U.S. Department of Labor

Board of Alien Labor Certification Appeals
1111 20th Street, N.W.
Washington, D.C. 20036

Date: JUL 16 1991

Case No. 89-INA-228

In the Matter of:

MODULAR CONTAINER SYSTEMS, INC.,
Employer

on behalf of

ENRICO ETTORE BERETTA,
Alien

Before: Brenner, Groner, Glennon, Guill, Litt,
Silverman, Romano and Williams
Administrative Law Judges

JAMES GUILL
Associate Chief Judge

DECISION AND ORDER

This matter arises from a request for administrative-judicial review of a denial of labor certification under section 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(14), and Title 20, Part 656 of the Code of Federal Regulations.

Background

On March 28, 1988, Employer, Modular Container Systems, Inc., filed an application for labor certification to enable the Alien to fill the position of General Manager (AF 95). The job duties were:

> Directs and coordinates activities of manufacturing metal wire container company. Confer with management personnel to establish production standards and develop budget and cost controls. Coordinate production activities to obtain optimum production and utilization of manpower, machines, and equipment. Liase with machinery supplier company in France to evaluate and promote possibilities for improved and expanded services. Plan and direct sales program by reviewing competitive position and developing new markets and products in the handling and displaying field.

(AF 95 at item 13). Employer included an educational requirement of four years of college. It did not require any specific degree, but did require a major field of study in applied economics and business. Also required was five years of experience in the job offered or in a position of executive responsibility with a company that manufactures wire containers and other wire products (AF 95 at item 14).

The Certifying Officer (CO) issued a Notice of Findings on September 26, 1988, proposing to deny certification based on (1) Employer's loss of corporate status in May 1988, and (2) the Alien's apparent status as an investor in Employer (AF 87-90). The CO informed Employer that if it submitted rebuttal, it should provide a copy of its Articles of Incorporation and current business license; documentation clarifying its current corporate status; and a statement explaining whether the Alien is an investor in the company, and, if so, the extent of his investment.

Employer submitted rebuttal documentation on October 31, 1988 (AF 62-86). The documentation consisted of:

> (1) A Certificate of Existence issued by the Secretary of State on October 21, 1988 showing incorporation of Modular Container Systems, Inc. on December 1, 1978 (AF 66).
>
> (2) A Certificate of Reinstatement issued on October 21, 1988 showing that Employer was incorporated on December 1, 1978, dissolved on May 13, 1988, and reinstated on October 13, 1988 (AF 67).
>
> (3) A copy of the Application for Reinstatement, dated October 7, 1988, signed by Stuart Marks[1] and the Alien (AF 68).[2]
>
> (4) An October 6, 1988 letter from Mr. Marks to Employer attesting that all outstanding shares of Modular Container Systems, Inc. are owned by Container Ventures, Inc., a Delaware corporation (AF 69).
>
> (5) A copy of Employer's Articles of Incorporation, together with amendments (AF 70-85). Mr. Marks is shown on this document as the sole incorporator (AF 85). The initial and sole member of the Board of Directors was the Alien, whose mailing address was in France (AF 83).

---

[1] Mr. Marks is a member of the law firm acting as counsel to Employer (see AF 69). A different law firm is representing Employer in this labor certification appeal (AF 54).

[2] Under Georgia law, this application must be signed by a "majority of the directors at the time of [the corporation's] involuntary dissolution who are now living and whose whereabouts can be determined after reasonable effort" (AF 18 -- Ga. Code Ann. §14-2-283(e)).

(6) A document showing United Corporate Services as consenting to appointment as Employer's registered agent (AF 86).

(7) Letters dated October 21 and October 25, 1988 indicating that United Corporate Services handled Employer's application for reinstatement (AF 64-65).

In his cover letter, Employer's counsel maintained that all of the shares of Container Ventures, Inc. are owned by two foreign companies (which he did not identify), and that "there is no business licensing requirement imposed upon a company which conducts business in their own state" (AF 62-63).

