U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW
Washington, D.C. 20001-8002

Date: JUL 16 1991

Case No: 90-INA-360

In the Matter of:

MALONE & ASSOCIATES,
Employer

on behalf of

JOHN ANTHONY MALONE,
Alien

Before: Brenner, Groner, Glennon, Guill, Litt,
Romano, Silverman 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.

I.

Dismissal for Failure to State Grounds for Appeal

On July 23, 1990, a panel of the Board dismissed this appeal based on Employer's failure to state grounds for the appeal; crucial in regard to this dismissal was Employer's failure to establish extraordinary circumstances for failing to make a timely request for an extension of time to file its appellate brief as required by the Notice of Docketing. Upon petition of Employer, en banc review was granted on August 29, 1990.

Although the dismissal was technically correct, the Board soon thereafter revised the Notice of docketing; that revision changed the standard for judging requests for extensions of time to file a supporting brief. Considered under the new Notice, a request arising under identical circumstances (i.e., the final day of the briefing period) would be judged based on a good cause standard rather than an extraordinary circumstances standard. In view of this procedural

background, as a matter of equity Employer's request for an enlargement of time to file the supporting brief will be judged based on a good cause standard. Compare Wonder Fashion, 90-INA-97 (May 30, 1990)(order vacating order of dismissal where Employers filed briefs in two companion cases but failed to change the docket number on the second brief, resulting in both briefs filed in the same Appeal File; dismissal found to be unduly harsh under the circumstances).

The Board concludes that good cause for such an enlargement of the period of time for filing a brief was established, and rules that Employer's brief was timely filed. The timely filing of the brief cures any error arising from the failure to state grounds for the appeal in its request for review. North American Printing Ink Co., 88-INA-42 (Mar. 31, 1988) (en banc); The Little Mermaid Restaurant, 88-INA-489 (Sept. 1, 1989). As such, this matter will be considered on the merits.[1]

II.

Alien Investor; Unduly Restrictive Requirements

Background

Employer, Malone & Associates is a law office, and an association of John Anthony Malone, the Alien. An application for labor certification on behalf of Mr. Malone for the position of International Attorney was filed on August 11, 1988 (AF 191). The job duties were:

> Maintains client contact, plans and develops client relationship, plans & develops business development strategies, and negotiates and drafts agreements on behalf of clients worldwide, with particular emphasis on Canada - USA. Analysis of Canadian & US developments affecting trade between these two countries to prepare client's tactical & strategic plans at the market and relationship level. Develops new business.

(AF 191 at item 13). Employer required an LL.B. or its equivalent, and fours years of experience in the job offered (AF 191 at item 14). Employer also required a "technical degree for working knowledge of sophisticated technology & science used in clients' business [and] working knowledge of Canadian law" (AF 191 at item 15).

Mr. Malone signed the application for labor certification as "Founding Partner" of Malone & Associates (AF 191 at item 191), and submitted that he is in the United States on a temporary professional visa (AF 191 at item 3 and 200 at item 3). He has a Bachelor of Science degree in Biochemistry, and a LL.B. degree in Law, both from the University of Alberta awarded in 1979 and 1982 respectively (AF 200 at item 11). Since September 1984 he has been the Managing Director of North American Rubber Co., Ltd., of Alberta, Canada. He has also worked

[1] This ruling makes it unnecessary to rule on Employer's contention that the Board has no authority to dismiss a labor certification appeal.

for Malone & Co. (Publishers) in Studio City, California, since September 1985 as Editorial Director and Publisher of a biweekly newsletter addressing science, energy and environmental issues (AF 201 at item 15). The Managing Director position is alleged to require at least 40 hours per week, while the editorial and publishing position "varies" in hours per week. Mr. Malone listed the same address for both Malone & Associates and his residence (AF 191 at item 6 and 200 at item 2).

On October 12, 1988, the local job service transmitted the matter to the Certifying Officer (CO) indicating that the application was unacceptable for processing given the relationship between the Alien and Employer (AF 190).

The Certifying Officer (CO) issued a Notice of Findings (NOF) on December 20, 1988, proposing to deny certification based on (1) the lack of an employer/employee relationship, (2) a tailoring of the job requirements to meet the Alien's background and qualifications, (3) the problem of how the Alien will interview and consider applicants since 20 C.F.R. §656.20(b)(3)(i) prohibits the Alien and/or agents or attorneys for the Alien from interviewing or considering the U.S. applicants, and (4) the lack of a showing of a recruitment effort (AF 178-181).

