USDOL/OALJ Reporter

ALTOBELI'S FINE ITALIAN CUISINE, 1990-INA-130 (Oct. 16, 1991)

[Source: Immigration Law Systems, Inc., Columbus, OH *]

U.S. Department of Labor

Board of Alien Labor Certification Appeals
Washington, DC

DATE: October 16, 1991
CASE NO: 90-INA-130

IN THE MATTER OF ALTOBELI'S FINE ITALIAN CUISINE, Employer
RAMAZANALI BASHIRI AFJEH GHALEI, Alien

David C. Farshy, Esquire
Atlanta, Georgia

BEFORE: Brenner, Groner and Silverman, ALJ
Lawrence BRENNER, Administrative Law Judge

REGION:4

BACKGROUND

On December 16, 1988, the Altobeli Corporation (d / b / a Altobeli's Fine Italian Cuisine) (Employer) applied for alien labor certification to enable Ramazanali Bashiri Afjeh Ghalei (Alien) to fill the position of Italian cook (AF 72-72(a)). As Italian cook, the Alien would plan menus, cook Italian dishes, estimate food consumption, order supplies, prepare food, serve food to waiters on order, supervise six kitchen helpers, and be responsible for the entire food inventory (AF 72). The minimum requirement for the satisfactory performance of those duties is three years' experience as an Italian cook or in Italian food preparation (AF 72).

On April 14, 1989, the Certifying Officer (CO) issued his Notice of Findings, proposing to deny labor certification because the Employer had not demonstrated that the job opportunity was clearly open to qualified U.S. workers (AF 62-65). The CO directed the Employer to produce information to aid in the determination of whether the job was clearly open (AF 65). Specifically, the CO requested a copy of the Employer's Articles of Incorporation; a list of shareholders and the number of shares held by each; an explanation of the family relationship between the Alien and the board members; any other documentation which would affirm that the job opportunity is clearly open to U.S. workers; a current certified financial statement; the number of specialty cooks currently employed; a list of all employees; the average number of customers served daily; the start-up date of the restaurant; and the names of the Alien's employers, if any, since 1988 (AF 65).

On May 22, 1989, the Employer filed a rebuttal to the Notice of Findings, responding to each of the CO's requests with specific documentary evidence (AF 8-61). On August 25, 1989, the CO issued his Final Determination, rejecting the Employer's rebuttal evidence and denying labor certification (AF 5-6). The Employer requested administrative-judicial review of the Final Determination on September 22, 1989 (AF 1), and subsequently filed a brief in support of its position (Employer's Brief).

DISCUSSION

When 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 sections 656.20(c)(8), 656.50; see Modular Container Systems, Inc., 89-INA-228 (July 16, 1991) (en banc) (discussing criteria for meeting these regulations).

In his Final Determination, the CO finds that the job of Italian cook is not clearly open to U.S. workers (AF 6). Specifically, he finds that "the job opportunity has been created for the express purpose of providing a means of entry to the United States for a family member of the [E]mployer." From the mass of information supplied by the Employer, he lists the three factors which influenced his decision.

First, the CO notes that the Employer filed the labor certification application on December 16, 1988, but the restaurant did not open until January 18, 1989 (AF 6; see AF 8, 41, 72). The CO does not explain how this observation supports his finding, and we will not venture to guess his reasoning. 1/

Second, the CO observes that the President / Treasurer of the Employer is the Alien's brother, and the Secretary is his sister-in-law

(AF 6; see AF 40). Although the CO does not mention it in his Final Determination, the Employer's rebuttal reveals that the Alien's family also has a substantial ownership interest in the Employer: his brother and sister-in-law hold 75% of the Employer's stock (AF 40).

