



Issue Date: 21 October 2016

BALCA Case No.: 2012-PER-01920
ETA Case No.: A-10293-26521

In the Matter of:

TYRRELL LIMITED,
Employer,

on behalf of

ESPINO, JOSE MIGUEL TANTOCO,
Alien.

Certifying Officer: Atlanta National Processing Center

Appearance: Steven Elias, Esquire
Law Office of Steven Elias
New York, New York
For the Employer

Before: Stephen R. Henley, *Chief Administrative Law Judge*; Paul R. Almanza,
and Clay G. Guthridge¹, *Administrative Law Judges*

DECISION AND ORDER
DIRECTING GRANT OF CERTIFICATION

PER CURIAM. This matter arises under § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) and the “PERM” labor certification regulations at 20 C.F.R. Part 656.²

BACKGROUND

¹ Chief Judge, Federal Maritime Commission and appointed under U.S. Office of Personnel Management Loan # 2016-14.

² “PERM” is an acronym for the “Program Electronic Review Management” system established by the regulations that went into effect on March 28, 2005.

The Employer filed an *Application for Permanent Employment Certification* (“Form 9089”) sponsoring the Alien for permanent employment in the United States in New York, New York. The occupational title listed in Form 9089, Section F-3 is “Market Research Analysts,” Standard Occupational Classification Code 19-3021.00. (AF 133).³ The Employer answered “yes” in response to Box C.9 on the Form 9089, which asks whether “the employer [is] a closely held corporation, partnership, or sole proprietorship in which the alien has an ownership interest, or [whether] there [is] a familial relationship between the owners, stockholders, partners, corporate officers, incorporators, and the alien.” (AF 132).

On February 15, 2011, the Employer was notified that its Form 9089 had been selected for audit. The Employer was asked to submit specifically identified documentation supporting its application, including “[a] statement describing any familial relationships between parties with ownership interests in the sponsoring company and the foreign worker.” (AF 130). The Employer was notified that the application would be denied if the Employer failed to provide the documentation by March 17, 2011. (AF 129).

The Employer served a timely response to the audit notification with documentation on March 15, 2011. (AF 19-127). The Employer stated: “Please be advised that the sole owner of the sponsoring company, Maria Elena Valbuena neé Espino is the mother of the foreign worker, Jose Miguel Tantoco Espino.” (AF 78). It also stated: “Please be advised that the General Manager, Ricio R. Tantoco is the official responsible for interviewing and hiring applicants involving the job opportunity listed in the submitted labor certification application.” (AF 126).

While the Certifying Officer (“CO”) denied the applications for two reasons, only one denial ground remains at issue on appeal:

Specifically, the ETA Form 9089, Section C.5, states the Employer only has 9 employees, and Section K.9, Job I Addendum, states the position currently held by the foreign worker (Assistant General Manager) “Acts as OIC in the absence of the General Manager” who as stated in Exhibits N & Q, has the responsibility for payroll, interviewing and hiring of applicants.

Since the employer failed to provide documentation necessary to overcome the presumption 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 the U.S. Worker; therefore this case is denied.

AUTHORITY FOR DENIAL: 20 C.F.R. 656.10(c)(8) requires, as a condition of employment, that: “The job opportunity has been and is clearly open to any U.S. worker.”

(AF 12).

On May 31, 2011, the Employer filed a timely request for reconsideration and argued:

This ground for denial is speculative and not provided in law or fact.

³ Citations to the Appeal File are abbreviated as “AF” followed by the page number.

The purpose of acting as Officer in Charge in the absence of the General Manager does not mean that the offered position will assume all of these functions. It is meant that this will occur when an emergent need arises.

As hiring and interviewing are not considered emergent, these matters can await the availability of the Officer in Charge.

The fact that the employer has conducted all requisite recruitment efforts without success is indicative of the fact that the applicant did not take part in the recruitment process for this application.

While we do not question the right of the Certifying Officer to request a document that bears upon the issue at hand, it exceeds its authority when it requires an employer to prove a negative as in the instant case.

