U.S. Department of Labor

Office of Administrative Law Judges
11870 Merchants Walk - Suite 204
Newport News, VA 23606

(757) 591-5140
(757) 591-5150 (FAX)

Issue Date: 07 June 2016

BALCA Case No.: 2012-PER-01446
ETA Case No.: A-11180-89437

In the Matter of:

PALM CAFE RESTAURANT,
Employer

on behalf of

REYES ALVARADO VAZQUEZ,
Alien.

Certifying Officer: William Carlson, Ph.D.
National Certifying Officer
Atlanta, Georgia

Appearance: Roger J. Gleckman, Esq.
Gleckman & Sinder
Los Angeles, California
For the Employer

BEFORE: **Markley, Johnson, Bergstrom**
Administrative Law Judges

DECISION AND ORDER DIRECTING GRANT OF CERTIFICATION

This matter arises under Section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A) ("the Act"), and the "PERM" regulations found at 20 C.F.R. Part 656 ("the Regulations").

BACKGROUND

On June 30, 2011, the Certifying Officer ("CO") accepted for filing Employer's ETA Form 9089 Application for Permanent Employment Certification ("the Application"). (AF 94–103).[1] The Application sponsored the Alien for permanent employment in the United States for the position of Chef and Head Cook. (AF 95). On August 31, 2011, the CO notified Employer

[1] Citations to the Appeal File are abbreviated as "AF" followed by the page number.

that it was selected for an audit and requested recruitment documentation as outlined in 20 C.F.R. § 656.17, as well as documentation of the U.S. workers who applied for the position; copies of Employer's articles of incorporation, partnership agreements, state or federal documentation in connection with the establishment of the sponsoring employer, and business licenses; an outline of the corporate structure and list of officers and partners; a statement of the employees with payroll sign-off responsibility; a statement describing familial relationships between parties with ownership interests and the foreign worker; a financial history of the employer; and the names of the employer's officials responsible for hiring or having control or influence over hiring decisions. (AF 89–93). Employer responded by letter dated September 21, 2011, and attached the documentation requested. (AF 7–88).

On January 31, 2012, the CO issued a determination letter and denied certification for one reason. (AF 2–6). The CO denied certification because the application indicated the Alien is the brother of one of the husband-and-wife owners of the business, and the CO found the Alien was possibly an integral part of the employer's business. (AF 3). Citing 20 C.F.R. § 656.10(c)(8)'s requirement that "the job opportunity has been and is clearly open to any U.S. worker,"[2] the CO stated the Department of Labor was unable to determine whether the job opportunity was open and available to U.S. workers, and denied the Application. (AF 6). On February 23, 2012, Employer submitted a request for review by the Board of Alien Labor Certification Appeals ("the Board"). (AF 1).

The CO forwarded the Appeal File to the Board, and the Board issued a Notice of Docketing on July 16, 2012. In response to the Notice, Employer submitted a statement to confirm its intention to proceed with an appeal before the Board on July 20, 2012. The CO did not submit a statement of position. On March 10, 2016, the Board issued an Order Requiring Certification on Mootness. Employer responded to the Order on March 15, 2016, and certified that the job identified in the Application is still open and available on the same terms, and the Alien identified in the Application is ready, willing, and able to fill the position.

DISCUSSION

PERM is an attestation-based program. *See* 20 C.F.R. § 656.10(c). Among other attestations, an employer must attest that the job opportunity described in the permanent labor application has been and is clearly open to any U.S. workers. *See* 20 C.F.R. § 656.10(c)(8). Accordingly, the regulations require an employer to conduct mandatory recruitment steps in a good faith effort to recruit U.S. workers prior to filing an application for permanent alien labor certification. *See* 20 C.F.R. § 656.17; 69 Fed. Reg. 77326, 77348 (Dec. 27, 2004). The CO may certify permanent labor applications only if there are not sufficient U.S. workers who are able, willing, qualified, and available to fill the position at the time the application is filed. *See* 20 C.F.R. §§ 656.1(a)(1), 656.24(b)(2). Therefore, the CO must verify the employer's attestations by determining whether the employer conducted a good faith test of the domestic labor market before hiring a foreign worker.

[2] This attestation requirement is incorporated into § 656.17(l), establishing the burden on the employer in a closely held business such as this husband and wife owned restaurant "to demonstrate the existence of a bona fide job opportunity, i.e., the job is available to all U.S. workers."

In this case, Employer reported that there was a familial relationship between the owners and the Alien. (AF 94). The CO then chose to audit the PERM application. (AF 89–93). The Audit Notification, in a list tracking the language of the regulation at 20 C.F.R. § 656.17(l) ("Alien influence and control over job opportunity"), requested certain business records showing whether the foreign worker had influence and control over the job opportunity. (AF 93). The Employer responded to the Audit, but the CO found the documentation provided was "insufficient to conclusively demonstrate that the job was open and available to U.S. workers." (AF 3). The CO cited the fact that the Alien is the brother of one of the husband-and-wife owners, "and is possibly an integral part of the employer's business," as its reason to determine that the Alien has considerable control and influence as to how the Employer's business is operated. (AF 3). The CO thus denied the application pursuant to 20 C.F.R. § 656.10(c)(8).

Employer argues that this case is analogous to *MMB Stucco*, *infra*, and that only two of the nine factors discussed in that case are applicable to this case. Employer contends the Alien has no influence or control over hiring decisions, is not an incorporator or founder, has no ownership interest, is not involved in management, and that the restaurant could continue without the Alien. Further, Employer argues that it complied in good faith with the application process, and that as the CO raised no objections to Employer's recruitment efforts, the job opportunity was valid.

