U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 21 October 2016

BALCA Case No.: 2012-PER-03149
ETA Case No.: A-11203-94679

In the Matter of:

JOHNMAN U.S.A., INC.
d/b/a
KARAOKE CHAMP,
Employer,

on behalf of

KIDA, TAKUYA,
Alien.

Certifying Officer: Atlanta National Processing Center

Appearance: David S. Sindell, Esquire
Sindell Law Offices, P.C.
7 West 36th Street, 14FL
New York, New York
For the Employer

Before: Stephen R. Henley, *Chief Administrative Law Judge*; Morris D. Davis, and Clay G. Guthridge,[1] *Administrative Law Judges*

DECISION AND ORDER
AFFIRMING DENIAL 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] For the reasons stated below, the decision of the Certifying Officer is affirmed.

[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.

BACKGROUND

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.[3] The occupational title listed in Form 9089, Section F-3 was "Accountant, Skill Level II," Standard Occupational Classification Code 13-2011.01. (AF 354). 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 353). As stated by the Employer in its PERM Recruitment Report submitted in response to the audit letter, "Toshihiko Kida, President [of the Employer], is the beneficiary's brother. Therefore, there is a familial relationship between the president and the foreign worker, Mr. [Takuya] Kida." (AF 39).

On January 31, 2012, 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 and notified that the application would be denied if the Employer failed to provide the documentation by March 1, 2012. (AF 348-352). The Employer served a timely response to the audit letter with documentation on February 29, 2012. (AF 16-347).

The Certifying Officer ("CO") reviewed the Employer's submission and found that the Employer had not met its burden of proving that the job opportunity has been and is clearly open to any U.S. worker. The CO informed the Employer:

> Denial Reason:
>
> Where the employer is a closely held corporation or partnership in which a familial relationship exists between the stockholder(s) or corporate officer(s) or incorporator(s) or partner(s) and the alien 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 employer was asked to provide documentation necessary to overcome the presumption, however, the documentation submitted was insufficient to demonstrate the job is open and available. Specifically, the documentation states that the President is the beneficiary's brother. It goes on to state that the President is primarily responsible for interviewing and hiring applicants. Further, included in the documentation is an organizational flow chart of work responsibilities in which

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[3] At the time the application was filed, the Alien worked for the Employer as head of the Management Division. According to the Employer's organizational chart, there were three subordinate divisions under the Alien's supervision: the Finance Division, the HR Division and the Store Management Division. (AF 38). The HR Division had one employee, who reported directly to the Alien and then to Alien's brother (CEO), in turn. (*Id.*). Citations to the Appeal File are abbreviated as "AF" followed by the page number.

> the foreign worker, Takuya Kida, is listed as the head of the Management Division of the company which is responsible for the HR department. Therefore, the foreign worker has undue influence over the hiring and firing of employees. The employer failed to provide documentation that overcomes the presumption that the job for which certification is sought is not a bona fide job opportunity.
>
> AUTHORITY FOR DENIAL: Pursuant to the Department's regulations at 20 CFR § 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 14).

On April 4, 2012, the Employer filed a timely Motion for Reconsideration/Appeal. The Employer acknowledged the familial relationship between the owner and the Alien (brother), but argued that "the Employer provides substantial evidence which firmly rebuts the familial relationship/influence presumption and clearly establishes that the job for which rebuts the presumption certification is sought is indeed a bona fide job opportunity." (AF 7). The Employer addressed evidence it had presented in its response to the audit letter in light of the factors set forth in *Modular Container Systems*, 1989-INA-00228 (July 16, 1991) (*en banc*), (AF 7-8), and argued that the evidence supported a finding that "the Employer's Accountant position was clearly open to a U.S. worker." (AF 8).

The CO reconsidered, but found that "the employer's request did not overcome the deficiencies stated in the determination letter." (AF 1). The CO wrote:

> The denial notification states the employer failed to provide documentation that overcomes the presumption that the job for which certification is sought is not a bona fide job opportunity. Specifically, documentation provided by the employer in response to audit indicates the President of the company, who is the foreign worker's brother, is primarily responsible for interviewing and hiring applicants. In addition, the organizational flow chart of work responsibilities shows that the foreign worker, Mr. Takuya Kida, is listed as the head of the Management Division of the company which is responsible for the Human Resources department, and therefore may have undue influence over the hiring and firing of employees. In response, the employer argues that the foreign worker has no ownership interest in the thirteen employee company, is not on the Board of Directors, and is not [indispensable] to the operation of the company. It also argues that the accounting job which requires fluency in Japanese is necessary for the company and was not tailored to the experience of the foreign worker. Moreover, the employer contends that although the foreign worker is listed as the head of the Employer's Management Division, which oversees Human Resources, he has no actual power to hire or fire employees because the Human Resources Division acts autonomously and makes employment decisions solely based on the needs of the corporation as a whole, independent of the influence or control of any other Division. However, the totality of the circumstances suggests that the

foreign worker and his brother have undue influence and control over the job opportunity for the following reasons:

• The foreign worker's brother is CEO and President of the company and its sole shareholder.

