

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
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**Issue Date: 03 March 2010**

**BALCA No.:** 2009-PER-00309  
**ETA No.:** A-07163-46008

*In the Matter of:*

**GOOD DEAL, INC.,**  
*Employer,*

*on behalf of*

**MAURICAS KASTYTIS,**  
*Alien.*

**Certifying Officer:** William Carlson  
Atlanta Processing Center

**Appearances:** James J. Orlow, Esquire  
Orlow, Kaplan & Hohenstein, LLP  
Philadelphia, Pennsylvania  
*For the Employer*

Gary M. Buff, Associate Solicitor  
Heather A. Vitale, Attorney  
Office of the Solicitor  
Division of Employment and Training Legal Services  
Washington, DC  
*For the Certifying Officer*

**Before:** **Colwell, Johnson and Wood**  
Administrative Law Judges

**DECISION AND ORDER**  
**AFFIRMING DENIAL OF CERTIFICATION**

**PER CURIAM.** 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.”).

**BACKGROUND**

On June 12, 2007, the Certifying Officer (“CO”) accepted for filing the Employer’s Application for Permanent Employment Certification for the position of “Building Repairer.” (AF 219-232).<sup>1</sup> 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.” (AF 219).

On July 11, 2007, the CO issued an Audit Notification, finding that the application showed that the Employer is a closely held corporation, partnership or sole proprietorship. (AF 245-248). The CO directed the Employer to submit several documents showing its corporate structure and finances, as well as documentation evidencing recruitment. (AF 248).

On August 10, 2007, the Employer responded to the Audit, attaching: a copy of its Articles of Incorporation, business registration, and certificate of authority; a list of its corporate officers; federal income tax returns, bank statements, and W-2s for 2001 through 2006; a copy of the ETA Form 9089; a copy of the Notice of Filing; and other relevant recruitment documentation. (AF 8-244). In its audit response cover letter, the Employer stated, “the beneficiary is the President and owns a substantial majority if the business. Since the company is so small, his managerial duties are less than 10% of his work.” (AF 9).

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<sup>1</sup> In this decision, AF is an abbreviation for Appeal File.

On October 18, 2007, the CO denied certification. (AF 5-7). The CO stated that because the alien beneficiary listed on the application is the sole investor and owner of the Employer and, by regulation, “not an employee,” the employment does not satisfy the definition of employment for an application for permanent labor certification, as required under 20 C.F.R. § 656.3.<sup>2</sup>

The Employer submitted a request for review on November 16, 2007. (AF 3-4). The Employer asserted that because there had been no applicants, the reason for the rule cited by the CO did not exist. The Employer also argued that “the rule is inapplicable or overbroad.” (AF 4). It also contended that “employment would be for ‘oneself’ only if the enterprise were a sole proprietorship or partnership,” and that in this case, “it is a corporation.” *Id.* The Employer also submitted documentation. *Id.*<sup>3</sup>

On April 25, 2009, the CO issued a letter of reconsideration finding that the denial of certification was valid. (AF 1). The CO stated that “[t]he employer’s response to the audit denial stated the beneficiary is the President and owns [a] substantial majority of the business, and the owner is his spouse.” *Id.* The CO found that the Employer had provided documentation verifying that the business was commenced with only two employees, the president and the owner, and that the Employer is a closely held corporation in which the foreign worker has an ownership interest. *Id.* The CO wrote:

Although the employer is a corporation, it is noted that the foreign worker is the President of the corporation. It would appear that the corporation relies for its very existence upon the skills and abilities possessed by the foreign worker. This means the foreign worker is such an integral part of the corporation that he cannot practically be separated from it. If he were, the corporation would cease to exist; thus, there is no employer-employee relationship and it is doubtful whether an actual job exists.

*Id.*

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<sup>2</sup> The CO also found that the Employer failed to provide proof of print advertisements; however, the CO later accepted the Employer’s information on this issue in a letter of reconsideration.

<sup>3</sup> The documentation includes tax returns from 2001 reflecting the Alien’s ownership of 75% of the company stock (AF 27) and for 2006 reflecting his ownership of 50% (AF 99) and his wife’s ownership of 50%. (AF 101).

BALCA issued a Notice of Docketing on April 28, 2009. The Employer filed a Statement of Intent to Proceed on May 4, 2009 and an appellate brief on June 12, 2009. In its brief, the Employer asserted that there were no applicants as a result of its recruitment and thus there were no workers to protect in this case. The CO did not file an appellate brief.