On January 23, 1989, Employer requested an enlargement of time for advertisement and recruitment, and submitted a declaration executed by the Alien in which it is stated that he has a relationship with Employer, but that he will not be involved in the recruitment process, which will be handled by an independent representative (AF 176-177). The CO granted an extension to February 24, 1989 for the submission of rebuttal to the NOF (AF 166). Subsequently, several additional enlargements of time were granted (AF 145, 146, 147, 148).

Employer submitted its rebuttal on May 25, 1989 (AF 102-165). In the rebuttal materials Employer presented evidence that it had placed an advertisement for the position in the Los Angeles Daily Journal on March 7, 8 and 9, 1989 (AF 149-153). Employer also amended the salary from $90 per hour to $45,000 per year (AF 156). Five U.S. applicants responded to the advertisements (AF 123-143). Employer argued that it has a bona fide job opening and that its minimum requirements are based on business necessity (AF 109-112). No recruitment report is contained in these rebuttal materials.

The CO issued a supplemental Notice of Findings on May 31, 1989 (AF 98-101). Therein he raised objections to the alien's ownership interest as indicating the lack of a clear opening for U.S. workers in violation of 20 CFR §§656.20(c)(8) and 656.50, the absence of an employer/employee relationship pursuant to section 656.50, and the lack of specificity regarding the interviewing and apparent rejection of U.S. applicants.

Employer requested, and the CO granted an enlargement of time to August 7, 1989 for Employer to respond to the supplemental Notice of Findings (AF 96-97). On August 7, 1989, Employer submitted another amendment to the application duplicating its earlier change of the salary to $45,000 per year, as opposed to $90 per hour, and requested another extension (AF 93-95). The enlargement of time was not granted (AF 92), and the CO issued a Final

Determination denying labor certification on August 31, 1989 based on Employer's failure to make a timely rebuttal of the supplemental Notice of Findings (AF 91).

On September 2, 1989, Employer requested administrative-judicial review (AF 67-90). On September 27, 1989, the CO issued another Notice of Findings, tracing the procedural history of the matter, and afforded Employer yet another opportunity to submit a rebuttal (AF 63-66). Employer requested another extension of time to respond on October 31, 1989 based on the "recent" retention of Maryann P. Gallagher, Esquire, to review the applications for employment (AF 60-62). The CO granted an enlargement on November 6, 1989 (AF 59).

On November 30, 1989, Employer finally submitted its rebuttal to the supplemental Notice of Findings (AF 42-58). The rebuttal indicated:

1) That Employer had retained Ms. Gallagher "as an independent representative for the recruitment process to hire for Employer," and not as its representative in the labor certification application.[2]

2) That the "Alien owns all of the firm of MALONE & ASSOCIATES."

3) That "whether alien or other qualified U.S. resident fills the job opening, the name and ownership interests of Employer firm will remain unchanged."

4) That the Alien's employment is permitted under United States-Canada Free Trade Agreement, 8 U.S.C. §1184, as a lawyer and biochemist.

5) That the five applications received in the recruitment process were forwarded to attorney Gallagher for her independent assessment.

6) That it amended the salary base to a yearly salary from $90.00 per hour to $45,000 per year "in keeping with the custom and practice of law firms in the area to pay associates yearly as opposed to hourly salaries."

Included in the November 30, 1990 rebuttal was Ms. Gallagher's recruitment report (AF 54-58). Therein she indicated that she is an employee of Employer, and had been retained to conduct an independent assessment of the five applicants for the International Attorney position Ms. Gallagher asserted that she had the authority to review the applications and make hiring decisions, that she had familiarized herself with the firm and its special requirements, and that the conclusions reached were her own.

The first applicant was rejected because he was not a member of the California bar, because his application had an unprofessional appearance, and because he could not be contacted at the telephone number provided on his resume. The second applicant was rejected because he

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[2] It is noted that Ms. Gallagher has signed all legal documents submitted in the application from the request for administrative-judicial review to the brief on en banc review.

did not have a technical degree or practical experience in science. The third applicant was rejected because he possessed the wrong technical degree, had no practical experience in the field of science, had not yet received his LL.B. and had been a practicing attorney for only one year. The fourth applicant was rejected because he did not have a technical degree, had the wrong legal experience (bankruptcy), and he did not return Ms. Gallagher's telephone call to discuss the matter further. The fifth and final applicant was rejected because, though he had a technical degree, he had only recently passed the California bar and had not yet actually practiced as an attorney; did not have an LL.B. or the equivalent; his resume and cover letter projected inexperience and lack of professional know-how; he did not return Ms. Gallagher's phone call.

