U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 07 May 2012

BALCA Case No.: 2011-PER-00715
ETA Case No.: A-09300-70792

In the Matter of:

MMB STUCCO, LLC,
Employer

on behalf of

MAX EDWIN BALDERRAMA,
Alien.

Certifying Officer: William Carlson
Atlanta National Processing Center

Appearances: Julie Soininen, Esq.
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For the Employer

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Office of the Solicitor
Division of Employment and Training Legal Services
Washington, DC
For the Certifying Officer

Before: **Calianos, Geraghty, McGrath**
Administrative Law Judges

JONATHAN C. CALIANOS
Administrative Law Judge

DECISION AND ORDER
REVERSING DENIAL 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), and the "PERM" regulations found at Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). For the reasons set forth below, we REVERSE the Certifying Officer's denial of the Certification.

BACKGROUND

On October 29, 2009, the Certifying Officer ("CO") accepted for filing the Application for Permanent Employment Certification of MMB Stucco, LLC ("Stucco" or "Employer") for the position of "Foreman." (AF 49).[1] The Employer indicated in section C-9 of the application that it was "a closely held corporation, partnership, or sole proprietorship in which the alien has an ownership interest, or . . . there [is] a familial relationship between the owners, stockholders, partners, corporate officers, incorporators, and the alien." (AF 59). Along with the application, the Employer submitted: (1) A Certificate of Organization for Stucco from the Commonwealth of Virginia; (2) A copy of computer screen shot from the Virginia State Corporation Commission showing Milton Balderrama as the registered agent for Stucco and indicating that Stucco consists of one member/manager with an effective date of February 6, 2009; (3) Another screen shot from the same website showing that Stucco is "Active"; and (4) A copy of a letter from the Internal Revenue Service providing the Employer Identification Number for Stucco. (AF 70-75). The rub in this case is created by the fact that the alien sought to be employed by Stucco is the brother of Milton Balderrama, the sole principal of Stucco. (AF 22 & 38).

On November 10, 2009, the CO issued a Request for Additional Information, seeking three categories of information within 30 days: (1) Proof of a federal employer identification number; (2) Proof of business entity; and (3) Proof of physical location. (AF 47). It is unclear whether the Employer responded to the request for Additional Information, as there is no response in the record. However, looking at the documents that were submitted with the original Application, it appears most of the information requested by the CO already accompanied the Application.

On September 21, 2010, the CO issued a "Notice of Supervised Recruitment" requiring the Employer to send a draft advertisement to the CO along with documents showing the Employer's corporate structure and finances, as well as any familial relationships with the alien

[1] In this decision, AF is an abbreviation for Appeal File.

within 30 days of the letter. (AF 42-46). On October 15, 2010, the Employer responded to the Notification of Supervised Recruitment, attaching the following documents: a letter from the owner of the company providing information regarding his company and his relationship to the foreign worker, the Employer's business license, the Employer's certificate of organization and other information from the Virginia State Corporation Commission, IRS notice of assignment of FEIN number, and copies of the Employer's Operating Agreement. (AF 13-41). Instead of conducting the supervised recruitment, on December 2, 2010, the CO denied the application on the ground that the job opportunity was not open and available to any United States worker, pursuant to 20 C.F.R. § 656.10(c)(8). (AF 11-12). The CO stated that "when the employer is a closely held corporation or partnership in which the alien has an ownership interest, a presumption exists that influence and control over the job opportunity is such that the job opportunity is not bona fide, i.e. not open and available to U.S. workers." The CO found that the Employer did not submit sufficient documentation to rebut the presumption, and stated: "Specifically, the foreign worker is the brother of the owner of the sponsoring employer."

On December 27, 2010, the Employer submitted a request for reconsideration. (AF 3-10). The Employer argued that the documents provided to the CO establish that the alien has no ownership interest in the Employer. The Employer also argues that the CO cannot find that the position is not open to U.S. workers, because he never requested documentation regarding the Employer's recruitment process, and therefore there is no evidentiary support for this finding. Lastly, the Employer argued that it has established a bona fide job opportunity.

