

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
800 K Street, NW, Suite 400-N  
Washington, DC 20001-8002

(202) 693-7300  
(202) 693-7365 (FAX)



**Issue Date: 07 December 2006**

**BALCA Case No.: 2005-INA-111**  
**ETA Case No.: P2001-DC-03368492**

*In the Matter of:*

**HARVEST OFFICE SERVICES, INC.**  
**T/A THE CATALYST GROUP,**  
*Employer,*

*on behalf of*

**BENITA GHURA,**  
*Alien.*

Certifying Officer: Stephen W. Stefanko  
Philadelphia, Pennsylvania

Appearance: Paul S. Allen, Esquire  
Washington, D.C.  
*For the Employer and the Alien*

Before: **Burke, Chapman, and Vittone**  
Administrative Law Judges

**DECISION AND ORDER**

**PER CURIAM.** This case arises from an Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of its application for labor certification. Permanent alien labor certification is governed by section 212(a)(5)(A) of the Immigration and

Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations (“C.F.R.”).<sup>1</sup>

## **BACKGROUND**

The sponsoring Employer – a Management Consultant business -- filed an application for permanent alien labor certification on behalf of the Alien for the position of Administrative Assistant. (AF 55). The Employer required two years of college education plus six months of experience in the “Related Occupation” of “Administrative Assistant or equivalent,” or, in the alternative, “High School Grad plus two years of experience as an Administrative Assistant or equivalent.” (AF 55, Items 14, 15).

On the ETA 750A, the Employer is listed as "The Catalyst Group," with a street address of 1329 18<sup>th</sup> Street, NW, Washington, DC 20036, and with a telephone number of 202-638-2777. The same street address is shown on the ETA 750B. The Alien's address is shown as c/o Paul Shearman Allen & Associates, 1329 18<sup>th</sup> Street, NW, Washington, DC 20036. (AF 57). The Alien's current employer is also shown to be Paul Shearman Allen & Associates, 1329 18<sup>th</sup> Street, NW, Washington, DC 20036, (AF 57) and the kind of business is shown to be "consulting and management services." (AF 58). Paul Shearman Allen & Associates, 1329 18<sup>th</sup> Street, NW, Washington, DC 20036, is shown as the agent for both the Employer and the Alien.

The CO issued a Notice of Findings proposing to deny certification on the ground that the Employer had not presented its actual minimum requirements in violation of 20 C.F.R. § 656.21(b)(5). Specifically, the CO concluded that the Alien's only qualifying experience was with Paul Sherman and Associates, and that Paul Sherman and Associates and The Catalyst Group appeared to be the same company. The CO provided the Employer several options for

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<sup>1</sup> This application was filed prior to the effective date of the “PERM” regulations. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004), unless otherwise noted.

rebutting, one of which was to show why the Alien's experience with Paul Sherman and Associates should not be considered as experience with The Catalyst Group. (AF 48-50).

A rebuttal dated July 22, 2002 was filed by the Employer under the letterhead of Paul Shearman Allen & Associates. The letterhead lists three active attorneys, including Paul Shearman Allen and Susan Au Allen. The Employer argued that The Catalyst Group and Paul Sherman and Associates are separate and distinct entities, the former being a sole proprietorship law firm owned by Mr. Allen, and the latter being a management consultancy business. The Employer indicated that The Catalyst Group is "formally" known as "Harvest Office Services, Inc." The Employer argued that The Catalyst Group is located in the same building as the law firm, but has its own premises, its own telephone number (202-861-0800), and files its own tax returns. In support, the Employer provided copies of checking account bank statements for The Catalyst Group, as well as its 2000 Income Tax Returns, and its Certificate of Incorporation. The rebuttal also included copies of a business card for The Catalyst Group showing Susan Au Allen as President and the telephone number of 202-861-0800, and a letter from Ms. Allen proffering that The Catalyst Group is a business entirely different in scope and nature from the law offices of Paul Shearman Allen & Associates. Ms. Allen's letter proffers that she owns 38% of The Catalyst Group, while Paul Allen owns 38%, and Ivan Au owns 24%. The business tax forms filed with rebuttal confirm these percentages and show Susan A. Allen as President, Paul S. Allen as Secretary-Treasurer, and Ivan Au as Vice President. (AF 41). The Employer also provided Mr. Allen's professional license, and documentation indicating that the Alien was hired by Mr. Allen as an Administrative Assistant in December 1999 after she had obtained a B.A. degree.