• The foreign worker's brother stated in response to audit that he is primarily responsible for interviewing and hiring applicants, including the job opportunity listed in the labor certification application. If this is the case, it isn't clear what role the head of Human Resources plays in hiring and firing and thus the influence of the foreign worker, who is listed in the organization chart as overseeing that division.

• Based on the organization chart, the foreign worker holds three titles in the management structure of the company: Head of the Division of Store Development, Head of the Management Division, and Head of the Finance Division.

• On the ETA Form 9089, the employer lists having six (6) employees -- although more are listed on the organizational chart.

• Although the basic accounting duties and the requirement for fluency in Japanese stated on the application and in recruitment advertising do not appear to be unduly tailored toward the foreign worker, his multiple management roles in the company suggests that the actual job opportunity may not have been accurately represented in the foreign labor certification application.

• Contrary to the assertion that the foreign worker is not [indispensable] to the operation of the company, the fact that he manages store development, a major stated incorporation goal of the company, and is also responsible for finance suggests that he plays a key role in the management structure.

Therefore, since the employer has not provided documentation that overcomes the presumption that the job for which certification is sought is not a bona fide job opportunity, the Office of Foreign Labor Certification Certifying Officer has determined this reason for denial to be valid in accordance with the Departmental regulations at 20 CFR § 656.10(c)(8).

(AF 1-2). The CO forwarded the case to this Board. (*Id.*)

Neither the Employer nor the CO 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-00475 (June 8, 2012); *see also* 20 C.F.R. § 656.17(*l*).[4] In

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

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.

Good Deal, Inc., 2009-PER-00309 slip op. at 4-5 (Mar. 3, 2010) (*citing Modular Container Systems, Inc.*).[5] An employer's "compliance and good faith in the application process" should also be considered. *Young Building Services, Inc.*, 2011-PER-02710, 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 a familial relationship exists between the CEO/President of the Employer and 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 found that "the organizational flow chart of work responsibilities shows that the [Alien] is listed as the head of the Management Division of the company which is responsible for the Human Resources department, and therefore may have undue influence over the hiring and firing of employees." (AF 1.) In making this finding, the CO rejected the Employer's argument in its request for reconsideration that:

> *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].

[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.

> The Alien is listed as the head of the Employer's Management Division, which oversees the Financial Division (in which he also works) and the Human Resources Division (in which he does not). Though it appears that the Alien is in a position to control or influence hiring decisions, as part of the Management Division, the Alien only oversees and ensures that each division runs smoothly. The Alien has no actual power to hire or fire employees. Rather, the Human Resources Division acts autonomously and makes employment decisions solely based on the needs of the corporation as a whole, independent of the influence or control of any other Division.

(AF 8). The CO based his finding on several factors:

> • The foreign worker's brother is CEO and President of the company and its sole shareholder.
> • The CEO/brother is primarily responsible for interviewing and hiring applicants, leaving the role of the head of Human Resources unclear.
> • The foreign worker is Head of the Division of Store Development, the Management Division, and the Finance Division.
> • The number of employees (thirteen).
> • The actual job opportunity may not have been accurately represented in the foreign labor certification application.
> • The fact that the Alien manages store development and is responsible for finance suggests that he plays a key role in the management structure.

(AF 1).

An alien can have actual influence over hiring practices when he or she occupies a management position with the sponsoring employer. *See Intervid, Inc.*, 2009-PER-00278 (Sept. 9, 2010) (finding the foreign worker had influence over the hiring process because he was "generally responsible for 50% of the company's hiring," even though the employer attempted to "remove the [a]lien from the hiring process" during labor certification recruitment). When an alien does not hold a position within the sponsoring employer from which he or she can actually influence hiring, the alien's influence may also be imputed when his or her relative has significant control over the sponsoring employer. *See Young Building Services, Inc.*, slip op. at 5 (finding the alien had influence over hiring "[d]ue to her familial relationship with the incorporator, president and sole shareholder of the [e]mployer").

