

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: 22 May 2008

In the Matters of:

ELITE LIMOUSINE PLUS, INC.,
Employer,

on behalf of

BILLAH, SYED MUSTAQUIM	BALCA No.	2007-INA-00070
	ETA No.	P-06107-11382
BHATIA, OM PARKASH	BALCA No.	2007-INA-00071
	ETA No.	P-06107-11383
BUTT, ZIAD MEHMOOD	BALCA No.	2007-INA-00072
	ETA No.	P-06107-11384
BUKHARI, SYED MADAD ALI	BALCA No.	2007-INA-00073
	ETA No.	P-06107-11385
NAZIR, AAMIR	BALCA No.	2007-INA-00074
	ETA No.	P-06107-11386
NEPAL, SHANKAR	BALCA No.	2007-INA-00075
	ETA No.	P-06107-11387
ASHRAF, WAQAS KALEEM	BALCA No.	2007-INA-00076
	ETA No.	P-06107-11388
BAKSH, QADIR	BALCA No.	2007-INA-00077
	ETA No.	P-06107-11389
CHAUDHRY, IMRAN	BALCA No.	2007-INA-00078
	ETA No.	P06107-11390
TALIB, MOHAMMED	BALCA No.	2007-INA-00079

	ETA No.	P-06107-11391
UDDIN, KHAWAJA MISBAH	BALCA No.	2007-INA-00080
	ETA No.	P-06107-11392
SINGH, JAGIR	BALCA No.	2007-INA-00081
	ETA No.	P-06107-11393
RASHID, ZABED	BALCA No.	2007-INA-00082
	ETA No.	P-06107-11394
RANA, MOHAMMAD JAVAID	BALCA No.	2007-INA-00083
	ETA No.	P-06107-11395
SACHDEVA, RAJESH	BALCA No.	2007-INA-00084
	ETA No.	P-06107-11396
SARKAR, SAROJIT	BALCA No.	2007-INA-00085
	ETA No.	P-06107-11397
SARFRAZ, MUHAMMAD FAHIM	BALCA No.	2007-INA-00086
	ETA No.	P-06107-11398
SHAH, SYED IBRAR	BALCA No.	2007-INA-00087
	ETA No.	P-06107-11399
SETHI, HARJESH	BALCA No.	2007-INA-00088
	ETA No.	P-06107-11401
SHERPA, TSEWANG	BALCA No.	2007-INA-00089
	ETA No.	P-06107-11401
SINGH, AJIT	BALCA No.	2007-INA-00090
	ETA No.	P-06107-11402
SHITTU, ADEMOLA WASIU	BALCA No.	2007-INA-00091
	ETA No.	P-06107-11403
SINGH, KULWINDER	BALCA No.	2007-INA-00092
	ETA No.	P-06107-11404

SINGH, LAKHWINDER	BALCA No.	2007-INA-00093
	ETA No.	P-01607-11405
SINGH, HARBHAJAN	BALCA No.	2007-INA-00094
	ETA No.	P-06107-11407
SINGH, GAGANDEEP	BALCA No.	2007-INA-00095
	ETA No.	P-06107-11408
SINGH, CHARANJIT	BALCA No.	2007-INA-00096
	ETA No.	P-06107-11409
SINGH, DHARAMBIR	BALCA No.	2007-INA-00097
	ETA No.	P-06107-11410
YAQUB, FAISAL	BALCA No.	2007-INA-00098
	ETA No.	P-06107-11411
ZIAULLAH, MOHAMMAD	BALCA No.	2007-INA-00099
	ETA No.	P-06107-11412
YUSUF, AHMED OLABODE	BALCA No.	2007-INA-00100
	ETA No.	P-06107-11413
SINGH, BALDEV	BALCA No.	2007-INA-00101
	ETA No.	P-06107-11414
SINGH, BALWANT	BALCA No.	2007-INA-00102
	ETA No.	P-06107-11416
RAHIM, RANA MUBASHIR	BALCA No.	2007-INA-00103
	ETA No.	P-06107-11417
SINGH, HARJIT	BALCA No.	2007-INA-00104
	ETA No.	P-06107-11418
SIKANDAR, MOHAMMED AL	BALCA No.	2007-INA-00105
	ETA No.	P-06107-11419
SHEIKH, SAJID MASOOD	BALCA No.	2007-INA-00106
	ETA No.	P-06107-11420