The CO issued yet another supplemental Notice of Findings, this time on December 5, 1989 because Employer's rebuttal had raised several new issues: failure to return resumes; whether the resumes were received in response to a new or old recruitment effort; interview of applicants by attorney or agent; lack of documentation of telephone calls. (AF 38-41).

Employer responded to the latest Notice of Findings on January 9, 1989 (AF 12-37). It enclosed copies of the resumes of the applicants, and clarified that the recruitment report resulted from a March 1989 publication, and not from a prior or subsequent recruitment effort. Employer asserted that Ms. Gallagher is a permanent employee of Employer, that she has the total and complete authority to hire, and that she normally interviews applicants for Employer. Finally, it is asserted that one applicant was unknown at the telephone number listed, one applicant was contacted, one was not contacted because of his obvious lack of qualifications, and two did not return telephone messages.

The CO issued his Final Determination on January 17, 1990 (AF 7-11). The first ground for denial of labor certification was Employer's failure to establish the existence of an employer/employee relationship or that the job is clearly open to a U.S. worker. The CO made the following findings:

> 1) On January 24, 1989 Employer asserted that its home based work station was temporary, and would later retain a permanent, non-home based facility. No subsequent material indicates that Employer's work site had changed.
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> 2) A general partnership engaged in the practice of law and bearing the name of the Alien would be unlikely to displace the Alien for a U.S. worker.
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> 3) Despite Ms. Gallagher's appointment as an independent representative, since she is a permanent "employee of the employer/alien, objectivity cannot exist in the recruitment process."
>
> 4) In view of the Alien's signing of the labor certification application on his own behalf, "a bona fide job is not seen to exist to which a qualified U.S. worker could be referred."

The CO also found a violation of 20 CFR §656.21(b)(2), which requires that the job opportunity must be described without unduly restrictive job requirements. Specifically, the CO objected to the requirements of a "technical degree for working knowledge of sophisticated technology" and "working knowledge of Canadian law." The CO found that "the unlikelihood of a U.S. worker meeting these requirements outweighs the possibility of justification through business necessity." He found that the requirements were tailored to the Alien.

Employer requested administrative-judicial review on February 5, 1990 (AF 1). The procedural history before the Board is related above in Division I.

Discussion

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.

The regulatory definition of "employment" found in §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 "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). 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. Modular Container Systems, Inc., 89-INA-228 (July 15, 1991) (en banc) (companion case to this decision).

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.

Malone & Associates is a law firm, founded and wholly owned by the Alien, bearing the name of the Alien, and located until recently in the Alien's own home. The job duties and requirements are specialized and very closely match the qualifications of the Alien. As such, it would be difficult to conceive of a situation in which employment of the Alien would more clearly be tantamount to self-employment. Hence, labor certification is barred per se.[3]

Bona Fide Job Opportunity

Assuming arguendo that employment of Mr. Malone by Malone & Associates is not merely self-employment, and thus is not barred per se, §656.20(c)(8) still requires the employer to 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: 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

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[3] Employer cites the United States-Canada Free-Trade Agreement, and the history of the implementing legislation, as providing for preferential treatment for persons with certain occupations from Canada (see section 307 of the United States-Canada Free-Trade Agreement Implementation Act of 1988, Pub. L. 100-449, 102 Stat. 1851 (1988)). The relevant portion of section 307 of the Act, as codified at 8 U.S.C. §1184(e), allows citizens of Canada to apply for admission as a nonimmigrant to perform certain occupations in the United States. By regulations presented at 8 C.F.R. §214.6, Canadian citizens may apply to an immigration officer for temporary entry (up to one year) to engage in certain business activities in the United States. Employer had not shown that these regulations, and the Act, have anything to do with permanent visas or labor certification (see also 8 C.F.R. §214.6(c)).

genuine opportunity exists for American workers to compete for the opening." Hall, 864 F.2d at 875.

In determining whether the job is clearly open to U.S. workers, the decisionmaker examines the totality of the circumstances. Modular Container Systems, 89-INA-228. 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;
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> -- is related to the corporate directors, officers, or employees;
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> -- was an incorporator or founder of the company;
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> -- has an ownership interest in the company;
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> -- is involved in the management of the company;
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> -- is on the board of directors;
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> -- is one of a small number of employees;
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> -- has qualifications for the job that are identical to specialized or unusual job duties and requirements stated in the application; and
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> -- 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.