The Certifying Officer's bare conclusion that the job offer is not bona fide is improper. *Exxon Chemical Corp.*, 88.INA-66 (Balca 1989).

The Certifying Officer provides no authority for the presumption claimed even when all recruitment was conducted.

(AF 3-4).

The CO reconsidered, but found that the reason for denial was valid:

The denial notification states the employer's documentation included with its audit response materials demonstrate the foreign worker's relationship with the employer entity (and principals thereof) is such that the job opportunity was not clearly open to any U.S. worker. In its request for reconsideration, the employer states the foreign worker's current position as assistant general manager does not mean the foreign worker acted as the officer in charge of hiring with respect to the job opportunity on the ETA Form 9089. However, the employer answered "Yes" to Section C-9 on the ETA Form 9089 which asks whether the foreign worker has an ownership interest in the employer entity or whether the foreign worker has a familial relationship with principals of the employer entity. In this regard, the employer's audit materials reveal the sole owner of the employer's business is the foreign worker's mother. The ETA Form 9089 also reflects the employer had nine employees and the foreign worker was the employer's assistant general manager at the time the application was filed. The job duties description on the ETA Form 9089 for the assistant general manager states the foreign worker acts as the officer in charge in the absence of the general manager. The employer's audit materials also contain an organizational chart depicting the foreign worker as third in the chain of command under the foreign worker's mother and the general manager; who also shares the foreign worker's middle name Tantoco. Accordingly, the foreign worker was a manager of the employer during the recruitment process and is the son of employer's sole owner in a company that

employs nine persons. These factors outweigh the employer's claim the foreign worker was not involved in the hiring process as an officer in charge and support the presumption of the foreign worker's influence and control over the availability of the job opportunity. Since the employer failed to establish a bona fide job opportunity was clearly open to any U.S. worker, the Office of Foreign Labor Certification Certifying Officer has determined this reason for denial as valid in accordance with Departmental regulations at 20 C.F.R. § 656.10(c)(8).

(AF 1).

On appeal, the Employer filed a statement confirming its intention to proceed with the appeal. Neither the Employer nor the CO, however, filed appellate briefs.

DISCUSSION

The regulation at 20 C.F.R. § 656.10(c)(8) provides that an employer must attest that “[t]he job opportunity has been and is clearly open to any U.S. worker.” If an employer is a closely held corporation, partnership, or sole proprietorship, a presumption arises that the job is not clearly open to U.S. workers when the sponsored alien has a familial relationship with the owners, stockholders, partners, corporate officers, or incorporators of the employer. *See Transmark Real Estate*, 2011-PER-475 (June 8, 2012); *see also* 20 C.F.R. § 656.17(l).⁴ In order to determine whether a bona fide job opportunity exists, the Board must weigh 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.

⁴ The regulation at 20 C.F.R. § 656.17(l) provides:

Alien influence and control over job opportunity. 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, and must provide to the Certifying Officer [certain enumerated documents].

Good Deal, Inc., 2009-PER-309 slip op. at 4-5 (Mar. 3, 2010) (citing *Modular Container Systems, Inc.*, 1989-INA-228, slip op. at 8-10 (July 16, 1991)).⁵ An employer’s “compliance and good faith in the application process” should also be considered. *Young Building Services, Inc.*, 2011-PER-2710, slip op. at 5 (Apr. 4, 2014). Furthermore, “[n]o single factor . . . shall be controlling.” *Id.* (internal citations omitted).

Because the Employer has attested that the sole owner of the sponsoring company is the mother of the Alien, we must analyze the *Modular Container* factors as they apply to this case.

Is the Alien in a position to control or influence hiring decisions regarding the job?

The CO noted that the Alien is the son of the owner of the Employer. The CO focused on the facts that the General Manager has the responsibility for payroll, interviewing, and hiring of applicants and that the Alien currently holds the position of Assistant General Manager and “[a]cts as [Officer in Charge] in the absence of the General Manager’ who . . . has the responsibility for . . . hiring of applicants.” (AF 12).