In this case, the CO cited both actual and imputed influence as factors in the decision to deny certification. With respect to actual influence, the organizational chart shows the Alien was one of three key division mangers and that he exercised supervisory authority over the HR division. (AF 38). On reconsideration, the Employer claimed the Alien had no actual authority to hire or fire employees because "the Human Resources Division acts autonomously and makes

employment decisions solely based on the needs of the corporation."[6] (AF 8). The Employer also relied on a signed declaration to assert that the Alien's brother, the CEO/President and sole-owner of the company is "primarily responsible for interviewing and hiring applicants for job opportunities within our company." (AF 39). On reconsideration, the CO determined the CEO/President's involvement with hiring decisions was sufficient to impute influence to the Alien. (AF 1).

The burden of proof to establish eligibility for certification is on the petitioning employer. 8 U.S.C. § 1361; 20 C.F.R. § 656.2(b). In *Your Employment Service, Inc., d/b/a The Hughes Agency*, 2009-PER-00151, slip op. at 7 (Oct. 30, 2009), the Board noted it "has long held that a bare assertion without either supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof." Here, the Employer made bare assertions that purport to establish the Alien had no influence on hiring; one assertion claiming the CEO was primarily responsible for hiring and the other claiming the HR Division acted autonomously on employment decisions. Even viewed in the light most favorable to the Employer, the reasoning of these claims is inconsistent. The organizational chart showed that, at least on paper, the Alien was the sole link between the CEO and the HR Department. (AF 38). The only other evidence that tends to support one assertion over the other is the Job Order the Employer filed with the New York State Job Bank on April 12, 2011, which advised interested parties to submit resumes to "Attn: Human Resources - Johnman U.S.A., Inc. d/b/a Karaoke Champ, 55 West 21st Street, 3rd Floor, New York, NY 10010." (AF 55). The net result is that the evidence is unclear on how the Employer's hiring process worked and what role, if any, the Alien played.

The burden is on the Employer to establish that the Alien was not in a position to influence the hiring decision. Upon reviewing the totality of the circumstances, we find that the Employer did not meet its burden here with respect to either actual or imputed influence. We further find that this factor supports the presumption that the job was not clearly open to U.S. workers. *See Nextlabs, Inc.*, 2011-PER-673 (Apr. 19, 2012) (finding that an alien exercised influence over the position because "the employee allegedly in control of hiring is directly overseen by the CEO [and cousin of the alien]").

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

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

[6] The CO reconsidered his decision to deny certification but then affirmed his earlier determination that the Employer failed to overcome the presumption. (AF 1-2). All of the information the CO considered in the denial of certification and upon reconsideration is part of the record for this Board to review and consider. 20 C.F.R. § 656.27(c); *Construction and Investment, Corp., d/b/a Efficient Air*, 1988-INA-00055 (Apr. 24, 1989); *Karam Kaur Khasriya LLC, d/b/a Zip Mart*, 2012-PER-02304 (July 14, 2016).

Is the Alien an incorporator or founder of the company?

The Employer asserts that "Toshihiko Kida [the Alien's brother] is the President and Founder of the Employer and owns 100% of all outstanding shares while the Alien has no ownership interest in the Employer." (AF 8). The CO does not contest this argument. 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?

The Employer asserts that "Toshihiko Kida [the Alien's brother] is the President and Founder of the Employer and owns 100% of all outstanding shares while the Alien has no ownership interest in the Employer." (AF 8). The CO found that "[t]he foreign worker's brother is [the Employer's] sole shareholder." (AF 1). 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 CO noted that the Alien is head of the Division of Store Development, the Management Division, and the Finance Division. The Employer asserts that "[t]he Alien is not a member of the Board of Directors for the Employer," and argues:

> Though it appears that the Alien is in a position to control or influence hiring decisions, as part of the Management Division, the Alien only oversees and ensures that each division runs smoothly. The Alien has no actual power to hire or fire employees. Rather, the Human Resources Division acts autonomously and makes employment decisions solely based on the needs of the corporation as a whole, independent of the influence or control of any other Division.

(AF 8).

The Audit Notification directed the Employer to provide an "outline of the corporate structure for the sponsoring employer that includes the name and title of each person within the company." (AF 351). In its response, the Employer said "Please refer to the following organizational chart for details." (AF 38). The organizational chart showed the Alien serving as head of the Management Division and reporting directly to the CEO. Three subordinate divisions were direct line reports to the Alien, including the HR Division. (*Id.*). In its request for reconsideration, the Employer said that while the organizational chart created the appearance that the Alien exercised control over the HR and Finance divisions, he "only oversees and ensures that each division runs smoothly." (AF 8).