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. Moreover, the business cannot have been established for the sole purpose of obtaining certification for the alien. Hall, 864 F.2d at 874.

The same factors discussed above in regard to whether employment of the Alien is tantamount to self-employment are also relevant here. To repeat, Malone & Associates is a law firm, founded and apparently wholly owned by the Alien, bearing the name of the Alien, and located until recently in the Alien's own home. The job duties and requirements are specialized and closely match the qualifications of the Alien.[4]

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[4] We do not reach the question of business necessity for Employer's specialized job requirements. Apparent tailoring of the job requirements to the Alien's qualifications, however, is relevant to the totality of the circumstances inquiry under §656.20(c)(8).

There are other factors in this matter indicating lack of a bona fide job opportunity. Once actual recruitment was conducted, Employer amended the application to reduce the salary, in effect, from $161,290 per year to $45,000. Employer's argument that this change was needed to bring the position in line with comparable associate's positions in the area is devoid of believability. In fact, it seems that the nature of the position changed to fit the situation. The original application describes an International Attorney, whose job duties would involve fairly high level elements such as maintaining and developing client contact. Later, however, Employer characterizes the job as an associate's position -- thus justifying the lowering of the salary and the contention that Mr. Malone himself would not necessarily fill the position. Yet when the qualifications of the U.S. applicants are examined, Employer again emphasizes the importance and special skills needed in the position.

Employer's unsupervised recruitment effort in March 1989 is not a persuasive showing of the bona fide nature of the position. The recruitment did not comport with the requirements of 20 CFR §656.21: there is no indication of a posting; no indication that any thought was given to whether a more appropriate publication than a local newspaper should have been used for this specialized professional position; and Employer did not contact the applicants until October 1989.

Employer attempted to isolate the Alien from the hiring decision by engaging an independent representative to review the applications, interview, and make the final hiring decision. Employer's choice for an independent representative, however, was also flawed. Ms. Gallagher was eventually identified as a permanent employee of Malone & Associates, a fact which brings into question whether she was genuinely independent in making hiring decisions. Moreover, we note that Employer's early identification of Ms. Gallagher as an employee was not as forthcoming as it might have been, clouding the relationship with the statement that it had "retained" Ms. Gallagher. Further, though Employer stated that Ms. Gallagher was not its representative for purposes of the labor certification application, she has signed all legal filings since the request for review.[5]

Without having conducted a hearing as provided at 20 C.F.R. §656.27(c)(4), we refrain from considering whether Employer's operations constitute a sham. Likewise, the question of inseparability of the Alien from Employer is not clear on this record. Undoubtedly the Alien's personal and financial support is central to Employer's operations. Nevertheless, we recognize that a law firm can potentially operate without the direct, physical presense of its founder (for example, Joel Hyatt could not conceivably work at each of his many firms throughout the United States).

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[5] The CO did not raise in the Final Determination the issue of whether the use of Ms. Gallagher to interview the applicants violated 20 CFR §656.20(b)(3). Likewise, we do not reach the question of whether that regulation was violated; however, the facts surrounding the employment of an independent reviewer are relevant to the totality of the circumstances for the inquiry under §656.20(c)(8).

Though we do not reach the conclusion that employment of the Alien involves outright sham nor absolute inseparability, viewing the totality of the circumstances, Employer has failed to establish that the job is clearly open to U.S. workers.

Because the Alien's relationship with Employer prevents the granting of labor certification, we do not address the CO's second ground for denial under 20 CFR §656.21(b)(2).

ORDER

Pursuant to 20 C.F.R. §656.27(c)(1), the denial of labor certification is AFFIRMED.

At Washington, D.C. Entered: 7/16/91

JAMES GUILL
Associate Chief Judge

JG/trs

J. Williams, concurring in part and dissenting in part.

I concur in the majority's finding that employment of the Alien is tantamount to self-employment, and hence barred per se under 20 C.F.R. §656.50. This finding disposes of the case, and I cannot fathom why the majority finds it necessary to discuss whether the job is clearly open to U.S. workers pursuant to 20 C.F.R. §656.20(c)(8). This discussion is dicta with which I cannot join since it decides matters not necessary for resolution of the case.