On February 21, 1989, the CO issued his Final Determination denying labor certification on three grounds. First, although Employer was later reinstated as a corporation, it was not in corporate status when it applied for labor certification.[3] Second, Employer failed to provide a copy of its current business license as the CO had requested. Third, the rebuttal evidence failed to clarify the Alien's status as an investor in Employer (AF 57-58).

On March 28, 1989, Employer requested that the CO reopen and reconsider the Final Determination (AF 3). Employer argued that under Georgia law, upon issuance of the Certificate of Reinstatement, its corporate existence was deemed to have continued without interruption from the date of issuance of the Certificate of Involuntary Dissolution (See Ga. Code Ann. §14-2-283(e) (1988); AF 17-20). Employer further argued that it had misunderstood the nature of the CO's request for a copy of its business license. It thought the CO was referring to state licensing requirements; therefore it attached documentation of its license to do business in the City of Lavonia (see AF 21-22(a)).

Finally, Employer addressed the investor/employee problem through statements made by counsel in the motion to reopen and reconsider:

> Modular was incorporated in Georgia on December 1, 1978 and has been conducting business in the wire products industry continuously since then. Since its inception, Modular has been affiliated with the French wire products company, Technifil. Technifil recognized the market for wire products in the United States, and wanted to be associated with a local operation to avoid foreign currency fluctuation problems inherent in any export operation. At that time, Mr. Beretta [the Alien herein] served Technifil as President. In 1981, while retaining his full time position as President of Technifil, Mr. Beretta assumed duties as General Manager of Modular. Acting pursuant to a royalty/support contract between Technifil and Modular, he provided technical support to the developing U.S. company. He assumed indirect oversight over the local operation but a full-time Vice President of Operations at Modular was charged with primary responsibility for running the company.

---

[3] The facts do not bear out this conclusion. Employer did not lose corporate status until May 1988 (AF 67), while the application was filed in March 1988 (AF 95).

> In 1987, Mr. Beretta acquired an indirect share in Modular. Currently, Modular is wholly-owned by Container Ventures, a Delaware company. Mr. Beretta owns 55% of Container Ventures, while Lanterna Finance, a Swiss corporation, controls the balance of issued common shares.[4]
>
> In 1988, Mr. Beretta resigned from Technifil in order to come to the United States and manage Modular. During the preceding decade of operation, two Vice-Presidents of Operations of the United States employer had failed to develop Modular into a highly profitable enterprise. . . . Mr. Beretta decided that managerial incompetence was causing Modular to receive an inadequate return on the U.S. investment. Between 1978 and 1987, Modular failed to generate the profits available in the burgeoning U.S. wire products markets. Consequently, Mr. Beretta entered the United States to manage Modular.

The motion to reopen and reconsider also included various brochures showing Modular's operations and products (AF 25-50(a)) and a price list (AF 51-53).

The case was denied on reconsideration on April 7, 1989 (AF 2). The CO did not address the question of failure to provide a copy of the business license from the City of Lavonia, since he decided

> not to reconsider the second factor which was the employer's failure to provide information needed to determine if the job was open to U.S. workers. . . . In this case, the new information reveals that the alien owns 55% of the company. Corporate status does not remove the alien, as part owner and general manager, from control over who is hired and fired. This control, plus the fact that the alien has been in the job since 1981, makes it clear to us that the job cannot truly be open to U.S. workers.

Employer requested administrative-judicial review on April 18, 1989 (AF 1).[5] A panel of the Board of Alien Labor Certification Appeals affirmed the denial of labor certification on June 12, 1990. On September 5, 1990, the Board granted en banc review and vacated the panel decision. Employer timely filed a brief on en banc review. The Certifying Officer did not file a

---

[4] Employer included a letter from corporate counsel confirming that Modular Container is a wholly owned subsidiary of Container Ventures Inc. (CVI); that 4,500 shares of common stock of CVI are owned by Lanterna Finance AG, a Swiss Corporation; and that 5,500 shares of common stock of CVI are owned by Enrico Beretta (the Alien) (AF 23). The record does not indicate whether Mr. Beretta has any ownership interest in Lanterna Finance.