UR-REHMAN, MOHAMMAD NAFEES	BALCA No.	2007-INA-00107
	ETA No.	P-06108-11422
ZHANG, TONGJIAN	BALCA No.	2007-INA-00108
	ETA No.	P-06108-11423
WALIA, BALWINDER	BALCA No.	2007-INA-00109
	ETA No.	P-06108-11424
UDDIN, RIAZ	BALCA No.	2007-INA-00110
	ETA No.	P-06108-11425
CHAND, SYED MUSTANSIR BILLAH	BALCA No.	2007-INA-00111
	ETA No.	P-06108-11426
PEERZADA, NOOR AHMED	BALCA No.	2007-INA-00112
	ETA No.	P-06108-11427
TARIQ, SYED MUHAMMAD	BALCA No.	2007-INA-00113
	ETA No.	P-06108-11428
UMAR, FARIDA	BALCA No.	2007-INA-00114
	ETA No.	P-06108-11429
UL-HAQ, MUHAMMAD AHSAN	BALCA No.	2007-INA-00115
	ETA No.	P-06108-11430
SINGH, JOGINDER	BALCA No.	2007-INA-00116
	ETA No.	P-06108-11431
SINGH, KULDEEP	BALCA No.	2007-INA-00117
	ETA No.	P-06108-11432
SALEEM, MUHAMMAD QASIM	BALCA No.	2007-INA-00118
	ETA No.	P-06108-11433
SAHAR, NAJUM UL	BALCA No.	2007-INA-00119
	ETA No.	P-06108-11434
TOOR, MUJAHID HUSSAIN	BALCA No.	2007-INA-00120

	ETA No.	P-06108-11435
QURESHI, MOHAMMAD TARIQ	BALCA No.	2007-INA-00121
	ETA No.	P-06108-11436
PARVEIZ, RAJA	BALCA No.	2007-INA-00122
	ETA No.	P-06108-11437
RAZA, SAYED NAYAR	BALCA No.	2007-INA-00123
	ETA No.	P-06108-11438
ROMERO, MARIA A.	BALCA No.	2007-INA-00124
	ETA No.	P-06108-11439
SAEED, MIR MOHAMMAD	BALCA No.	2007-INA-00125
	ETA No.	P-06108-11440
SABHARWAL, DINESH	BALCA No.	2007-INA-00126
	ETA No.	P-06108-11441
RATHOOR, MIAN RASHAD FAROOQ	BALCA No.	2007-INA-00127
	ETA No.	P-06108-11442
RAUF, MUHAMMED ABDUR	BALCA No.	2007-INA-00128
	ETA No.	P-06108-11443
ROB, A.T.M. ABDUR	BALCA No.	2007-INA-00129
	ETA No.	P-06108-11444
RAHMAN, SHAFUR	BALCA No.	2007-INA-00130
	ETA No.	P-06108-11445
REDDY, ETYKALA R.	BALCA No.	2007-INA-00131
	ETA No.	P-06108-11446
RANA, MOHAMMAD SHAKEE	BALCA No.	2007-INA-00132
	ETA No.	P-06108-11447
BELHOUR, EL-MOSTAFA	BALCA No.	2007-INA-00133
	ETA No.	P-06108-11448

