). On September 5, 2002, Employer requested review of the FD and the matter was docketed in this Office on October 29, 2002. (AF 82).

DISCUSSION

In the amended NOF, dated June 4, 2002, the CO noted that labor certification had recently been issued for a similar position with Employer. The CO questioned whether permanent, full-time work could be guaranteed for a second market research analyst position. The CO directed Employer to provide evidence of the number of market research projects undertaken in the last year, the number of employees who have performed the position for the last two years and their resumes and payroll records, and if recent changes in business had necessitated the second research market analyst position, Employer was also asked to provide copies of market reports generated by the research market analyst. (AF 66).

Employer's rebuttal to the amended NOF consisted of a letter by Employer's Vice President, Douglas Gomez, dated July 15, 2002, and a general overview of the company. (AF 68-73). In summary, Mr. Gomez's letter cited the previously submitted tax returns from 2000 and 2001 as proof that Employer is a "growing and viable company" and noted that the company anticipated further growth and increased sales. (AF 73). The overview of the company included: introductory comments, background, objectives, the Executive and Management personnel, which consists of seven individuals, including two Market Research Analysts, and general information regarding manufacturing, sales, distribution, licensing, promotion, products, and past and future goal statements. (AF 68-71).

In the FD, the CO found Employer's rebuttal inadequate, stating that Employer's rebuttal did not contain any market research reports, resumes of incumbents, payroll records, or other evidence of market research activity, as requested in the NOF. Employer did demonstrate growth in his business, as he showed that gross receipts had increased from \$1.26 million to \$1.3 million and were expected to further increase to \$1.5 million. (AF 48-64). Employer indicated that a strong marketing staff was responsible for such an increase and that the increase in business necessitated an additional marketing research analyst position. (AF 47). The CO found that Employer

failed to show how the growth in sales was related to market research activity and failed to document market research activity within Employer's business. (AF 80).

A petitioning employer must provide directly relevant and reasonably obtainable documentation requested by a CO. *Gencorp*, 1987-INA-659 (Jan. 13, 1988) (*en banc*); *Kogan & Moore Architects, Inc.*, 1990-INA-466 (May 10, 1991); *Bob's Chevron*, 1993-INA-498 (May 31, 1994). An employer's failure to produce a relevant and reasonably obtainable document requested by the CO is grounds for the denial of certification. *STLO Corp.*, 1990-INA-7 (Sept. 9, 1991). When an employer does not justify its failure to produce the requested documentation, certification is properly denied. *Vernon Taylor*, 1989-INA-258 (Mar. 12, 1991).

In the present case, Employer has established that it has a growing business and apparently has the financial resources to employ another Market Research Analyst. However, as found by the CO, Employer failed to provide the documentation reasonably requested by the CO, which is pertinent to the market research activity within its business. Employer did not suggest that this information was unavailable or not reasonably obtainable. Employer simply did not provide any evidence of market research analysis conducted by his company. Accordingly, the CO could not determine if the position was a bona fide job opportunity.

In the Request for Review, Employer argued that the regulations do not require the disclosure of market research reports, as they are private trade secrets. However, Employer failed to present this argument as a justification for not producing this documentation with rebuttal. Further, Employer did not produce any of the other requested documentation, such as resumes of incumbents, payroll records, or any other evidence of market research activity in the company. As a result, Employer has failed to document the existence of a permanent, bona fide, full-time job opening for another Market Research Analyst. In view of the foregoing, we find that 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.