[5] On June 30, 1989, Employer submitted a letter written by the Mayor of the City of Lavonia for inclusion in the Appeal File. This letter is not considered on appeal since it was not part of the record upon which the denial was made. 20 CFR §§656.26(b)(4), 656.27(c); O'Malley Glass & Millwork Co., 88-INA-49 (Mar. 13, 1989).

brief. Amicus curiae briefs were invited from the American Immigration Lawyers Association and from the AFL-CIO, but none were submitted.

Discussion

I. Interrelationship Between Alien and Employer

The following chronology of events summarizing the Alien's involvement with the sponsoring employer is derived from both the assertions of counsel in the motion to reopen and reconsider,[6] and the independent documentation of record:

1. The Alien began his employment with Technifil, a French company, in 1966 as an Export Manager; in 1967 he became Manager of Technifil's Matmag Division; in 1974 he became General Manager of Technifil; in December 1978 he became President of Technifil. The record does not disclose the Alien's ownership interest, if any, in Technifil.

2. During the late 1970s Technifil determined that it should expand into the United States and should do so through a U.S. based operation.

3. On December 1, 1978, Modular Container Systems, Inc. (Employer herein) was incorporated. At the time of its incorporation the Alien was named as the sole member of Modular's Board of Directors and maintained his position as President of Technifil. Modular's management was provided by U.S. citizens, and from its inception there existed a "royalty/support" agreement between Technifil and Modular. The record does not define or otherwise explain what the royalty/support agreement encompassed.

3. In 1981, the Alien became General Manager of Modular, while maintaining his position as Director of Modular and President of Technifil. Apparently remaining in France (the record is not clear on this point), the Alien provided technical support to and assumed indirect oversight over Modular, but local operations in the U.S. were the responsibility of a full-time Vice President of Operations.

4. In 1987, the Alien acquired an "indirect," majority share in Modular. The record does not disclose the Alien's ownership interest, if any, in Modular prior to 1987.

5. In 1988, the Alien resigned from Technifil to come to the U.S. to manage Modular, assertedly based on a belief that managerial incompetence by Modular's U.S. managers had caused its failure to develop into a highly profitable enterprise.

6. On March 28, 1988, Modular filed its application for labor certification on behalf of the Alien.

---

[6] For reasons stated in Part VI. of this Decision and Order, we cannot ultimately consider the assertions of counsel in this matter as evidence.

II. Alien's Ownership Interest in Sponsoring Employer

Where an alien for whom labor certification is sought has an ownership interest in, or some other special relationship with, the sponsoring employer, the employer must demonstrate that a bona fide job opportunity exists for qualified U.S. applicants and that, if hired, the alien will not be self-employed. 20 CFR §§656.20(c)(8), 656.50. Because confusion exists regarding the meaning of these regulations in "investor" cases, we elected to revisit the issue en banc.[7]

III. 20 CFR §656.50 - Self-employment As a Per Se Bar

Although prior Board decisions have tended not to distinguish the regulatory proscriptions of self-employment and the lack of a bona fide job opportunity, there is at least a technical distinction. The regulatory definition of "employment" found in section 656.50 states:

> "Employment" means permanent full-time work by an employee for an employer other than oneself. For purposes of this definition an investor is not an employee.

Under this definition, if the position for which certification is sought constitutes nothing more than self-employment, it does not constitute genuine "employment" under the regulations, and labor certification is barred per se. Hall v. McLaughlin, 864 F.2d 868, 870 (D.C. Cir. 1989); Edelweiss Manufacturing Company, Inc., 87-INA-562 (Mar. 15, 1988) (en banc). We hold, therefore, that if the alien or close family members have a substantial ownership interest in the sponsoring employer, the burden is on the employer to establish that employment of the alien is not tantamount to self-employment, and therefore a per se bar to labor certification. See Amger Corp., 87-INA-547 (Oct. 15, 1987) (en banc).