CHADHA, DEEPINDER SIN	BALCA No.	2007-INA-00134
	ETA No.	P-06108-11449
BELAL, AHMED	BALCA No.	2007-INA-00135
	ETA No.	P-06108-11450
BAIG, MIRZA ASGHAR	BALCA No.	2007-INA-00136
	ETA No.	P-06108-11451
BAIG, MIRZA ANEES	BALCA No.	2007-INA-00137
	ETA No.	P-06108-11452
ALI, SAFDAR	BALCA No.	2007-INA-00138
	ETA No.	P-06108-11453
ALMALLAH, KHALID SALAMEH	BALCA No.	2007-INA-00139
	ETA No.	P-06108-11454
ALI, IFTIKHAR	BALCA No.	2007-INA-00140
	ETA No.	P-06108-11463
ALI, RAHAT	BALCA No.	2007-INA-00141
	ETA No.	P-06108-11465
ARIF, MUHAMMAD MOBEEN	BALCA No.	2007-INA-00142
	ETA No.	P-06108-11466
GOYAL, DAVINDER	BALCA No.	2007-INA-00143
	ETA No.	P-06108-11467
FAROOQ, ABDUL	BALCA No.	2007-INA-00144
	ETA No.	P-06108-11468
BABU, SHAHID	BALCA No.	2007-INA-00145
	ETA No.	P-06108-11469
BABAR, SHAHINSHAH	BALCA No.	2007-INA-00146
	ETA No.	P-06108-11470
ATHAR, MOHAMMAD	BALCA No.	2007-INA-00147
	ETA No.	P-06108-11471

AHMED AKEEL	BALCA No.	2007-INA-00148
	ETA No.	P-06108-11472
ALI CHOUDHARY SAIF	BALCA No.	2007-INA-00149
	ETA No.	P-06108-11473
MEHMOOD ARSHAD	BALCA No.	2007-INA-00150
	ETA No.	P-06108-11474
ALI SYED NASIR	BALCA No.	2007-INA-00151
	ETA No.	P-06108-11475
FARAMOOZ	BALCA No.	2007-INA-00152
	ETA No.	P-06108-11476
FORERO JUAN CARLOS M	BALCA No.	2007-INA-00153
	ETA No.	P-06108-11477
HUSSAIN MOHAMMAD TAR	BALCA No.	2007-INA-00154
	ETA No.	P-06108-11478
HASAN MOHAMMED K.	BALCA No.	2007-INA-00155
	ETA No.	P-06109-11482
HUSSAIN ASHIQ	BALCA No.	2007-INA-00156
	ETA No.	P-06109-11483
HUMAYOON SHAHID	BALCA No.	2007-INA-00157
	ETA No.	P-06109-11484
HAFEEZ ABDUL	BALCA No.	2007-INA-00158
	ETA No.	P-06109-11485
HANIF TAHIR	BALCA No.	2007-INA-00159
	ETA No.	P-06109-11486
GHORI SAGHIR AHMED	BALCA No.	2007-INA-00160
	ETA No.	P-06109-11487

GILLANI SYED INAM	BALCA No. 2007-INA-00161 ETA No. P-06109-11488
ISLAM S.M. SHAHIDUL	BALCA No. 2007-INA-00162 ETA No. P-06109-11489
ALI QAMAR	BALCA No. 2007-INA-00163 ETA No. P-06109-11490
ASHRAF SHEIKH MUHAMM	BALCA No. 2007-INA-00164 ETA No. P-06109-11491
ALI ZULFIQAR	BALCA No. 2007-INA-00165 ETA No. P-06109-11492
ALI YOUNUS UMERJEE H	BALCA No. 2007-INA-00166 ETA No. P-06109-11493
ALVI SHABIR ANJUM .	BALCA No. 2007-INA-00167 ETA No. P-06109-11495
ASIM MUHAMMAD	BALCA No. 2007-INA-00168 ETA No. P-06109-11496
FENG HSUEH CHIH	BALCA No. 2007-INA-00169 ETA No. P-06109-11497
CHEN YING	BALCA No. 2007-INA-00170 ETA No. P-06109-11498
CHOWDHURY OMAR FARUQ	BALCA No. 2007-INA-00171 ETA No. P-06109-11499
DIN MALIK NASEERUD	BALCA No. 2007-INA-00172 ETA No. P-06109-11500
DIANI NADIA	BALCA No. 2007-INA-00173 ETA No. P-06109-11501
KHAN ABDUL WAHEED	BALCA No. 2007-INA-00174 ETA No. P-06109-11504