The CO found the Employer's rebuttal unconvincing and denied certification. (AF 27-30). The CO observed that the telephone number was amended only after issuance of the NOF, and that the nature of the business of Paul Shearman Allen & Associates was amended, without explanation, on the ETA 750B to show "law firm" instead of the original "Consulting and Management Services." The CO noted that all of the addresses for the various letterhead, business card, and other documentation showed the same street address, and no separate suite numbers. The CO noted, *inter alia*, that Mr. Allen owned 38% of The Catalyst Group, that Mr.

and Mrs. Allen were husband and wife, that Mr. Allen is the attorney representing the Alien and the employer who provided the Alien with the qualifying experience for the position for which labor certification is sought, and that Mrs. Allen is an attorney with Paul Shearman Allen & Associates.<sup>2</sup> The CO concluded that The Catalyst Group and Paul Shearman Allen & Associates were obviously intertwined.

On October 16, 2002, the Employer filed a motion to reconsider or, in the alternative, appeal of the denial of certification. The motion to reconsider contains some argument and factual allegations that were not part of the rebuttal. The Appeal File contains no indication that the CO ruled on the motion to reconsider. Normally, new evidence is not considered before the Board. *See, e.g., Capriccio's Restaurant*, 1990-INA-480 (Jan. 7, 1992). Because the Board has repeatedly warned the CO's that they must rule on motions for reconsideration, we impose an adverse inference that the CO considered the new evidence and argument in constructively denying the motion for reconsideration, and therefore such new evidence and argument is part of the record for the Board's consideration on review. *See R.J. Max Catering, Inc.*, 1999-INA-222 (Feb. 8, 2001). The new factual allegations and argument are (1) that the Alien had experience "equivalent" to that of an administrative assistance prior to being hired by Paul Shearman Allen & Associates, and (2) that the reason that there are no separate suite numbers for Paul Shearman Allen & Associates and The Catalyst Group is that the building in which the two businesses are located only uses floor numbers to identify tenants. The Employer stated that the two businesses occupy two levels of a multi-story, mixed-use condominium, and no suite or room numbers are used because the businesses are easily found inside the front door.

## **DISCUSSION**

Section 656.21(b)(5) provides that an employer shall document that its requirements for the job opportunity represent its actual minimum requirements, and that it has not hired workers with less training or experience for jobs similar to that involved in the job opportunity, or that it

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<sup>2</sup> The CO also stated that the G-28 and a letter transmitting the application to the local job service were both signed by Mrs. Allen as a member of the law firm. These documents, however, are not contained in the Appeal File.

is not feasible to hire workers with less training or experience than that required by the employer's job offer.

Reviewing the documentation of record, we accept the Employer's contention that Paul Shearman Allen & Associates and The Catalyst Group are distinct legal entities.

However, BALCA caselaw makes it clear that business structure alone is not decisive in determining whether the alien's experience was gained with a different employer for purposes of section 656.21(b)(5).

The Board held in *Inmos Corp.*, 1988-INA-326 (June 1, 1990) (en banc), that to determine whether an alien's experience was gained with the same or different employer, the circumstances of each case must be examined. The Board stated in *Inmos* that the fundamental question is whether the employer is circumventing the fair testing of the U.S. labor market by shifting the alien from employment with one entity to employment with another, thereby providing the alien with the requisite training and experience without providing the same opportunity to U.S. workers. In *Young Chow Restaurant*, 1987-INA-697 (Jan. 13, 1989) (en banc), the Board indicated that showing that the two employers are separate legal entities may not be sufficient to demonstrate that they are separate employers for labor certification purposes. A concurring opinion in *Young Chow* cited *Edelweiss Manufacturing Co., Inc.*, 1987-INA-562 (March 15, 1988) (en banc). *Edelweiss* involved the issue of whether the alien in that case was inseparable from the sponsoring employer. The Board's decision in *Edelweiss* made it clear that the Board would look to substance, rather than form, in determining whether to grant labor certifications, and that it was not necessary to find fraud to look behind a business structure. The Board wrote:

The denial of labor certification in this case has been construed as an attack on the corporate form of doing business. It is argued that the corporation and the stockholders are separate and distinct entities, which are beyond scrutiny save in cases of fraud. In the context of this case, this view suggests that the representations of the corporation must be taken at face value without question of the real motive, or purpose of the stockholders in directing the corporate acts. Applied to this case, it means (and it has been stated) that the Secretary of Labor must accept the representations of the employer that it is offering a job to a U.S.

worker unless the corporate action is clearly a sham to avoid the effects of the Act and regulations.