The analysis under this regulation focuses on the alien's investment status, and includes all circumstances relevant to that status (though factors other than investment may be considered if relevant to the narrow question of self-employment). An employer must provide information concerning this relationship if it is requested by the CO. See Rainbow Imports, Inc., 88-INA-289 (Oct. 27, 1988). Furthermore, a corporation may be scrutinized to determine whether, despite the corporate structure, nothing more than self-employment is involved. Edelweiss Manufacturing, 87-INA-562. Though many aliens with investment interests in the sponsoring employer will have difficulty overcoming this regulatory proscription, we hold that the sponsoring employer can overcome it if it can establish genuine independence and vitality not dependent on the alien's financial contribution or other contribution indicating self-employment.

---

[7] See, e.g., Kaye & Litwin, Labor Certification Practice Advisory, AILA Monthly Mailing February 1990 at 83; Ann Lake Bryant, "Preliminary Labor Certification for Certain Immigrants Coming to Perform Labor" in Immigration Law and Procedure §44.04[2][c] (Gordon & Mailman eds. Aug. 1990).

IV. Bona Fide Job Opportunity

If the employment is established not to be merely self-employment, and thus not barred per se, section 656.20(c)(8) provides the additional requirement that the employer attest that the job opportunity has been and is clearly open to any qualified U.S. worker. This provision infuses the recruitment process with the requirement of a bona fide job opportunity:[8] not merely a test of the job market. See Bulk Farms, Inc., No. C-90-1955 DLJ (N.D. Cal. Feb. 21, 1991); Amger Corporation, 87-INA-545 (Oct. 15, 1987) (en banc), citing Pasadena Typewriter and Adding Machine Co., Inc. v. United States Dept. of Labor (CV 83-5516-AABT, C.D. CA (1987)); Rimaco, Inc., 89-INA-362 (Nov. 16, 1990).

Where the alien for whom labor certification is sought is in a position to control hiring decisions or where the alien has such a dominant role in, or close personal relationship with, the sponsoring employer's business that it would be unlikely that the alien would be replaced by a qualified U.S. applicant, the question arises whether the employer has a bona fide job opportunity.

Thus, an employer seeking labor certification for an alien who has an ownership or other relationship with the employer must not merely engage in a recruitment effort and show that no qualified U.S. worker is available; it must also establish that it has a bona fide job opportunity open to qualified U.S. workers. That an alien is an investor, or has some other special relationship with the employer, however, does not establish the lack of a bona fide job opportunity per se (unless, of course, the investment is so great that employment of the alien is tantamount to self-employment in violation of section 656.50). Ultimately, the question of whether a bona fide job opportunity exists in situations where the alien has an ownership interest or some other special relationship with the employer depends on "whether a genuine determination of need for alien labor can be made by the employer corporation and whether a genuine opportunity exists for American workers to compete for the opening." Hall, 864 F.2d at 875.

---

[8] While we decline to reach an issue not raised by the parties, i.e., the validity of regulations, in an abundance of caution we note that some have argued that the regulatory requirements of a bona fide job opportunity and actual recruitment are not supported by the legislative history associated with the labor certification provision of the Immigration and Nationality Act §212(a)(14), 8 U.S.C. §1182(a)(14). See, e.g., McCormick & Jeffers, "Labor Certification for Alien/Beneficiary Shareholders," Manual on Labor Certification: Practice & Procedure, pp. 223-242 (AILA 1990); see also Edelweiss Manufacturing Company, Inc., 87-INA-562 (Nov. 10, 1988) (order den mot for en banc recon).

V. Test of Bona Fides

In Lignomat, U.S.A., Inc., 88-INA-276 (Oct. 24, 1989) (en banc) (motion for recon denied Jan. 24, 1990),[9] the Board applied a two-pronged test derived from pre-BALCA caselaw by the District of Columbia Circuit Court of Appeals in Hall, 864 F.2d 868. The first prong examines whether, in light of the alien's part-ownership, the corporation is a sham and a scheme for obtaining labor certification (sham test). The second prong examines whether the corporation has come to rely heavily upon the alien's skills and contacts so that, were it not for the alien, the corporation would probably cease to exist (inseparability test).

