

Presumptions and Entrepreneurs: A Review of Recent BALCA Decisions for Entrepreneurs

By David Wilks and Brooke Ireland*

The labor certification process allows companies to obtain green cards for current or future employees through a test the labor market. In this test, the employer conducts regulation-governed recruitment to document that no available U.S. worker (citizen or permanent resident) is available for the position in which the employer hopes to employ a foreign national. Because this process tends to be more ministerial in process as compared to other green card paths, which may require discretionary government findings of extraordinary ability or working in the national interest, this process is frequently used by employers to obtain green cards for their foreign-born staff.

However, this path has proven difficult for entrepreneurs. Under 20 CFR §656.3, investors are excluded from the definition of employee for purposes of labor certifications:

Employment means:

(1) Permanent, full-time work by an employee for an employer other than oneself. For purposes of this definition, **an investor is not an employee...**¹ [*Emphasis added*].

As entrepreneurs generally own equity as a result of some form of investment in their enterprises, this can become problematic when seeking a green card through the labor certification process.

As noted by the Board of Alien Labor Certification Appeals (“BALCA”) in its *en banc* decision, *Matter of Modular Container Systems, Inc.*, 89-INA-228:

Under this definition,² if the position for which certification is sought constitutes nothing more than self-employment, it does not

* **David Wilks** (djw@millermayer.com) is Senior Counsel at Miller Mayer LLP (<http://www.millermayer.com>) in Ithaca, NY. He has helped numerous entrepreneurs and new businesses meet their immigration goals. A graduate of Cornell Law School, he currently serves as national vice chair of the American Immigration Lawyers Association (AILA)’s USCIS Vermont Service Center liaison committee. He is a member of the U.S. Alliance for International Entrepreneurs (USAIE) (<http://usaie.org>), which provides comprehensive services and advice to international entrepreneurs.

Brooke Ireland (bki@millermayer.com) is an immigration assistant at Miller Mayer. She graduated with a Bachelor of Science degree from Ithaca College, and has multiple years of experience working in the immigration field.

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¹ 20 CFR §656.3

² The definition referred to is the language referenced above from 20 CFR §656.3. At the time this decision was decided, this same language was located at 20 CFR §656.50.

constitute genuine “employment” under the regulations, and labor certification is barred per se.³

As such, if the foreign national, or the foreign national’s family members own a substantial interest in the employer, the employer will need to show that relationship with the foreign national is not merely self-employment by showing “independence and vitality not dependent on the alien's financial contribution or other contribution indicating self-employment.”⁴

If an employer can make this initial showing, it must still show that a bona fide job opportunity was open to U.S. workers. As explained by BALCA in *Modular Container Systems*:

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.⁵

In essence, the concern is that if the foreign national’s ownership puts them in a position to influence the test of the labor market, there cannot be a bona fide job opportunity for the labor certification. As such, where the foreign national or the foreign national’s family own part of the employer, the employer will need to overcome the presumption that there was not a bona fide job opportunity available to U.S. workers.

To determine whether the employer has overcome this presumption, the Certifying Officer (“CO”) will use a “totality of the circumstances test.” The CO will consider whether the foreign national:

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 employer;
4. has an ownership interest in the employer;
5. is involved in the management of the employer;
6. is on the board of directors;
7. is one of a small number of employees;

³ See *In re Modular Container Systems, Inc.*, 1989-INA-228 (July 16, 1991) (en banc).

⁴ See *Id.*

⁵ See *Id.*

8. has qualifications for the job that are identical to specialized or unusual job duties and requirements stated in the application;
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.⁶

To allow the CO to review these factors, closely held employers who are owned by the labor certification beneficiary, or by family members of the beneficiary, are required to maintain additional documentation relating to corporate formation and finances in the employer's audit file.⁷

The purpose of this article is to assess how entrepreneurs and employer-owners have fared under this adjudicative regime. To that end, we have identified three recent BALCA panel decisions where the labor certification beneficiary owned at least a portion of his or her employer. In each case, a BALCA panel found that the employer either failed to demonstrate that the offered position was not merely self-employment, or failed to overcome the presumption that there was no bona fide job opportunity for U.S. workers.

We will discuss each case below, along with the strategies used by each employer to attempt to overcome this presumption. After a brief discussion of each case, this article will then conclude with a brief discussion of emerging trends.

Matter of Foreign Autos, 2012-PER-01881 (Aug. 30, 2016).⁸

An employer of seven or fewer employees sought a labor certification for a mechanical engineer. The beneficiary of the labor certification owned 51% of the employer, with the remaining 49% owned by the employer's President. The CO denied this labor certification, in part, because the CO did not believe that the employer had successfully shown a bona fide job opportunity was available to U.S. workers given the beneficiary's majority stake in the employer.

In requesting reconsideration, the employer explained that only the President of the employer had authority over the human resources function and had final authority on hiring and firing. Additionally, the employer noted that the beneficiary received only salary, and not employer profits.

The CO upheld the denial finding that the 51% stake gave the foreign national "implicit influence and control" over the employer and, by extension, the test of the labor market.

