U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 25 September 2015

In the Matter of:

STEP BY STEP DAY CARE LLC,
Employer,

BALCA Case No.: 2012-PER-00737
ETA Case No.: A-09212-57845

on behalf of

JENNIFER COLYER,
Alien.

Certifying Officer: William Carlson, Ph.D.
Atlanta National Processing Center

Appearance: Lorenzo M. Lleras, Esq.
Lorenzo M. Lleras, P.A.
Gainesville, FL
For the Employer

Gary M. Buff, Associate Solicitor
Jonathan R. Hammer, Attorney
Office of the Solicitor
Division of Employment and Training Legal Services
Washington, D.C.
For the Certifying Officer

Before: **McGrath**, **Geraghty, Calianos**
Administrative Law Judges

TIMOTHY J. McGRATH
Administrative Law Judge

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."). For the reasons set forth below, we affirm the denial of the Employer's Application for Permanent Employment Certification.

BACKGROUND

On July 31, 2009, the CO accepted for filing the Employer's Application for Permanent Employment Certification for the position of "Daycare Center Director." (AF 234, 241). The Employer indicated on its ETA Form 9089 the company is a closely-held corporation, in which the foreign worker, Jennifer Colyer, has an ownership interest. (AF 233).

On April 27, 2010, the CO issued an Audit Notification. (AF 229-32). In the audit, the CO requested documentation including: (1) information on the business structure of the Employer; (2) a statement describing any familial relationships between parties with ownership interests in the sponsoring company and the foreign worker; (3) the name of the employee with primary responsibility for interviewing and hiring applicants; and (4) the names of the Employer's officials who have control or influence over hiring decisions involving the job opportunity listed on the ETA Form 9089. (AF 229-32).

On May 27, 2010, the Employer responded to the audit, providing the requested information. (AF 24-228). The documentation showed that Ms. Colyer and her husband purchased the Employer in 2005, and each have 50% ownership of the company. (AF 24). Ms. Colyer is the Director and her husband is the Operations Manager. (AF 25). The documentation also showed that the recruitment for the job opportunity was conducted by Ms. Gail Green, the Assistant Director for the Employer, and Ms. Colyer and her husband were not involved. (AF 25).

The CO denied the Employer's application on September 8, 2010. (AF 22-23). The CO stated when an employer is a closely held corporation in which the alien has an ownership interest or a familial relationship with the stockholders, officers, incorporators, or partners, and is one of a small number of employees, a presumption exists the job opportunity is not bona fide, i.e. not open and available to U.S. workers. (AF 23). The CO concluded the Employer's documentation provided on audit was insufficient to overcome the presumption. Specifically, the CO referred to documentation showing: (1) the hiring official for the job opportunity, Ms. Green, is a subordinate of the foreign worker, Jennifer Colyer; (2) Ms. Colyer is responsible for "all aspects of personnel management"; and (3) Ms. Green is not the usual official having authority and control over hiring. (AF 23). The CO denied the application pursuant to 20 C.F.R. § 656.10(c)(8), which requires the "job opportunity has been and is clearly open to any U.S. worker."

The Employer filed a request for reconsideration on October 6, 2010. (AF 3-21). The Employer stated Ms. Colyer and her husband typically make hiring decisions, in consultation with Ms. Green, but because Ms. Colyer is the beneficiary in this case and the co-owner of the Employer, the procedure was modified so Ms. Colyer and her husband were not involved in recruitment. (AF 4, 5). The Employer stated both Ms. Colyer and her husband have E-2 investor visas as a result of purchasing the company, and Ms. Colyer's stay in the United States is not necessarily dependent on her current position as Director for Employer. (AF 4). Employer attached Chapter 65C-22, Florida Administrative Code, Child Care Standards, which states every

daycare is required to have a credentialed director, to show the position does not exist for the benefit of Ms. Colyer, but rather exists due to requirements of Florida law. (AF 4).[1]

The CO upheld his denial of certification because the job was not open and available to U.S. workers under section 656.10(c)(8), and forwarded the application to the Board of Alien Labor Certification Appeals ("BALCA") for review on December 12, 2011. (AF 1-2). The CO stated an employer's representative who interviews or considers U.S. workers for the job offered to the foreign worker must be the person who normally interviews or considers U.S. applicants under section 656.10(b)(2)(ii), and found it was not in the best interest of U.S. workers to have a subordinate of the foreign worker conduct interviews. (AF 1). The CO also found Chapter 65C-22 of the Florida Administrative Code demonstrates Ms. Colyer's role with Employer is integral to the business as she is the individual possessing the Director Credential required for the business to operate.

BALCA issued an order of docketing on April 25, 2012. The Employer filed a Statement of Intent to Proceed on May 7, 2012, but did not file an appellate brief. The CO filed an appellate brief ("CO. Br.") on June 18, 2012. The CO stated when a foreign worker has an ownership interest in the employer, the burden is on the employer to establish the job opportunity is open to all applicants, and this determination is made by looking at the totality of the circumstances, including factors as set forth in *Modular Container Systems*, 1989-INA-228 (July 16, 1991) and *Good Deal, Inc.*, 2009-PER-00309 (Mar. 3, 2010). Using the factors in *Modular Container*, the CO argues the Employer has not met its burden. Specifically, the CO relies on the fact that the hiring was done by a subordinate of Ms. Colyer, and as the co-owner of the business, she pays the subordinate's salary. The CO also emphasized Ms. Colyer has an ownership interest in the company, is married to the other co-owner, is the primary manager of the company, is in charge of personnel, and holds the required Director Credential required for the business' operation.