The employer’s audit materials also contain an organizational chart depicting the foreign worker as third in the chain of command under the foreign worker’s mother and the general manager; who also shares the foreign worker’s middle name Tantoco. Accordingly, the foreign worker was a manager of the employer during the recruitment process and is the son of employer’s sole owner in a company that employs nine persons. These factors outweigh the employer’s claim the foreign worker was not involved in the hiring process as an officer in charge and support the presumption of the foreign worker’s influence and control over the availability of the job opportunity.

(AF 1).

The Employer argues that:

The purpose of acting as Officer in Charge in the absence of the General Manager does not mean that the offered position will assume all of these functions. It is meant that this will occur when an emergent need arises.

As hiring and interviewing are not considered emergent, these matters can await the availability of the Officer in Charge.

(AF 3).

⁵ “*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).” *Good Deal, Inc.*, at 4 n. 4.

It would be highly unusual for an assistant who assumes a general manager's duties for the daily operations of a business in the general manager's absence to also assume the general manager's authority to hire and fire employees in the general manager's absence. We find that the Alien's position as OIC in the absence of the General Manager does not mean that he had control over the hiring process.

An alien's influence over hiring practices may be imputed when his or her relative has significant control over the sponsoring employer. In *Young Building Services, Inc.*, a panel found that an alien was "likely in a position to influence the decisions of the company" because the "Alien's sister is the president, sole owner, incorporator and shareholder of the company." However, the panel in *Young Building Services* emphasized that its inquiry was impeded because of the employer's bad faith. Not only did the employer initially conceal the familial relationship, it failed to supply the CO with relevant documents about the relationship. The case before us is distinguishable because the Employer did not conceal the familial relationship and engaged in a good faith recruitment effort. Furthermore, the Employer in this case did not receive any other applicants for the position and consequently did not reject any applicants.

In the absence of a bad faith recruitment effort, it is less likely that the Alien's influence over hiring can be imputed simply because his mother owns the Employer. In *Altobeli's Fine Italian Cuisine*, 1990-INA-130 (Oct. 16, 1991) (pre-PERM), the alien's brother and sister-in-law owned 75% of the sponsoring company and served as its corporate officers. Like the General Manager in this case, the alien's brother in *Altobeli's* appears to have exercised managerial control over a business with a small number of employees. Nevertheless, the panel concluded "the employer has demonstrated that it is genuinely independent from the alien." *Id.* In making this determination, the panel found it "quite significant" that the CO did not challenge the employer's compliance with the recruitment regulations. *Id.*; see also *Mike's Warehouse*, 2011-PER-2252 (Aug. 28, 2013) (remanded for further review) ("[a]side from being the sole proprietor's brother, there is no indication the foreign worker has any influence over the hiring process"); *H & R Auto Paint & Body Repair*, 2002-INA-169 (Aug. 5, 2003) (pre-PERM) (finding that "the record reflects Employer made every effort at compliance with and demonstrated good faith effort in the processing of this claim" and that the alien had no influence over the hiring process, even though his brother was the sole-proprietor of the business).

The facts under this prong are in equipoise. The Alien's mother owns the company, the Alien and the General Manager with hiring authority share the middle name "Tantoco," suggesting an additional familial connection, and the Employer is a small company. However, the Employer engaged in good faith recruitment efforts. The Employer posted the job with a state workforce agency (SWA), placed recruitment advertisements in the New York Post, posted on the employer web site, listed with a job search web site, and advertised with an employee referral program. (AF 135-136). Despite these recruitment efforts, the Employer did not receive any other applications for the position and consequently did not reject any other applicants. We note that on reconsideration, the CO did not find fault with the Employer's recruitment efforts. As in *Altobeli's*, 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. Upon reviewing the totality of

the circumstances, we find that this factor neither supports nor rebuts the presumption that the job was not clearly open to U.S. workers.

Is the Alien related to the corporate directors, officers, or employees?

The parties do not dispute that the Alien's mother is the owner and of the Employer. We find that this factor supports the presumption that the job was not clearly open to U.S. workers.

Is the Alien an incorporator or founder of the company?