On appeal to BALCA, the BALCA panel applied the totality of the circumstances test:

1. **Is in the foreign national in a position to control or influence hiring decisions regarding the job for which labor certification is sought?** According to the employer's

⁶ See *id.*

⁷ See 20 CFR § 656.17(l); see also *In re Salestream Software Inc.*, 2012-PER-01732 (BALCA Oct. 21, 2016).

⁸ See *In re Foreign Autos*, 2012-PER-01881 (BALCA Aug. 30, 2016).

partnership agreement, the foreign national and the President were partners, each having an equal vote on company decisions. As a majority vote was required in order to execute any action, this essentially gave the foreign national veto authority over any hiring decision.

2. **Is the foreign national related to the corporate directors, officers, or employees?** There was no family relationship in this case.
3. **Was the foreign national an incorporator or founder of the employer?** The foreign national was not the incorporator, nor on the initial board of directors.
4. **Does the foreign national have an ownership interest in the employer?** The foreign national owned 51% of the employer.
5. **Is the foreign national involved in the management of the employer?** The foreign national was listed as a manager.
6. **Is the foreign national on the board of directors?** The foreign national was not a director.
7. **Is the foreign national one of a small number of employees?** The employer had seven employees at most.
8. **Does the foreign national have qualifications for the job that are identical to specialized or unusual job duties and requirements stated in the application?** The responsibilities were not specialized or unusual.
9. **Is the foreign national 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 foreign national's responsibilities were unique within the employer, which BALCA found to mean that the foreign national was important to the continued function of the employer.

Five of the categories weighed against the availability of a bona fide job opportunity, and four weighed in favor. While the BALCA panel did not simply count the factors for and against, it did find that in the totality of the circumstances, the job opportunity was not clearly open to U.S. workers. The panel did not list any particular factor as being more important than the others, so it is difficult to determine which was the most critical element against the labor certification. However, it does appear that a beneficiary owning a majority share of an employer with legal authority to prevent hiring decisions will be very problematic for a labor certification.

Matter of Step by Step Daycare LLC, 2012-PER-00737 (Sept. 25, 2015).⁹

⁹ *In re Step by Step Daycare LLC, 2012-PER-00737 (BALCA Sept. 25, 2015).*

A daycare provider sought a labor certification for its “Daycare Center Director.” The beneficiary co-owned the employer with her husband in a 50-50 relationship. Typically, the beneficiary and her husband made the hiring decisions for the employer, however this system was modified for purposes of the labor certification, to allow the beneficiary’s subordinate to have full authority over the recruitment process.

The CO denied the case finding that because the beneficiary pays the salary of the subordinate, is married to the other co-owner, and directs the operations of the employer, the employer had not overcome the presumption that there was not a bona fide job opportunity available.

The BALCA panel agreed with this finding. While the panel did not go item by item through each element of the totality of the circumstances test, it did find, “Nearly all of the factors...are met in this matter.”¹⁰ The panel was particularly troubled by having a subordinate of the beneficiary conduct the recruitment:

...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...it is difficult to find [that the beneficiary and her spouse] had no influence on the hiring process in regard to the labor certification.¹¹

As such, moving the hiring and firing away from the beneficiary does not appear to cure the presumption, particularly where the recruitment is now conducted by a subordinate.

As an additional caveat, the panel noted:

Additionally, as noted by the CO, under section [656.10(b)(2)(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.”¹²

Thus, changes to the recruitment process designed to shield the foreign national from his or her regular influence on the employer’s hiring process will likely result in the denial of the labor certification.

Matter of Caceres Cleaning Contractors Corp., 2012-PER-00027 (Jul. 3, 2013)¹³

A closely held janitorial company sought a labor certification for its “Janitorial Supervisor,” who was the sole owner of the employer. In its audit response, the employer argued that the beneficiary’s wife (and not the beneficiary) had hiring and firing authority, that janitorial supervisory staff was generally not available in the area of employment, and that it had

¹⁰ See *id.*

¹¹ See *id.*

¹² See *id.*

¹³ See *In re Caceres Cleaning Contractors Corp., 2012-PER-00027 (BALCA Jul. 3, 2013).*

conducted proper recruitment in testing the labor market. However, the CO denied this application as self-employment, and therefore ineligible for a labor certification.

The BALCA panel agreed. The panel found that the because the beneficiary was the sole shareholder of a closely-held company and performed the same position he did when the beneficiary ran the employer as a sole proprietorship, this constituted self-employment. Therefore, a labor certification was barred.

In addition, the panel conjectured that even if this was not self-employment, the matter would not survive the totality of the circumstances test because of the beneficiary's ownership and control of the employer.

Conclusion

As exemplified by the cases above, obtaining a labor certification is especially challenging for individuals who own significant portions of their employer. Large ownership interests tend to cause Certifying Officers to find that a beneficiary has undue influence over the test of the labor market, and therefore make a bona fide job opportunity impossible. Sole ownership by the beneficiary is especially problematic as it may be construed as disallowed self-employment.

To be clear, the case examples discussed above are panel decisions, and not *en banc* decisions. However, based on these decisions it appears that a minority owner who has no management authority, has never been involved in hiring and firing, did not found the company, and is not related to any other owners would be in the best position to survive the self-employment and totality of the circumstances tests. Such a person is unlikely to be an effective entrepreneur. As such, the labor certification does not appear to be the best vehicle for entrepreneurs to obtain green cards.