An Alien's relationship to corporate officers and shareholders is one factor which influences the determination of whether a bona fide job opportunity exists. Modular Container Systems, supra. A close relationship does not, by itself, establish that the job opportunity is not bona fide or available to U.S. workers. Paris Bakery Corp., 88-INA-337 (Jan. 4, 1989) (en banc). However, it does invite greater attention to whether the Employer genuinely needs to fill the petitioned position, the job has been specifically tailored to the Alien's qualifications, the Employer has recruited in good faith, and the recruitment has produced qualified applicants. Id.

In his Final Determination, the CO neglects to address many factors which should be weighed to determine whether the job of Italian cook was clearly open to U.S. workers. 2/ In fact, the only other subject he broaches -- the final factor prompting his denial of certification -- is whether the Employer genuinely needs to fill the petitioned position. He speculates that, if hired, the Alien might displace the Employer's current U.S. workers (AF 6). To support his hypothesis, the CO states that --

> in addition to Alien's brother who is currently kitchen manager and chef, they also employ a cook, a line cook, and a prep cook and serve an average of 104 patrons per day; which averages 52 meals served at lunch and 52 at dinner. In light of the small number of patrons served daily, the Certifying Officer is not persuaded that the Employer has need of an additional cook.

(AF 6). The CO's list of the Employer's current employees and his report of the total meals served are correct (see AF 41); however, his allocation of 52 meals to lunch and 52 to dinner and his assessment of how many cooks are needed to produce the meals are pure speculation. We will not grant more weight to the CO's speculative conclusions than to the Employer's statement that the restaurant needs to hire an Italian cook.

The rule of Modular Container, supra, requires us to examine the totality of the circumstances to determine whether a bona fide job opportunity exists in this case. The record shows that the Alien has no ownership interest in the Employer (AF 40), is not an incorporator or founder (AF 39), is not on the board of directors (AF 37) and is not a current employee (AF 41). Moreover, the job duties and requirements for the Italian cook are not specialized or unusual (AF 72), and do not appear to be tailored to match the Alien's qualifications. The Employer's restaurant has been operating without the Alien (AF 41), and there is no reason to think that the Alien's talents are so important that the restaurant probably would not continue without him. Finally, and quite significantly, the CO did not challenge the Employer's compliance with the regulations governing recruitment or the Employer's rejection of two U.S. applicants (AF 42-43(a), 73).

Despite the Alien's family relationship to two of the Employer's board members and shareholders, we find that the Employer has demonstrated that it is genuinely independent from the Alien: the Alien does not make financial or other contributions to the Employer's business; the Employer engaged in good faith recruitment for the petitioned position; and the Alien did not control the hiring decision. After considering the totality of the circumstances, including the factors which influenced the CO, we find that a bona fide job opportunity exists and that the Employer's hiring of the Alien will not be tantamount to self-employment. 3/

ORDER

The Final Determination denying the application for Alien employment certification is REVERSED, and the Certifying Officer is directed to GRANT certification.

1/ Even if we were to assume that the CO meant that no job existed at the time of the application, we would accept the counter-argument by the Employer's attorney (Employer's Brief at 5). The attorney emphasized that the Employer was incorporated on July 21, 1988 (see AF 34), and the business account of the Employer was established in September 1988 (see AF 13), both several months before the application was filed on December 16, 1988 (see AF 72). He argued that "[i]t is not an unusual business practice to hire employees [a] few days before the business is opened to the public in order to get ready for such an event" (Employer's Brief at 5).

2/ This omission is glaring since the CO asked the Employer to provide much of the probative information (AF 65).

3/ In Patisserie Suisse, Inc., 90-INA-131, also issued today, the Certifying Officer cited only one ground for finding that no

employer / employee relationship existed, although the record contained other evidence which might have supported his finding. Since the single ground was not enough to uphold the Certifying Officer's finding, and since the employer had not had an opportunity to rebut the challenge on broad grounds, we remanded the case to the Certifying Officer to issue a new Notice of Findings and allow the employer to submit rebuttal evidence. In contrast, in this case, the CO's ground for finding that the job is not clearly open to U.S. workers is meritless, and the record does not contain any other evidence to sustain his finding.