Section 656.10(c) states in relevant part: "The employer must certify to the conditions of employment listed below on the *Application for Permanent Employment Certification* under penalty of perjury . . . . (8) The job opportunity has been and is clearly open to any U.S. worker." 20 C.F.R. § 656.10(c)(8). Further, the regulations address potential influence and control over a job opportunity by the named alien. *See* 20 C.F.R. § 656.17(l). Section 656.17(l) states:

> If the employer is a closely held corporation or partnership in which the alien has an ownership interest, *or if there is a familial relationship* between the stockholders, corporate officers, incorporators, or partners, and the alien, or if the alien is one of a small number of employees, the employer in the event of an audit must be able to demonstrate *the existence of a bona fide job opportunity, i.e., the job is available to all U.S. workers*.

Id. (emphasis added). When determining whether a bona fide job opportunity exists, the Board considers the totality of the circumstances and considers the following factors as to whether the alien:

1. Is in the position to control or influence hiring decisions regarding the job for which labor certification is sought;
2. Is related to the corporate directors, officers, or employees;
3. Was an incorporator or founder of the company;
4. Has an ownership interest in the company;
5. Is involved in the management of the company;
6. Is on the board of directors;
7. Is one of a small number of employees;

8. Has qualifications for the job that are identical to specialized or unusual job duties and requirements stated in the application; and
9. Is so inseparable from the sponsoring employer because of his or her pervasive presence and personal attributes that the employer would be unlikely to continue in operation without the alien.

MMB Stucco, LLC, 2011-PER-00715, PDF at 4 (BALCA May 7, 2012) (citing *Modular Container Systems, Inc.*, 1989-INA-00228, PDF at 8–10 (BALCA July 16, 1991) (en banc) (footnotes omitted)). The employer's compliance and good faith in the application process should also be considered by the Board. *Id.* No single factor, such as a familial relationship between the alien and the employer, shall be controlling. *See Labor Certification for the Permanent Employment of Aliens in the United States; Implementation of New System*, 69 Fed. Reg. 77326, 77356 (Dec. 27, 2004).

Employer is correct in its argument that the CO raised no objections to Employer's recruitment efforts. The Board finds significant Employer's attestation that no U.S. worker responded to the newspaper advertisements and SWA filing. Based on the documentation provided by Employer in the application and in the response to the Audit, Employer complied with all of the regulatory requirements in its recruitment efforts.

In the denial, the CO cited the following factors for the inference that the job opportunity was not open and available to U.S. workers: (1) the Alien is the brother of one of the owners; (2) the Alien is "possibly an integral part of the employer's business"; and (3) "conceivably the employer's business operations cannot continue without the foreign worker," which gives the Alien "considerable control and influence as to how the employer's restaurant is operated." (AF 3).

Considering the factors enumerated in *MMB Stucco*, *supra*, and applying the totality of the circumstances test, the Board finds from the outset that: (1) the Alien does not control or influence Employer's hiring decisions; (2) the Alien is not an incorporator or founder of the company; (3) the Alien does not have an ownership interest in the company; (4) the Alien is not on the board of directors; (5) the Alien is not one of a small number of employees; and (6) the Alien does not have qualifications identical to specialized or unusual job duties and requirements stated in the application. Two other factors – whether the Alien is involved in the management of the company, and whether the Alien is inseparable from the sponsoring Employer – also are not applicable here. Although the organizational chart provided by Employer indicates the Head Cook position is in charge of several line cooks, there is no evidence in the job description that the Head Cook engages in management activities, and the Head Cook is not involved in payroll activities. In addition, Employer has argued that the restaurant can function without the Alien, and there are other cooks who could assume the duties of the Head Cook. Therefore, the record supports a finding that eight of the nine factors are inapplicable.

This case is analogous to *Altobeli's Fine Italian Cuisine*, 1990-INA-130 (BALCA Oct. 16, 1991). There, the Board, in a post-*Modular Container* decision, found there was a bona fide job opportunity where the alien's brother and sister-in-law owned 75 percent of the employer's stock. *Id.* The Board applied the nine factors, and found the alien had no ownership interest,

was not an incorporator or founder, was not on the board of directors, did not contribute financially to the business, did not control the hiring decision, was not a current employee, and the job duties and requirements were not specialized or unusual and did not appear to be tailored to match the alien's qualifications. *Id.* The Board also found "quite significantly, the C.O. did not challenge the Employer's compliance with the regulations governing recruitment." *Id.*

Although the Alien in this matter has a familial relationship with the owners, we find the Alien does not have control and influence over Employer's business operations. Employer has demonstrated that it is independent from the Alien, the Alien is not involved financially in Employer's business, Employer engaged in good faith recruitment for the position, no U.S. worker applied for the position after proper recruitment efforts, and the Alien was not involved in the hiring decision. When all of the factors are viewed as a whole, including the CO's reasons, we find a bona fide job opportunity exists pursuant to 20 C.F.R. § 656.17(l). This, combined with Employer's recruitment efforts, indicates that the job opportunity has been and is clearly open to any U.S. worker under 20 C.F.R. § 656.10(c)(8). Therefore, we reverse the CO's denial of labor certification.

ORDER

IT IS ORDERED that the denial of labor certification is hereby **REVERSED**, and we direct the Certifying Officer to **GRANT** labor certification in this case.

For the Panel:

Digitally signed by Monica F. Markley
DN: CN=Monica F. Markley, OU=Administrative Law Judge, O=US DOL Office of Administrative Law Judges, L=Newport News, S=VA, C=US
Location: Newport News VA

MONICA MARKLEY
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for en banc review by the Board. Such review is not favored and ordinarily will not be granted except (1) when en banc 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, DC 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 en banc review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.