Another standard that has been applied is a "significant-ownership-and-control" test, where the totality of circumstances is examined to determine whether a bona fide job opportunity exists. See Ocean Paradise of Hawaii, 89-INA-188 (Nov. 21, 1989). These standards have been applied in various cases, with the Board having applied both tests concurrently in B.F. Hope Construction, Inc., 89-INA-182 (Feb. 27, 1990) and Rimaco, Inc., 89-INA-362 (Nov. 16, 1990).

We hold that the Board will apply the totality of the circumstances test to determine whether a job is clearly open to U.S. workers. This does not mean that we reject sham and inseparability as factors in the analysis; to the contrary, they are elements to consider when determining whether a bona fide job opportunity exists where the alien is an investor or has some other special relationship with the sponsoring employer. The totality of the circumstances test applied in cases such as Ocean Paradise, however, provides a much more flexible and encompassing analysis.[10]

In applying the totality of the circumstances test, factors that may be examined to determine whether the job is clearly open to a U.S. worker may 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;[11]

---

[9] In Lignomat, the Board held that where the Alien and his wife were 49% shareholders, were two of the three directors and comprised the officers of the corporation, and the Alien was one of five employees, the Alien was so inseparable from the corporation that a genuine test of the labor market would be unlikely.

[10] The phrase "significant-ownership-and-control test" is a misnomer because the alien need not have an ownership interest in the sponsoring employer to violate the regulations; the test having broader implications, covers family relationships and unique employee situations as well.

[11] See, e.g., Summit Enterprises, 88-INA-448 (Oct. 20, 1989). It is a violation per se for the alien to participate in the interview or consideration of U.S. applicants under section 656.20(b)(3)(i)).

-- is related to the corporate directors, officers, or employees;[12]

-- was an incorporator or founder of the company;[13]

-- has an ownership interest in the company;[14]

-- is involved in the management of the company;[15]

-- is on the board of directors;[16]

-- is one of a small number of employees;[17]

-- has qualifications for the job that are identical to specialized or unusual job duties and requirements stated in the application;[18] and

---

[12] See, e.g., Young Seal of America, 88-INA-121 (May 17, 1989) (Alien's wife was director, chief financial officer and corporate secretary). Compare Paris Bakery, 88-INA-337 (Jan. 4, 1990) (en banc) (close family relationship between person having authority to hire and alien does not, standing alone, establish lack of bona fide job opportunity).

[13] See, e.g., Shehrazade, Inc., 88-INA-170 (July 19, 1988) (incorporator); Amger Corporation, 87-INA-545 (Oct. 15, 1987) (founder).

[14] See, e.g., Lignomat, 88-INA-276 (Alien and his wife 49% shareholders); Amger Corporation, 87-INA-545 (Alien 100% shareholder). We note that in Hall, 864 F.2d at 877, the Court in affirming an administrative law judge decision that the Alien was inseparable from the sponsoring employer observed, inter alia, that the Alien had sold most of his corporate stock in Employer immediately prior to applying for labor certification, but reserved an option to repurchase. Likewise, we hold that such circumstances are relevant to the inquiry of whether the job is clearly open to U.S. workers.

[15] See, e.g., Amger Corporation, 87-INA-545 (president); Ocean Paradise of Hawaii, 89-INA-188 (Nov. 21, 1989) (president).

[16] See, e.g., Lignomat, 88-INA-276 (Alien and his wife two of three directors); B.F. Hope Construction, Inc., 89-INA-162 (Feb. 27, 1990) (Alien one of two directors); Ocean Paradise, 89-INA-188 (chairman of board of directors).

[17] See, e.g., GHR Atlanta Realty, Inc., 89-INA-123 (Mar. 26, 1990) (alien only employee); B.F. Hope, 89-INA-162 (alien one of two employees); Kica, Inc., 88-INA-169 (July 18, 1988) (alien one of three employees).