On July 8, 2015, in response to this Panel's Order Requiring Certification on Mootness, the Employer indicated the job identified on the PERM applications is still open and available and the alien identified in the application remains ready, willing, and able to fill the position.

DISCUSSION

Section 656.10(c) states in relevant part: "The employer must certify to the conditions of employment listed below on the *Application for Permanent Employment Certification* under penalty of perjury . . . . (8) The job opportunity has been and is clearly open to any U.S. worker." Further, the regulations address potential influence and control over a job opportunity by the named foreign worker. 20 C.F.R. § 656.17(l). Section 656.17(l) states:

[1] Employer also submitted an inspection report from the Florida Department of Children & Families from March 22, 2010, received by Ms. Green. (AF 13-20). The inspection report stated an employee was suspended for not having completed required coursework. Employer attempts to rely on this report to show Ms. Green has the power to make personnel decisions, by making an inference that Ms. Green was the individual who suspended the employee. (AF 5). There is no evidence in the inspection report to make this inference.

> 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.

When determining whether a bona fide job opportunity exists, the Board must consider 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, PDF at 4-5 (Mar. 3, 2010) (*citing Modular Container Systems, Inc.*, 1989-INA-228, PDF at 8-10 (July 16, 1991) (en banc) (footnotes omitted)). The Board should also consider the Employer's compliance and good faith in the application process. *Id.* No single factor, such as a familial relationship between the alien and the employer or the size of the employer, shall be controlling. Labor Certification for the Permanent Employment of Aliens in the United States; Implementation of New System, 69 Fed. Reg. 77326, 77356 (Dec. 27, 2004).

Nearly all of the factors set out in *Good Deal* and *Modular Container* are met in this matter. Ms. Colyer has a 50% ownership interest in the company, is involved in the management of the company, and is related by marriage to the other co-owner and Operations Manager for the company. (AF 24, 117). Both Ms. Colyer and her husband purchased the company in 2005. (AF 202). Ms. Colyer is also one of a small number of employees; there are a total of 12 employees plus Ms. Colyer and her husband. (AF 223). The 12 employees are all teachers, with the exception of Ms. Green, who is both a teacher and the Assistant Director. (AF 223). Ms. Colyer is currently employed as the Director, and her role is critical to the Employer's business as she has the required Director Credential needed to run the daycare. (AF 24).

We find Ms. Colyer was also in a position to control or influence hiring decisions regarding the job for which labor certification is sought. While the Employer argues the recruitment process in this case was conducted by Ms. Green and neither Ms. Colyer nor her husband had any role in the recruitment, (AF 4, 5, 25, 50), we agree with the CO that having the

recruitment conducted by a subordinate of the foreign worker is not in the best interest of U.S. applicants. *See* 20 C.F.R. § 656.10(b)(i). Ms. Colyer has control over all personnel management according to the ETA Form 9089, and as a co-owner, pays Ms. Green's salary.

The Employer asserts Ms. Colyer and her husband typically make hiring decisions, in consultation with Ms. Green, but because Ms. Colyer is the beneficiary in this case, the procedure was modified so Ms. Colyer and her husband were not involved in recruitment. (AF 4, 5). Because Ms. Colyer and her husband are typically in charge of hiring decisions, it is difficult to find they had no influence on the hiring process in regard to this labor certification. Additionally, as noted by the CO, under section 656.10(b)(ii), the person who interviews or considers U.S. workers for the job offered to the foreign worker "must be the person who normally interviews or considers, on behalf of the employer, applicants for job opportunities." As Ms. Green does not normally conduct the interviews or consider applications, this regulation is not met.

Lastly, the Employer asserts the job opportunity is bona fide because Ms. Colyer's ability to stay in the U.S. under her current E-2 visa is not necessarily tied to the granting of labor certification in this matter. (AF 25, 50, 119-26). We do not find this sufficient to overcome the other factors suggesting the position is not open to U.S. workers. Ms. Colyer is currently in the Director position with Employer and her preference is to remain with the Employer, evidenced by the filing of the labor certification application. (AF 5). Therefore, while she could take another avenue if necessary, this does not diminish her interest and potential to influence the recruitment process in this matter.

Based on the foregoing, we hereby affirm the CO's denial of certification in this matter as the Employer has not met its burden of establishing that the job opportunity is open to U.S. workers as required by 20 C.F.R. § 656.10(c)(8).

ORDER

It is **ORDERED** the denial of labor certification in this matter is hereby **AFFIRMED**.

For the Panel:

Digitally signed by TIMOTHY MCGRATH
DN: CN=TIMOTHY MCGRATH, OU=ADMINISTRATIVE LAW JUDGE, O=US DOL Office of Administrative Law Judges, L=Boston, S=MA, C=US
Location: Boston MA

TIMOTHY J. McGRATH
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR EN BANC 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 the Board's 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.