



**Issue Date: 05 August 2003**

**BALCA Case No.: 2002-INA-169**  
ETA Case No.: P1996-CA-09052902/ML

*In the Matter of:*

**H & R AUTO PAINT & BODY REPAIR,**  
*Employer,*

*on behalf of*

**MAHMOUD FAYOUZI TOUSSINEJAD,**  
*Alien.*

Certifying Officer: Martin Rios  
San Francisco, California

Appearances: Edward M. Weisz, Esquire  
Beverly Hills, California

Before: Burke, Chapman and Vittone  
Administrative Law Judges

**JOHN M. VITTON**  
Chief Administrative Law Judge

### **DECISION AND ORDER**

This case arises from an application for labor certification<sup>1</sup> filed by an Automotive Body Shop for the position of Automobile Body Repairer. (AF 15-16).<sup>2</sup> The following decision is based on the record upon which the Certifying Officer (CO) denied certification and Employer's request for review, as contained in the Appeal File ("AF").

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<sup>1</sup> Alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) and 20 C.F.R. Part 656.

<sup>2</sup>"AF" is an abbreviation for "Appeal File".

## STATEMENT OF THE CASE

On September 28, 1995, Employer, H & R Auto Paint & Body Repair, filed an application for alien employment certification on behalf of the Alien, Mahmoud Fayouzi Toussinejad, to fill the position of Automobile Body Repairer. Minimum requirements for the position were listed as four years experience in the job offered. (AF 15-16).

An Assessment Notice was issued by the Employment Development Department, (EDD), on December 29, 1995, questioning the relationship of the Alien and Employer, and whether a *bona fide* job opening in fact exists. (AF 46-47).

Employer responded by letter dated January 6, 1996 that the Alien is his brother, but further stated a willingness to cooperate with the EDD to locate a qualified and available U.S. worker. (AF 19-20).

Employer received no applicant referrals in response to its recruitment efforts. (AF 23-25).

A Notice of Findings (NOF) was issued by the Certifying Officer (CO) on September 14, 1999, proposing to deny labor certification based upon a finding that there appeared to be no clear job opening for U.S. workers, as the Alien's familial relationship made it unlikely he would be replaced by a qualified U.S. workers outside the family. In rebuttal, Employer was instructed to submit the following evidence:

- >alien's ownership interest including percentage of stock owned and the value of the alien's ownership interest in the firm compared to the total value of the firm;
- >articles of incorporation listing the names and titles of all corporate officers/board members and the alien's relation to same;

- >statement of the scope of alien's authority to hire/fire employees;
- >explanation how the person who makes the hiring decision for the position in question is completely independent of the alien and the alien's influence; and
- >evidence to support your assertion (see box 23h, ETA 750A) that there is a job clearly open to a U.S. worker

(AF 11-13).

In Rebuttal, Employer stated that it is a sole proprietorship and submitted copies of a Fictitious Business Statement showing himself as the owner. Employer stated that there are no officers; that he is the owner and manager with the sole responsibility of hiring and firing employees; and that the Alien has no ownership interest and does not hold any position of any kind in the organization, or have hiring/firing authority of any kind. (AF 5-10).

A Final Determination denying labor certification was issued by the CO on December 22, 1999, based upon a finding that Employer had failed to adequately respond to the NOF and had failed to show that a job opening for U.S. workers exists. (AF 3-4).

Employer filed a Request for Review by letter dated January 3, 2000. (AF 1-2). This matter was referred to this Office and docketed on April 26, 2002. Employer filed a Statement of Position on April 30, 2002.

## **DISCUSSION**

Pursuant to 20 C.F.R. § 656.3 DEFINITIONS, "Employment" means permanent full-time work by an employee for an employer other than oneself. Section 656.20(8) requires that the job opportunity be clearly open to any qualified U.S. worker. Requiring that a job opening be *bona fide* ensures that a true opening exists and that it is not merely

the functional equivalent of self-employment. Where an employer seeks labor certification for an alien who is in a position to control hiring decisions or who has such a dominant role in, or close personal relationship with, the employer's business that the employer probably would not replace the alien with a qualified U.S. applicant, the Board allows the CO to examine carefully whether the employer has complied with section 656.20(c)(8). However, the fact that an Alien is an investor, or has some other special relationship with the employer, does not establish *per se* the absence of a *bona fide* job opportunity. Ultimately, the question of whether a *bona fide* job opportunity exists turns on "whether a genuine determination of need for alien labor can be made by the employer corporation and whether a genuine opportunity exists for American workers to compete for the opening." *Modular Container Systems, Inc.*, 1989-INA-228 (July 16, 1992)(*en banc*), citing *Hall v. McLaughlin*, 864 F.2d 868 (D.C. Cir. 1989).

Under *Modular Container*, the factors to be examined may include, but are not limited to, whether the alien is in the position to control or influence hiring decisions regarding the job for which labor certification is sought; is related to the corporate directors, officers or employees; was an incorporator or founder of the company; has an ownership interest in the company; is involved in the management of the company; is one of a small number of employees; has qualifications for the job that are identical to specialized or unusual job duties and requirements stated in the application; and 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. *Id.* The totality of the circumstances standard also includes a consideration of the employer's level of compliance and good faith in the processing of the claim. Moreover, the business cannot have been established for the sole purpose of obtaining certification for the alien. *Id.*

The Board stated in *Paris Bakery*, 1988-INA-337 (Jan. 4, 1990) (*en banc*), that while a family relationship increases the level of scrutiny to be paid to the application, it is only one factor to be considered. If the employer genuinely needs an employee with the alien's qualifications, the job has not been tailored to the alien, and good faith recruitment

has not produced qualified applicants, a family relationship does not *per se* require denial of certification.

In the instant case, the CO denied labor certification on the basis that the Employer's rebuttal was non-responsive in its failure to provide the requested information regarding "names and titles of all corporate officers/board members and the alien's relation to same" and "how the person who makes the hiring decision for the position in question is completely independent of the alien and the alien's influence . . . ." Employer has documented that it is a sole proprietorship and hence, has no officers, board members or stock interests. Employer further affirmed that the Alien has no ownership interest in the business and no authority of any kind concerning the hiring and firing of employees. While Employer has acknowledged a familial relationship, the evidence reflects that the business was started in June 1988 and has been an ongoing business operating without the Alien since that time. (AF 54). The evidence further indicates that the Alien was employed outside the United States performing auto body repair work since 1982, and still was at the time of filing of this application in 1995. (AF 65). Moreover, the record reflects Employer made every effort at compliance with and demonstrated good faith effort in the processing of this claim. Employer amended its rate of pay as requested (AF 19), advertised for the position as directed, and was responsive to and made every effort to comply with the CO's requests. Employer documented that, despite its efforts at recruitment, there were no applicants for the petitioned position. (AF 23). Considering the totality of circumstances, it is determined that Employer has established a good faith effort at recruitment for a *bona fide* job opportunity and accordingly, labor certification was improperly denied.

## **ORDER**

The Certifying Officer's denial of labor certification is hereby **REVERSED** and labor certification is **GRANTED**.

For the panel:

**A**

**JOHN M. VITTON**

Chief Administrative Law Judge

**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.