

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
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**Issue Date: 16 July 2012**

**BALCA Case No.: 2011-PER-01046**  
ETA Case No.: A-08189-67687

*In the Matter of:*

**WEST END PUBLISHING LLC,**  
*Employer*

*on behalf of*

**ANTAR, MAHMOUD IBRAHIM MOHAMED,**  
*Alien.*

Certifying Officer: William Carlson  
Atlanta National Processing Center

Appearances: Anis Saleh, Esq  
Saleh & Associates  
Coral Gables, Florida  
*For the Employer*

Before: Sarno, Bergstrom, Malamphy  
Administrative Law Judges

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

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 August 14, 2008, the Certifying Officer (“CO”) accepted for filing the Employer’s Application for Permanent Employment Certification for the position of “Director – fine art marketing development” (AF 375).<sup>1</sup> On March 27, 2009, the CO sent Employer an Audit Notification Letter requesting that Employer provide certain information in accordance with 20 C.F.R. §656.20. (AF 375-377). Because the Employer indicated their status as a closely held corporation, the CO also specifically requested:

-A copy of the articles of incorporation, partnership agreement, business license or similar documents that establish the business entity;

-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 to the alien beneficiary;

-The financial history of the corporation/company/partnership, including the total investment in the business entity and the amount of investment of each office, incorporator/partner and the alien beneficiary; and

-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

(AF 377).

On April 29, 2009 the Employer responded and included all required documentation. (AF 44-374). The Articles of Incorporation reveal that on the date of formation (December 21, 2004) the only two managers/members of the LLC were the Alien and his brother (“Brother”). Brother is listed as the registered agent. (AF 297-298) In an Amendment filed on November 17, 2005 both brothers resigned as members and Ms. Feldman was appointed as the sole member. (AF 300) Later Mr. Farrell is also appointed member. (AF 304). The current organization chart reveals Ms. Feldman is the Managing Member to who both brothers report. Alien is the Director of Fine Art Marketing Development and Brother is the President. The chart appears to list six employees and five independent contractors. (AF 309) Employer’s report asserts that neither

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

current member of the LLC are related to the Alien. Employer also asserts the Alien never had a financial interest in the company, though Brother used to have a 10% equity interest. (AF 47). Ms. Feldman asserts she is the sole individual to make hiring decisions. (AF 48).

On September 9, 2010, the CO denied the application. The CO found that the Employer had failed to show that the position was bona fide, open and available to U.S workers. The CO also incorrectly asserts the Employer failed to include “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 to the alien beneficiary.” *Id.* (included at AF 47) Finally, the CO found that the alien did not possess the required qualifications. (AF 43).

On October 8, 2010, the Employer requested reconsideration, arguing that the CO did not clearly state the bases for denial, and that the alien was actually qualified for the position. (AF 3-5). On April 5, 2011 the CO denied certification on reconsideration but accepted the Employer’s position on the alien’s qualifications. (AF 1) The CO forwarded the case to BALCA on April 11, 2011, and BALCA issued a Notice of Docketing on June 15, 2011. The Employer did not file a Statement of Intent to Proceed, nor did the CO file a Statement of Position. New counsel for the Employer filed an appearance on May 12, 2011.

## **DISCUSSION**

To begin, the Employer filed a Notice of Entry of New Counsel on May 12, 2011. The Notice of Docketing from BALCA was sent on June 15, 2011, to the Employer’s former lawyer. It is unclear whether the Employer’s current attorney ever received the Notice in time to file a Statement of Intent to Proceed. Therefore we proceed under the assumption that because the Notice went to the wrong attorney, and the Employer retained new counsel, the Employer intends to pursue the appeal. It would be fundamentally unfair to dismiss the case because the Notice of Docketing was sent to the wrong attorney a full month after the Employer gave notice that they retained new counsel. It is unclear whether the Employer was ever on notice of the required Intent to Proceed. Therefore as the Employer sought new counsel to pursue this claim, we assume that the Employer intended to proceed.

The CO denied certification because the Employer “failed to submit documentation [in its audit response] to demonstrate the job is open and available to U.S. workers .....” (AF 1). The regulation in question, 20 C.F.R. §656.10(c)(8), requires the Employer to attest that the position is “clearly open to any U.S. worker.” The regulation at 20 C.F.R. § 656.17(l) further elaborates:

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 hinges on an examination of the totality of circumstances.<sup>2</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;
- 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.

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<sup>2</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); *Good Deal, Inc.*, 2009-PER-00309 (March 3, 2010).

*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 is a closely held corporation by so indicating in Section C-9 of the ETA Form 9089. (AF 378) Therefore the Employer must rebut the presumption that the job opportunity is not bona fide, i.e., is not open and available to U.S. workers. Although the CO incorrectly found that the Employer failed to include all required documentation, review of the supporting documents establish that the Employer failed the totally-of-circumstances test articulated in *Modular Container Systems*.

The Alien fails several factors of the *Modular Container Systems* test. First, the Alien was an original incorporator and founder of the company. (AF 298) Second, the Alien is involved in the management of the company as he oversees three independent contractors, and reports only to Ms. Feldman. (AF 309) Finally, the Alien is one of a small number of employees; one of only six direct employees or one of eleven if the independent contractors are taken into consideration. *Id.* In addition to the factors articulated, the Alien's history as one of the original incorporators of the LLC arising a suspicion that the current corporate structure is a sham. The Employer provided no information as to why Alien and Brother both decided to resign as members of the LLC they incorporated and allow Ms. Feldman to take over as managing member. A business cannot have been structured for the sole purpose of obtaining certification for the Alien. *Hall v. McLaughlin*, 864 F.2d 868, 874 (D.C. Cir. 1989).

Although the Board in *Modular Container Systems* provided no guidance as to the weighing of each of their articulated factors, this Board finds that the Alien's failure of three factors, as well as the lack of explanation as to his resignation as member of the LLC, fails to overcome the Employer's burden that the job opportunity was not bona fide, open, and available to U.S. workers. Accordingly, we find the CO's denial of certification was appropriate.

## **ORDER**

**IT IS ORDERED** that the denial of labor certification in this matter is hereby **AFFIRMED**.

For the Panel:

**A**

DANIEL A. SARNO, JR.  
District Chief Administrative Law Judge

DAS,JR./AMJ/jcb  
Newport News, Virginia

**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.