

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
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**Issue Date: 28 August 2013**

**BALCA Case No.: 2011-PER-02252**

**ETA Case No.: A-08315-03939**

*In the Matter of:*

**MIKE'S WAREHOUSE,**  
*Employer*

*on behalf of*

**SAGHAFI, KOUROSH,**  
*Alien.*

Certifying Officer: Atlanta National Processing Center

Appearances: Samuel N. Smith  
Fairfax, VA  
*For the Employer*

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

Before: **ROMERO, KENNINGTON, and ROSENOW**  
Administrative Law Judges

**DECISION AND ORDER REVERSING DENIAL  
OF CERTIFICATION AND REMANDING CASE**

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 20 C.F.R. Part 656. The Employer filed an Application for Permanent Employment Certification for the position of "Shop and Alteration Tailors" on December 17, 2008. (AF 57-68).<sup>1</sup>

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

## **BACKGROUND**

The Certifying Officer (“CO”) sent an Audit Notification Letter on September 28, 2009. (AF 53-56). Employer requested an extension to respond, which was granted, and responded on October 21, 2009. (AF 24-52). On March 10, 2011, the CO denied Employer’s application. (AF 21-23). The CO stated that where the employer is a closely-held corporation or partnership in which a familial relationship exists between the corporate officer and the alien, a presumption arises that the alien’s influence and control over the job opportunity is such that it is not bona fide. Specifically, the CO stated that Employer failed to provide adequate documentation explaining the financial history of the company, because though it began business in 1993, the only document submitted was a bank statement for September 2009. Because he determined the documentation Employer submitted in response to the Audit Notification was insufficient to demonstrate the job was bona fide and open and available to U.S. workers, as required by 20 C.F.R. Section 656.10(c)(8), the CO denied the application.

Employer requested reconsideration of the denial on April 5, 2011. (AF 3-20). In its request for reconsideration, Employer submitted Form 1040s for 2007-2009, which the CO did not consider, in accordance with 20 C.F.R. 656.24(g)(2)(ii). On July 28, 2011, the CO stated that the documentation Employer provided in its audit response did not overcome the presumption of the foreign worker’s influence and control, for several reasons. Employer’s company has only one employee. The foreign worker is the brother of the employer, who is the established sole proprietor and the hiring authority for the company. Moreover, the CO stated, Employer failed to provide the requested financial history. (AF 1-2). The file was then transmitted to the BALCA for further review.

## **DISCUSSION**

PERM is an exacting process, designed to eliminate back-and-forth between applicants and the government, and to favor administrative efficiency over dialogue in order to better serve the public interest overall, given the resources available to administer the program. *HealthAmerica*, 2006-PER-1, slip op. at 19 (July 18, 2006) (en banc). An employer bears the burden of proof to establish eligibility for labor certification. 8 U.S.C. § 1361; 20 C.F.R. § 656.2(b). The PERM regulations require an employer seeking to apply for permanent labor certification on behalf of an alien to file an ETA Form 9089. 20 C.F.R. § 656.17(a). The regulations provide that incomplete applications will be denied. 20 C.F.R. § 656.17(a). If an employer’s application is selected for audit, it must respond within 30 days and submit all requested documentation. 20 C.F.R. § 656.20. A substantial failure by the employer to provide required documentation will result in that application being denied under Section 656.24.

Additionally, the regulations provide that once an application is filed, requests for modifications to the application will not be accepted. 20 C.F.R. § 656.11(b). For applications submitted after July 16, 2007, a request for reconsideration submitted on behalf of an application may include only documentation received from the employer in response to a request from the CO or documentation the employer did not have an opportunity to present to the CO but which existed at the time the application was filed. 20 C.F.R. § 656.24(g)(2).

PERM is also an attestation-based program. 20 C.F.R. § 656.10(c). Among other attestations, an employer must attest that the job opportunity in the permanent labor application has been and is clearly open to any U.S. workers. 20 C.F.R. § 656.10(c)(8). Accordingly, the regulations require an employer to conduct mandatory recruitment steps and make 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 only certify permanent labor applications if there are not sufficient United States workers who are able, willing, qualified, and available at the time of the application. *See* 20 C.F.R. § 656.1(a)(1). An employer carries the burden of showing that it has a bona fide job opportunity open to all U.S. workers. *See In the Matter of Intervid, Inc.*, 2009-PER-00278 (Sept. 9, 2010).