On February 25, 2011, the CO forwarded the case to BALCA. (AF 1-2). In the CO's transmittal letter, he stated that the Employer did not establish a bona fide job opportunity because of the following reasons: even though the company was founded in February 2009, the alien worked for the employer for over three years in the same position as the job opportunity immediately prior to the company's establishment; the company has only five employees, including the foreign worker; although the alien is not an officer, he is the only supervisor and the other 4 employees report to him; the alien only reports to his brother; and the Employer failed to provide the financial history requested.

BALCA issued a Notice of Docketing on April 21, 2011. The Employer filed a Statement of Intent to Proceed on April 27, 2011, and filed an appellate brief on May 24, 2011. The CO did not file a Statement of Position, but requested the denial be affirmed for the reasons

set forth in the final determination letter dated December 2, 2010, and the transmittal letter dated February 25, 2011. On February 21, 2012, the Employer certified via email that the job identified on the PERM application is still open and available, and that the alien identified in the PERM application remains ready, willing, and able to fill the position.

DISCUSSION

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." Further, the regulations address potential influence and control over a job opportunity by the named alien. 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,

When determining whether a bona fide job opportunity exists, the Board must consider the totality of the circumstances, considering, among other factors, 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

Good Deal, Inc., 2009-PER-00309, PDF at 4-5 (Mar. 3, 2010) (*citing Modular Container Systems, Inc.*, 1989-INA-228, PDF at 8-10 (July 16, 1991) (en banc) (footnotes omitted)). The Board should also consider the Employer's compliance and good faith in the application process. *Id.* No single factor, such as a familial relationship between the alien and the employer or the size of the employer, shall be controlling. Labor Certification for the Permanent Employment of Aliens in the United States; Implementation of New System, 69 Fed. Reg. 77326, 77356 (Dec. 27, 2004).

Few cases have dealt specifically with familial relationship (as opposed to ownership interest or control), but several pre-PERM decisions provide guidance on this issue. In *Paris Bakery Corp.*, 1988-INA-337 (Jan. 4, 1990) (en banc),[2] the alien's brother was the sole stockholder and president of the sponsoring employer, and the company employed 9 employees. The Board clarified that its earlier decision in *Young Seal* did not imply that a close family relationship alone establishes that a job opportunity is not bona fide. *Id.* at 4. The Board explained that "assuming that there is still a genuine need for an employee with the alien's qualifications, the job has not been specifically tailored for the alien, the Employer has undertaken recruitment in good faith and the same has not produced applicants who are qualified, the [fraternal] relationship, per se, does not require denial of certification." *Id.* The Board held that:

> the Employee has represented that his growing business requires the need of an additional baker qualified in the type of French baking which is the hallmark of its business. The record is devoid of any evidence to contradict such representation. He has twice recruited for the position. The qualifications have not been challenged as restrictive. No qualified applicant has applied. Under these circumstances we conclude that the fraternal relationship is of no consequence.

Id.

In *Altobeli's Fine Italian Cuisine*, 1990-INA-130 (Oct. 16, 1991), a post-*Modular Container* decision, the President/Treasurer of the Employer was the alien's brother and the Secretary was his sister-in-law, and the brother and sister-in-law owned 75% of the Employer's stock. The Board applied the totality of the circumstances test, using the factors laid out in *Modular Container*, and found that: (1) The alien had no ownership interest in the Employer, is not an incorporator or founder, is not on the Board of Directors, and is not a current employee;

[2] Although this case was decided prior to *Mondular Container*, it still provides some guidance on the issue of familial relationships.