JUDGE MALIK ASGHAR	BALCA No.	2007-INA-00175
	ETA No.	P-06109-11503
IQBAL MOHAMMAD DILWA	BALCA No.	2007-INA-00176
	ETA No.	P-06109-11504
HUQ EHTESHAMUL	BALCA No.	2007-INA-00177
	ETA No.	P-06109-11505
KANTH ASHAR	BALCA No.	2007-INA-00178
	ETA No.	P-06109-11506
ISMAIL MOHAMMAD	BALCA No.	2007-INA-00179
	ETA No.	P-06109-11507
IQBAL QU Aid	BALCA No.	2007-INA-00180
	ETA No.	P-06109-11509
CHAUDHRY MOHAMMAD	BALCA No.	2007-INA-00181
	ETA No.	P-06109-11510
CHOWDHURY MOHAMMAD S	BALCA No.	2007-INA-00182
	ETA No.	P-06109-11511
MAHMUD SABBIR	BALCA No.	2007-INA-00183
	ETA No.	P-06109-11513
MALIK IJAZ GUL	BALCA No.	2007-INA-00184
	ETA No.	P-06109-11515
LEE KHENG SOON	BALCA No.	2007-INA-00185
	ETA No.	P-06109-11516
MAHMOOD IJAZ	BALCA No.	2007-INA-00186
	ETA No.	P-06109-11517
MANOCHA OM PRAKASH	BALCA No.	2007-INA-00187
	ETA No.	P-06109-11519
MALIK MOHAMMAD AKBAR	BALCA No.	2007-INA-00188

	ETA No.	P-06109-11520
MOAZZEM MOHAMMED	BALCA No.	2007-INA-00189
	ETA No.	P-06109-11521
MOHAMMAD KAMRAN	BALCA No.	2007-INA-00190
	ETA No.	P-06109-11522
LAHLOU DRISS	BALCA No.	2007-INA-00191
	ETA No.	P-06109-11523
KUMAR SUKHJINDER	BALCA No.	2007-INA-00192
	ETA No.	P-06109-11527
MAHMOOD KHALID	BALCA No.	2007-INA-00193
	ETA No.	P-06109-11528
MIAN KHALID HANIF	BALCA No.	2007-INA-00194
	ETA No.	P-06109-11529
MIAN KHALID MAHMOOD	BALCA No.	2007-INA-00195
	ETA No.	P-06109-11530
MAHMOOD MAJID	BALCA No.	2007-INA-00196
	ETA No.	P06109-11531
MALIK MOHAMMAD ZAHEE	BALCA No.	2007-INA-00197
	ETA No.	P-06109-11532
CHOUDERY MOHAMMAD AZ	BALCA No.	2007-INA-00198
	ETA No.	P-06109-11533
DHANRAJ CHAITANAND	BALCA No.	2007-INA-00199
	ETA No.	P-06109-11534
ABBAS RAJA YAWER	BALCA No.	2007-INA-00200
	ETA No.	P-06109-11535
ALAM ABDUL	BALCA No.	2007-INA-00201
	ETA No.	P-06109-11537