Section 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[.]

20 C.F.R. § 656.17(l). The regulation then lists the documentation an employer must provide to the CO in that situation:

- (1) A copy of the articles of incorporation, partnership agreement, business license or similar documents that establish the business entity;
- (2) A list of all corporate/company officers and shareholders/partners of the corporation/firm/business, their titles and positions in the business' structure, and a description of the relationships to each other and the alien beneficiary; and
- (3) The financial history of the corporation/company/partnership, including the total investment in the business entity and the amount of investment of each officer, incorporator/partner and the alien beneficiary; and
- (4) The name of the business' official with primary responsibility for interviewing and hiring applicants for positions within the organization and the name(s) of the business' official(s) having control or influence over hiring decisions involving the position for which labor certification is sought.
- (5) If the alien is one of 10 or fewer employees, the employer must document any family relationship between the employees and the alien.

20 C.F.R. § 656.17(l). In *Modular Container Systems, Inc.*, 1989-INA-228 (July 16, 1991) (en banc), the BALCA held that the question of whether a bona fide job opportunity exists turns on an examination of the totality of the circumstances, including but not limited to, whether the alien is in the position to control or influence hiring decisions regarding the position for

which certification is sought; is related to the corporate directors, officers, or employees; 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 stated in the application; and is so inseparable from the sponsoring employer because of his or her pervasive presence that the employer would be unlikely to continue in operation without the alien. *Id.* at 8-10. “[A]ssuming 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.” *Paris Bakery Corp.*, 1988-INA-337 at 4 (Jan. 4, 1990) (en banc).

In the instant case, Employer acknowledged it is a closely-held corporation in section C-9 of the ETA Form 9089. (AF 57). In response to the Audit Notification letter, Employer responded with the following:

- A copy of the business license permit for Nader Saghafi dba Mike’s Warehouse
- A bank statement for Mike’s Warehouse dba Nader Saghafi for the month of September, 2009
- A statement from Nader Saghafi indicating a total investment in the business of \$140,000, invested solely by him
- A letter from Nader Saghafi stating that he is the sole proprietor of Mike’s Warehouse, the only person responsible for interviewing and hiring employees, and that the alien beneficiary is his brother.

(AF 47-51). The ETA Form 9089 indicates that employer has only one employee. (AF 57). Employer indicated that there were no applications for the position in response to its advertisements. The foreign worker has experience as a tailor, but the position of “shop and alteration tailor” is not so specialized or unusual to raise suspicion that it was created for him. In fact, the position for which certification is sought is a low-level, relatively unskilled position. Employer attested that the foreign worker does not have an ownership interest in the company, but as the brother of the sole proprietor and sole owner, there is a question about his ability to influence the hiring process.

While the financial information Employer provided in response to the Audit Notification letter was limited, Employer provided what was required by 20 C.F.R. Section 656.17(l)(3), which states only that an employer must provide documentation of “the financial history of the corporation/company/partnership, including the total investment in the business entity and the amount of investment of each officer, incorporator/partner and the alien beneficiary.” Aside from being the sole proprietor’s brother, there is no indication the foreign worker has any influence over the hiring process.

The CO’s explanation that Employer failed to provide adequate documentation of the financial history of the company is unsatisfactory because it was limited to the fact that “[t]he company began business in 1993; however, the only document submitted in response to the audit

notification was a bank statement for the month of September 2009.” (AF 22). The CO did not explain in the Audit Notification or reconsideration what documentation he would have found satisfactory to fulfill the requirement of 20 C.F.R. Section 656.17(l)(3). The Board has found that “an employer needs to know the basis for a denial in order to file a meaningful motion for reconsideration.” *MMB Stucco, LLC*, 2011-PER-00715 (May 7, 2012). In this case, Employer adequately responded to the CO’s audit requests and submitted documentation that met the regulatory requirements. The CO should reassess this documentation and reach a substantive decision on whether or not Employer satisfied its burden.

Accordingly, **IT IS ORDERED** that the denial of labor certification in this matter is **REVERSED** and the case is **REMANDED** to the CO for further review in accordance with this opinion.

For the panel:

**PATRICK M. ROSENOW**  
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 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.