[18] See, e.g., Medical Equipment Designs, Inc., 87-INA-673 (May 6, 1988) ("remarkable match" between job requirements and Alien's qualifications).

-- 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.[19]

The totality of the circumstances standard also includes a consideration of the employer's level of compliance and good faith in the processing of the claim. See, e.g., Malone & Associates, 90-INA-360 (July 15, 1991) (en banc) (companion case to today's decision). Moreover, the business cannot have been established for the sole purpose of obtaining certification for the alien, i.e., a sham. Hall, 864 F.2d at 874.

VI. Statements of Counsel As Evidence

In this matter, much of the information pertaining to the Alien's personal and financial relationship to Employer was presented solely in the form of assertions made by counsel in the motion to reopen and reconsider, and in his appeal brief. Thus, it must be determined whether the statements of counsel for Employer may be considered as evidence by the Board.[20]

In panel decisions, the Board has twice taken the position that statements of counsel in a brief or otherwise presented, unsupported by underlying party or non-party witness documented assertions do not constitute evidence, and are not entitled to evidentiary value. DeSoto, Inc., 89-INA-165 (June 8, 1990). Accord Dr. Sayedur Rahman, 88-INA-112 (Mar. 20, 1990). In Yaron Development Co., Inc., 89-INA-178 (Apr. 19, 1991) (en banc), the Board ruled that the factual theory presented by counsel in a brief cannot serve as evidence of material facts.

This position is in accord with general principles of the law of evidence, except that an attorney may be competent to testify about matters of which he or she has first-hand

---

[19] See, e.g., Hall, 864 F.2d at 877 (Employer traded heavily on name and contacts of Alien in export-import business); Bulk Farms, Inc., 89-INA-51 (Jan. 3, 1990) (alien president and sole stockholder, was involved in marketing of business; employer's brochure contained personal message to prospective customers from Alien and his wife); Medical Equipment, 87-INA-673 (Alien active in development of product, intimate with foreign inventors of product, owned royalty rights to product, deemed essential by Employer to manufacturing and marketing of product in U.S.).

[20] Generally, where an employer fails to supply information concerning the alien's investor status reasonably requested by the Certifying Officer, a finding can be made that the employer failed to establish that it has a bona fide job opportunity. Rainbow Imports, Inc., 88-INA-289 (Oct. 27, 1988). In this instance, however, the CO considered the evidence and argument submitted by Employer in its motion to reopen and reconsider, but found it insufficient to establish Employer's job was clearly open to U.S. workers. Thus we consider the ground for denial to be failure of that documentation to carry Employer's burden of persuasion, and not failure to supply requested documentation. Compare Construction & Investment Corp., 88-INA-55 (Apr. 24, 1989) (the Board can consider evidence submitted on request for reconsideration before the CO where the CO considered the evidence in denying the request).

knowledge.[21] See generally 81 Am. Jur. 2d, Witnesses §97; Jones, The Law of Evidence §29:10. In this instance it cannot be discerned whether the specific facts asserted by counsel were based on first-hand knowledge, though it appears unlikely that they were given the span of time covered and the subjective nature of assertions such as the reason the Alien felt it necessary to personally take control of U.S. operations. Hence, the Board will not consider counsel's statements as evidence -- they are merely argument, mostly unsupported by independent documentation.[22]

Where an employer's counsel has first-hand knowledge of matters attested to, he or she may face a serious ethical dilemma when acting both as a witness and an advocate in the same administrative proceeding, and may be required to withdraw as counsel should his or her testimony become necessary.[23] Generally, where evidence is obtainable from other sources, absent extraordinary circumstances or compelling reasons, an attorney representing a litigant should not act as a witness. United States v. Dack, 747 F.2d 1172 (7th Cir. 1984).