## **DISCUSSION**

In pertinent part, the PERM regulations provide that “[e]mployment means: (1) Permanent, full-time work by an employee for an employer other than oneself. For purposes of this definition, an investor is not an employee.” 20 C.F.R. § 656.3. Moreover, the regulation at 20 C.F.R. § 656.10(c)(8) requires the employer to attest that “[t]he job opportunity has been and is clearly open to any U.S. worker.” The regulation at 20 C.F.R. § 656.17(l) provides: “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....”

In *Modular Container Systems, Inc.*, 1989-INA-228 (July 16, 1991) (en banc), the Board held that the question of whether a bona fide job opportunity exists turns on an examination of the totality of circumstances.<sup>4</sup> The Board stated the factors to examine 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;

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<sup>4</sup> *Modular Container Systems, Inc.* was decided under the pre-PERM regulations. The decision’s criteria, however, were explicitly incorporated into the PERM regulations. See Employment and Training Administration, Final Rule, Labor Certification Process for the Permanent Employment of Aliens in the United States ["PERM"], 20 CFR Part 656, 69 Fed. Reg. 77326, 77356 (Dec. 27, 2004); Employment and Training Administration, Proposed Rule, Implementation of New System, Labor Certification Process for the Permanent Employment of Aliens in the United States ["PERM"], 20 CFR Part 656, 67 Fed. Reg. 30466, 30474 (May 6, 2002).

- was an incorporator or founder of the company;
- has an ownership interest in the company;
- is involved in the management of the company;
- is on the board of directors;
- 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.

*Modular Container Systems, Inc., supra* at 8-10 (footnotes omitted). The employer's level of compliance and good faith in the processing of the claim is also relevant. *Id.*

In the instant case, the Employer acknowledged that it was a closely held corporation by indicating in section C-9 of its PERM application that it was "a closely held corporation, partnership or sole proprietorship in which the alien has an ownership interest." (AF 219). Subsequently, in its audit response letter, the Employer stated that "the beneficiary is the President and owns a substantial majority of the business." (AF 9). Using the analysis from *Modular Container Systems, Inc.*, nearly every factor weighs against the Employer.<sup>5</sup> As the Employer's President, the Alien is clearly in a position to control or influence hiring decisions regarding the job for which labor certification is sought; he is married to the only other employee, who is also the named owner of the company; he was an incorporator or founder of the company; he has a 50% ownership interest in the company; he is involved in the management of the company;<sup>6</sup> he is one of only two employees (the other being his spouse); and he is so inseparable from the sponsoring Employer because of his pervasive presence and personal attributes that the Employer would be unlikely to continue in operation without him. As the CO stated in his letter of reconsideration, "the foreign worker is such an integral part of the corporation that he cannot practically be separated from it." (AF 1).

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<sup>5</sup> The only factor that supports the Employer's position is that the job duties are not unusual or specialized.

<sup>6</sup> The record does not reflect whether the Employer has a Board of Directors.

In both its request for review and its appellate brief, the Employer emphasized that it received no applications as a result of its recruitment.<sup>7</sup> However, the lack of applicants for a job opportunity does not demonstrate that the job opportunity is bona fide or open to U.S. workers, as required under 20 C.F.R. § 656.17(l). The Employer carries the burden of showing that it has a bona fide job opportunity that is open to all U.S. workers. As the Board found in *Modular Container Systems, Inc.*, the sponsoring employer can overcome the regulatory proscription that self-employment is a per se bar if it can establish “genuine independence and vitality not dependent on the alien's financial contribution or other contribution indicating self-employment.” *Id.* at 6. In this case, the Employer has clearly not met its burden of overcoming the presumption that the Alien has influence and control over the job opportunity. Accordingly, we find that the Employer has not established that it has a bona fide job opportunity.

Based on the foregoing, we affirm the CO's denial of labor certification.

## **ORDER**

**IT IS ORDERED** that the 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

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<sup>7</sup> The Employer's appellate brief referenced several decisions of the Board of Immigration Appeals (BIA) and Acting Commissioner of the former Immigration and Naturalization Service (INS) regard to two visa petitions and a deportation matter. BIA and old INS decisions, however, are not binding on BALCA. Moreover, they all predate BALCA's *Modular Container Systems, Inc.* decision, which as noted, was explicitly adopted in the PERM regulations. See n.3 of this decision, *supra*.

**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.