The Alien was the head of the "Management Division," yet the Employer contends he was not involved in management of the company, a claim the very title of the position he held seems to belie. Providing oversight and ensuring each of his subordinates divisions ran smoothly implies the Alien was responsible for the success or failure of the divisions reporting to him. As the court said in *Sharff v. Pioneer Fin. Serv., Inc.*, No. 92 C 20034, 1993 WL 87718, at *7 (N.D.Ill. Mar. 22, 1993), "it defies common sense to give [a company official] responsibility for

a department yet deprive him of the authority to control the department." The same applies here. Therefore, we find that this factor supports 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 thirteen employees. (AF 8; AF 346). 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 an "Accountant – Skill Level II." The Form 9098 indicates that the job requires a bachelor's degree in economics or a related area of study, but that no experience is necessary. No other field of study or combination of education and experience is acceptable. Foreign education is acceptable, but experience in an alternate occupation is not acceptable. The position requires fluency in Japanese. (AF 354-355).

With the exception of fluency in Japanese, these job requirements are not unusual for the position of accountant. The regulations provide that "[a] foreign language requirement can not be included, unless justified by business necessity." 20 C.F.R. § 656.17(h)(2). The Employer's response to the audit letter explains that fluency in Japanese is a business necessity because the majority of its customers require communication in Japanese and its accounting records and financial records are in English and Japanese. (AF 40). The CO found that "the basic accounting duties and the requirement for fluency in Japanese stated on the application and in recruitment advertising do not appear to be unduly tailored toward the foreign worker." (AF 1). We accept the Employer's explanation for the requirement for fluency in Japanese set forth at AF 40. Therefore, 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 incorporated on June 2, 1995. (AF 125-127). The Alien began working for the Employer on April 1, 2008. (AF 358). The Employer argues that "[i]f the Alien were to cease working, the second member of the Financial Division would be able to compensate and another employee could assume the duties of the Management Division with reasonable competency." (AF 8). The panel in *Altobeli's Fine Italian Cuisine*, 1990-INA-00130 (Oct. 16, 1991) (pre-PERM), 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"). The Employer functioned without the Alien for its first thirteen years of operation and there is no reason to think that the Employer would not return to operating 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 record indicates that the Employer advertised the opening for the position several times using several different methods. The advisements include:

Two Sunday Print Advertisements:
New York Daily News -- 05/01/2011 (AF 59-60).
New York Times -- 05/08/2011 (AF 58).

Job Order with New York State Job Bank – posted 04/12/2011 -- 05/15/2011 (AF 55-56).

Internal Posting -- 04/11/2011-05/15/2011 (AF 53).

Employee Referral Program -- 04/11/2011- 05/15/2011, offering bonus up to $500 (AF 62).

Online Advertisement -- New York Daily News -- www.monster.com 05/03/2011-05/11/2011 (AF 63-68).

Company Website -- 04/19/2011-05/11/2011 (AF 69-72).

Despite this effort to fill the Accountant position, the Employer "did not receive any response to [the] advertisement from any qualified legal U.S. workers." (AF 35).

Indicia of bad faith in the recruitment process 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 the current case. The CO has not found fault with the Employer's recruitment procedures. Accordingly, we find that this factor weighs against the presumption that the job was not clearly open to U.S. workers.

Conclusion

The Board in *Modular Container Systems* provided no guidance on the weight to afford each of the factors; however, in *Young Building Services* the Board said no single factor is controlling and the totality of the circumstances must be assessed. This panel finds that the Alien's close familial relationship to the CEO/President and sole shareholder (his brother) as well as the Alien's position over the HR Division in the company's organizational structure, among other factors that favor the presumption, outweigh the factors that tip the Employer's way. Accordingly, we find that the Employer failed to meet its burden to establish that the job opportunity was bona fide, open, and available to U.S. workers and we find that the CO's denial of certification was appropriate.

ORDER

Based on the foregoing, **IT IS ORDERED** that the denial of labor certification in this matter is **AFFIRMED**.

Entered at the direction of the panel by:

Digitally signed by TODD R. SMYTH
DN: CN=TODD R. SMYTH, OU=LEGAL COUNSEL, O=US DOL Office of Administrative Law Judges, L=Washington, S=DC, C=US
Location: Washington DC

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.