Although the statements of Employer's counsel in this matter are not evidence and will not be considered by the Board on review, we recognize that the informality of administrative proceedings concerning labor certification applications may have contributed to the attempt to use counsel's statements as evidence. Indeed, it appears that the Certifying Officer considered

---

[21] For example, in this record the assertions of the law firm of Kaye, Scholer, Fierman, Hays & Handler concerning the ownership structure of Employer constitute admissible evidence since they concern matters about which attorneys in that firm had first-hand knowledge, and since that firm was not representing Employer in this labor certification proceeding (see AF 23, 69).

[22] We note that the regulations, at section 656.20(b)(1), provide that

> [i]f an alien and/or the employer intends to be represented by an agent, the alien and/or the employer shall sign the statement set forth on the Application for Alien Employment Certification form: That the agent is representing the alien and/or employer and that the alien and/or employer takes full responsibility for the accuracy of any representations made by the agent.

Although an inference might be drawn that this regulation authorizes an agent to make allegations on behalf of an alien or employer in a labor certification proceeding, it cannot make an attorney a competent witness regarding matters about which he or she does not have first-hand knowledge, nor does it resolve the ethical dilemma presented where an attorney acts both as witness and advocate in the same proceeding.

[23] Compare the "advocate-witness" rule, which prohibited under DR 5-102(A) an attorney from appearing as both a witness and an advocate in the same litigation in federal court, except under special circumstances. Phillips v. Wyrick, 558 F.2d 489 (8th Cir. 1977), cert. denied 98 S.Ct. 1283, 434 U.S. 1088, 55 L.Ed.2d 793; United States v. Morris, 714 F.2d 669 (7th Cir. 1983). See also Model Rules of Professional Conduct, Rule 3.7.

counsel's assertions in ruling on the motion to reopen and reconsider, albeit he still found them unpersuasive. We also note that the Board's prior treatment of statements of counsel as evidence has been inconsistent. See, e.g., Ramazzotti Landscaping, 90-INA-78 (Feb. 22, 1991) (in footnote 4, the panel describes the attorney's letter in rebuttal an "inferior source of information"); Splashware Company, 90-INA-38 (Nov. 26, 1990) (panel apparently used attorney's letter as evidence); contra Yaron Development, 89-INA-178; DeSoto, Inc., 89-INA-165; Dr. Sayedur Rahman, 88-INA-112.

Although in future cases counsel cannot depend on a remand to permit a perfection of the evidentiary record, we recognize the inconsistent practice of the Department of Labor in considering attorney assertions in the past, and that this case clarifies the law to be applied in "investor" cases. Thus, under the particular circumstances of this case, we remand the matter to permit Employer to present its evidence in a more appropriate format and for the CO to consider such evidence in light of the above. Whether there is a job opportunity clearly open to U.S. workers will turn on the properly presented evidence of the factual details of the Alien's influence or control over Modular through the interlocking corporations, examined under the criteria set forth in this decision.

VII. Business License/Corporate Status

We are satisfied that Employer's lapse in corporate status is not material absent a finding that Employer obtained reinstatement for the sole purpose of providing a "shell" entity to employ the Alien. We are also satisfied that Employer's failure to provide a copy of its current business license was based on a misunderstanding, and that the copy of that license submitted with the motion to reopen and reconsider should be considered by the CO on remand. Accordingly,

ORDER

Pursuant to 20 C.F.R. §656.27(c)(3), this matter is remanded for further proceedings consistent with the above.

At Washington, D.C.

Entered: 7/16/91
JAMES GUILL
Associate Chief Judge

JG/trs

J. Williams, with whom J. Groner joins, dissenting.

I would deny certification in this matter based on the record presented, even assuming arguendo that everything stated by counsel in this matter is in evidence. The Alien is clearly in a

position to control who is hired for the position he is seeking to fill: he was the sole member of the Employer's Board of Directors from its inception; he has had a majority ownership interest in the Employer since 1987; he has been involved in management of the Employer since its inception and has been performing the job for which labor certification is sought since 1988. These facts unambiguously illustrate that the job is not clearly open to qualified U.S. workers.