In matters affecting the public interest, we are not bound to find fraud or sham in order to look behind the corporation to determine the validity of its actions. Public interest and policy considerations override the immunity given the stockholders under the corporate entity. For example, the corporate form does not shield the stockholders from the operation of the public interest in matters of taxation, labor law, or antitrust actions. As regards the public interest, the guiding principle is succinctly stated in *Bangor Punta Operations, Inc. v. Bangor & Aroostock Railroad Co.*:

Although a corporation and its shareholders are deemed separate entities for most purposes, the corporate form may be disregarded in the interests of justice where it is used to defeat an overriding public policy. . . [citations omitted]. In such cases, courts of equity, piercing all fictions and disguises, will deal with the substance of the action and not blindly adhere to the corporate form.

417 U. S. 703, 94 S. Ct. 2578 (1974). Labor certification is a matter of important public concern, which requires attention to substance rather than form.

In *Salad Bowl Restaurant t/a Ayhan Brothers Food, Inc.*, 1990-INA-200 (May 23, 1991), a panel of the Board held that where three of four shareholders of a petitioning employer are the only shareholders of an enterprise where the alien gained qualifying experience, the two entities are considered the same employer. Moreover, in *Obro Ltd.*, 1990-INA-51 (Feb. 21, 1991), a panel held that a pattern of exchanging employees between the employer providing qualifying experience and the petitioning employer would not be acceptable, and that the petitioning employer must prove that it is not only a separate and distinct legal entity, but also that it has “distinct operational independence.”

Thus, despite The Catalyst Group's distinct legal status as a business, it cannot be ignored that there is close relationship between it and Paul Shearman Allen & Associates. Mr. Allen is representing the sponsoring Employer and the Alien in the labor certification. His law firm advertises itself as an Immigration Firm. (*see* AF 1 "Immigration Practioners [sic] Since 1973"). Mrs. Allen is the President of the sponsoring Employer. She is shown on the letterhead of the law firm, and the Employer's petition for review includes the admission that she works for the firm from time to time. Mr. Allen owns as much of The Catalyst Group as does Mrs. Allen, and

is listed as its Secretary-Treasurer. The only other stockholder appears to be related to the Allens, and only has a minority interest. Mr. and Mrs. Allen are husband and wife. The Alien gained the experience now being required by the sponsoring Employer with the law firm. We are not convinced by the argument made in the request for review that the Alien's prior experience was the "equivalent" of experience as an Administrative Assistant.<sup>3</sup> The ETA 750B indicated that Paul Shearman Allen & Associates was a management consulting concern, suggesting that the Alien - or whoever actually filed out the form - did not draw a distinction between Mr. Allen's law firm and the consulting business. The two businesses share the same office building. Even considering the additional information provided with the request for review about the nature of the facility, it is not clear whether the two businesses are located in separate suites or, if physically separated, how substantial the separation is. We note that the Alien's address is shown on the ETA 750B as the address as Paul Shearman Allen & Associates and The Catalyst Group.

In sum, it is clear that the Alien was hired by Paul Shearman Allen & Associates without experience as an Administrative Assistant (or its equivalent), and that The Catalyst Group – while technically a distinct legal entity with a different business purpose from the law firm – was a family business with a close relationship with Paul Shearman Allen & Associates in terms of corporate officers, personnel and physical location. In view of all of the exigent circumstances, we conclude that the experience requirement was not established to be The Catalyst Group's actual minimum requirement for the job, and that the CO properly denied certification.

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<sup>3</sup> The Employer argued in its petition for review that, at the time of hire by Mr. Allen, the Alien had more than 17 months of employment experience, part of which were the "equivalent" of experience as an administrative assistant. The portion of the Alien's experience claimed as equivalent included three months as an Assistant Manager for a formal wear store, two months as a Legal Advocate, and over one and a half months working in a Summer College Leadership Program. (AF 4, 11). Although the skills applied in these type of jobs might lead an employer to consider an applicant for an administrative-assistant position, none of appears to have been substantially secretarial or clerical in nature.

## **ORDER**

For the reasons stated, the denial of certification is **AFFIRMED**.

Entered at the direction of the panel by:

**A**

Todd R. Smyth  
Secretary to the Board of Alien  
Labor Certification Appeals

**NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW:** This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its 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, N.W., Suite 400  
Washington, D.C. 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 full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within ten days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.