There is no evidence in the record suggesting that the Alien was an incorporator or founder of the company. We note that the Alien was born May 6, 1984 (AF 31), and the Employer was founded as a business in 1990. (AF 27). We find that this factor weighs against the presumption that the job was not clearly open to U.S. workers.

Does the Alien have an ownership interest in the company?

There is no evidence in the record suggesting that the Alien has an ownership interest in the company. We find that this factor weighs against the presumption that the job was not clearly open to U.S. workers.

Is the Alien involved in the management of the company?

The Alien has worked in the position for the Employer since 2007. As found above, he has some management duties over day-to-day operations when the General Manager is not present, but there is no evidence that his management duties extended to hiring. The facts under this prong are in equipoise. Although there is no evidence of bad faith in the application process, the Alien exercises some operational duties when the General Manager is not present, the Employer is a small company with nine employees (AF 27), and the Alien's mother owns the company. Upon reviewing the totality of the circumstances, we find that this factor neither supports nor rebuts the presumption that the job was not clearly open to U.S. workers.

Is the Alien one of a small number of employees?

The Alien is currently employed by the Employer as one of nine employees. (AF 27). We find that this factor supports the presumption that the job was not clearly open to U.S. workers.

Does the Alien have qualifications for the job that are identical to specialized or unusual job duties and requirements stated in the application?

The Employer is sponsoring the Alien to work as a "Market Research Analyst," Skill Level I, requiring a Bachelor's degree in finance and marketing and no experience in the job field. No alternate field of study, combination of education and experience, or field of study was

acceptable, although foreign education was acceptable. (AF 28-29).⁶ No specialized or unusual job duties and requirements are stated in the application. We find that this factor weighs against the presumption that the job was not clearly open to U.S. workers.

Is the Alien so inseparable from the Employer because of his or her pervasive presence and personal attributes that the Employer would be unlikely to continue in operations without the Alien?

The Employer was established in 1990. The Employer operated without the Alien until he was hired for this position in 2007 and there is no reason to think that the Employer would not continue to operate without him. The panel in *Altobeli's*, determined that a similar fact pattern favored a ruling for the employer. (“The Employer’s restaurant has been operating without the Alien, and there is no reason to think that the Alien’s talents are so important that the restaurant probably would not continue without him”). We therefore find that this factor weighs against the presumption that the job was not clearly open to U.S. workers.

Did the Employer engage in a good faith recruitment process?

The Employer adequately documented its good faith recruitment effort and on reconsideration, the CO did not find fault with the Employer’s recruitment procedures.⁷ Despite these efforts, the Employer did not receive any applications for the position.

As discussed *supra*, indicia of bad faith may include concealing the existence of a familial relationship, improperly rejecting otherwise qualified U.S. workers, and failing to respond to a CO’s inquiry. None of these elements are present in this case. Accordingly, we find that this factor weighs against the presumption that the job was not clearly open to U.S. workers.

Conclusion

While a familial relationship between an alien and an employer creates a presumption that a job is not clearly open to U.S. workers, the presumption is not so stringent as to be insurmountable. Even though the mother of the Alien in this case owns the Employer, a review of the totality of the circumstances leads us to find that the job opportunity was open to U.S. workers. Despite good faith recruitment efforts, the Employer did not receive any other applications for the position, was diligent in its recordkeeping, and forthright in its disclosures to the CO. Accordingly, we reverse the CO’s determination on this denial ground.

⁶ We note that the Alien graduated from Boston University in 2007 with major fields of study in finance and marketing. (AF 32).

⁷ The CO originally found fault with the application process, (AF 12), but accepted the Employer’s additional documentation submitted with the request for reconsideration and found the recruitment process satisfied the requirements of the Act and regulations. (AF 1).

ORDER

Based on the foregoing, **IT IS ORDERED** that the denial of labor certification in this matter is **REVERSED** and that this matter is **REMANDED** for certification pursuant to 20 C.F.R. § 656.27(c)(2).

Entered at the direction of the panel by:

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 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 ten double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed ten double-spaced pages. Upon the granting of a petition the Board may order briefs.