AKTER MOUSHUMEE	BALCA No. 2007-INA-00202 ETA No. P-06109-11538
KHAN MOHAMMAD SHAFIQ	BALCA No. 2007-INA-00203 ETA No. P-06109-11539
RAFIQUL SYED	BALCA No. 2007-INA-00204 ETA No. P-06110-11551
KHAN KHALID AHMED	BALCA No. 2007-INA-00205 ETA No. P-06110-11552
KHAN MOHAMMAD IQBAL	BALCA No. 2007-INA-00206 ETA No. P-06110-11553
KHAN ABDUL HASEEB	BALCA No. 2007-INA-00207 ETA No. P-06110-11554
KUMAR PARVEEN	BALCA No. 2007-INA-00208 ETA No. P-06110-11555
KIYANI BABAR HUSSAIN	BALCA No. 2007-INA-00209 ETA No. P-06110-11556
KHAN NOOR AHMED	BALCA No. 2007-INA-00210 ETA No. P-06110-11557
KHAN MUHAMMED AZFAR	BALCA No. 2007-INA-00211 ETA No. P-06110-11558
KHAN AHMED	BALCA No. 2007-INA-00212 ETA No. P-06110-11559
KHAN ASHFAQ MOHAMMAD	BALCA No. 2007-INA-00213 ETA No. P-06110-11560
KANDA ASHOK KUMAR	BALCA No. 2007-INA-00214 ETA No. P-06110-11561
KUMAR NAVEEN	BALCA No. 2007-INA-00215 ETA No. P-06110-11562

KHAN MUHAMMAD IFTIKH	BALCA No.	2007-INA-00216
	ETA No.	P-06110-11563
KHAN CHOUDHRY MIAN	BALCA No.	2007-INA-00217
	ETA No.	P-06110-11564
KHANAM NASREEN KADER	BALCA No.	2007-INA-00218
	ETA No.	P-06110-11565
SYED KHURSHID H.	BALCA No.	2007-INA-00219
	ETA No.	P-06110-11566
AHMED AMJAD	BALCA No.	2007-INA-00220
	ETA No.	P-06110-11568
AHMED BARKAT	BALCA No.	2007-INA-00221
	ETA No.	P-06110-11569
AHMED TAREK	BALCA No.	2007-INA-00222
	ETA No.	P-06110-11570
AHAMMED ENAAM	BALCA No.	2007-INA-00223
	ETA No.	P-06110-11571
AHMED MANZOOR	BALCA No.	2007-INA-00224
	ETA No.	P-06110-11572
AHMED FAHEEM	BALCA No.	2007-INA-00225
	ETA No.	P-06110-11575
AKHA ISMAIL EBRAHIM	BALCA No.	2007-INA-00226
	ETA No.	P-06110-11576
AHMAD MOHAMMAD FAROO	BALCA No.	2007-INA-00227
	ETA No.	P-06110-11577
AHMED EJAZ	BALCA No.	2007-INA-00228
	ETA No.	P-06110-11578
ALEEM DAR	BALCA No.	2007-INA-00229

	ETA No.	P-06110-11579
SALIM IQBAL KABIR	BALCA No.	2007-INA-00230
	ETA No.	P-06110-11580
SHAHID SHEIKH RIAZ	BALCA No.	2007-INA-00231
	ETA No.	P-06110-11586
SHERPA GIRMI	BALCA No.	2007-INA-00232
	ETA No.	P-06110-11587
RAHMAN MD OHIDUR	BALCA No.	2007-INA-00233
	ETA No.	P-06110-11588
WANG ZI LIANG	BALCA No.	2007-INA-00234
	ETA No.	P-06110-11589
MUNIR AFTAB	BALCA No.	2007-INA-00235
	ETA No.	P-06110-11591
SINGH SUKHJINDER	BALCA No.	2007-INA-00236
	ETA No.	P-06110-11592
SOHAIL MIR	BALCA No.	2007-INA-00237
	ETA No.	P-06110-11593
UDDIN NIZAM	BALCA No.	2007-INA-00238
	ETA No.	P-06110-11594
TASNEEM MUHAMMAD	BALCA No.	2007-INA-00239
	ETA No.	P-06110-11595
MUNOZ SEGUNDO	BALCA No.	2007-INA-00240
	ETA No.	P-06110-11596
QAZI IMRAN	BALCA No.	2007-INA-00241
	ETA No.	P-06110-11597
NAWAZ SHAH	BALCA No.	2007-INA-00242
	ETA No.	P-06110-11598