(2) The job duties were not specialized or unusual, or tailored to the alien; (3) The restaurant had been operating without the alien and there is no reason that the restaurant would not be able to continue without him; (4) The CO did not challenge the Employer's compliance with the regulations governing recruitment or the Employer's rejection of two U.S. applicants; (5) The alien did not make financial or other contributions to the business; (6) The Employer engaged in good faith recruitment; and (7) The alien did not control the hiring decision. *Id.* The Board found that based on these factors that a bona fide job opportunity existed.

The Employer in this case first argues that the there is no "logical connection between the legal and factual reasons cited in support of the denial." In the denial letter, the CO stated that when an the alien *has an ownership interest* in the employer, a presumption exists that the job opportunity was not bona fide because of the alien's influence and control over the job opportunity, and found that the Employer did not provide sufficient documentation to overcome the presumption. The Employer argues that because it had established through documentary submissions that the alien did not have an ownership interest in the Employer, the CO's reason for denial cannot stand. The Employer similarly argues that the additional reasons for denial in the CO's transmittal letter cannot be considered because the Employer did not have a chance to address them in its Motion for Reconsideration. We agree on both counts.

In the denial letter, the CO misstates that the alien has an ownership interest in the Employer. All of the documentation submitted by the Employer indicates that alien has no ownership interest in Stucco. Additionally, as the sole legal basis for its decision, the CO cites to 20 C.F.R. §656.10(c)(8) which governs attestations. The regulations states that: "The employer must certify to the conditions of employment listed below on the Application . . . under penalty of perjury . . . . Failure to attest to any of the conditions listed below results in a denial of the application . . . . (8) The job opportunity has been and is clearly open to any U.S. worker." A brief review of the Application shows that it contains the required attestation on page 9 of 11. (AF 68). This is not a situation where the CO conducted an audit seeking documentation of the Employer's recruitment process. Such documentation was never requested by the CO, and without such information in the record it is unclear how the CO knows what recruitment steps were taken by the Employer. Simply put, the CO had no facts available in the record regarding the actual recruitment process utilized by the Employer upon which to rest its decision, and its denial on that basis was improper. It is likely that recruitment documentation was never

requested because the Employer was cooperating in a supervised recruitment process that the CO apparently abandoned without warning or notice to the Employer.

Furthermore, we agree that the new reasons provided by the CO in its transmittal letter to BALCA should not be considered upon appeal. Even if the new reasons for denial are valid, it is far too late in the process to reveal the underlying rationale for such a decision in a transmittal letter to the appellate forum. An employer must be provided with adequate notice of the regulatory violations found. *Medical Care Professionals, Inc.*, 2008-PER-00247, PDF at 6 (July 17, 2009). The Board has found that "an employer needs to know the basis for a denial in order to file a meaningful motion for reconsideration. Thus . . . the CO must identify the section or subsection allegedly violated and the nature of the violation, when notifying the applicant of a denial." *Kay Mays*, 2008-PER-00011, PDF at 5 (Aug. 27, 2008). Fundamental fairness requires that an employer has an opportunity to rebut the reasons for denial provided by the CO. *See Ornelas, Inc.*, 2009-PER-00246, PDF at 4 (June 23, 2009) ("Given the terseness of the November 8, 2007 denial, and the lack of an opportunity for the Employer to supplement the record in response to the CO's letter on reconsideration, we conclude that fundamental fairness dictates that we return this matter to the CO"); *Marathon Hosiery*, 1988-INA-00218, PDF at 2 (May 4, 1989) (en banc) ("[A] CO may not cite new evidence in a Final Determination, because the Employer must be afforded the opportunity to rebut the evidence being relied on to deny certification.") (citations omitted). We therefore find that in the interest of due process and fundamental fairness, the Employer should not be denied certification based on the new reason provided by the CO in his transmittal letter. Accordingly, we reverse the CO's denial of labor certification.

ORDER

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

For the Panel:

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Jonathan C. Calianos

Administrative Law Judge

Boston, Massachusetts

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 review by the full Board. 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, 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 full Board 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.