NISAR TAUQIR	BALCA No. 2007-INA-00243 ETA No. P-06110-11599
MAHMOOD MUHAMMAD KHA	BALCA No. 2007-INA-00244 ETA No. P-06110-11600
SINGH AMAR JEET	BALCA No. 2007-INA-00245 ETA No. P-06110-11601
SINGH JASWANT	BALCA No. 2007-INA-00246 ETA No. P-06110-11602
SHARMA RAJIV	BALCA No. 2007-INA-00247 ETA No. P-06110-11603
UDDIN MOHAMMAD FAHIM	BALCA No. 2007-INA-00248 ETA No. P-06110-11604
SHAHID MOHAMMAD	BALCA No. 2007-INA-00249 ETA No. P-06110-11605
SINGH GAGANJOT	BALCA No. 2007-INA-00250 ETA No. P-06110-11606
PURI GULSHAN KUMAR	BALCA No. 2007-INA-00251 ETA No. P-06110-11607
SINGH SUKHDEV	BALCA No. 2007-INA-00252 ETA No. P-06111-11613
SHAH MUHAMMAD HAFIZ	BALCA No. 2007-INA-00253 ETA No. P-06111-11614
SHAHID MUHAMMAD	BALCA No. 2007-INA-00254 ETA No. P-06111-11615
SINGH SHUKJEET	BALCA No. 2007-INA-00255 ETA No. P-06111-11616
RAFIQUE YASIR	BALCA No. 2007-INA-00256 ETA No. P-06111-11617

MUSHTAQ MUHAMMAD	BALCA No. 2007-INA-00257
	ETA No. P-06111-11619
SINGH RASHPAL	BALCA No. 2007-INA-00258
	ETA No. P-06111-11620
AHMED AMJAD	BALCA No. 2007-INA-00259
	ETA No. P-06339-13572
AHMAD AKHTAR NIAZ	BALCA No. 2007-INA-00266
	ETA No. P-06110-11574

Aliens.

Appearance: Reaz H. Jafri, Esquire
Manhasset, New York
For the Employer and the Alien

Certifying Officer: Barbara Shelly
Philadelphia Backlog Elimination Center¹

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

JOHN M. VITTON
Chief Administrative Law Judge

DECISION AND ORDER

These cases arise from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of 191 applications² 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) ("Act"), and Title 20, Part 656 of the Code of Federal

¹ The Backlog Elimination Centers closed effective December 21, 2007. All further correspondence to the Certifying Officer about these applications should be directed to the Chicago Processing Center.

² The Appeal File indicates that the Employer originally filed 196 applications. The Employer, however, only appealed 191 of the denied applications. (AF 6-7).

Regulations (“C.F.R.”).³ Because of the similarity of the facts and issues raised these cases, we consolidated the appeals for decision. *See* 29 C.F.R. § 18.11.⁴ The following decision is based on the records upon which the CO denied certification and the Employer’s request for review. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

The applications at issue in these appeals all involved the position of Limousine Driver. They were all denied on the same grounds – lack of a bona fide job opportunity as required by 20 C.F.R. § 656.20(c)(8), lack of an offer of employment as defined by 20 C.F.R. § 656.3, and lack of ability to pay the wage offered as required by 20 C.F.R. § 656.20(c)(1). For purposes of providing the factual context of the appeals, we will focus on the application in Case No. 2007-INA-00070, which is representative of all of the applications on the material facts.⁵

³ These applications were 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.

⁴ The Employer filed a single request for hearing for all of its applications, and asked that the argument made therein be applied to all of the appeals because “the issues are identical in all cases.” (AF 1).

⁵ When the Board docketed an appeal, it serves on the parties a Notice of Docketing and Order Requiring Statement of Position or Brief. Sixty-four of the Notices served on the Aliens in these matters were returned by the United States Postal Service as undeliverable. Specifically, the Notices were returned in Case Nos. 2007-INA-00071, 2007-INA-00078, 2007-INA-00083, 2007-INA-00084, 2007-INA-00086, 2007-INA-00096, 2007-INA-00098, 2007-INA-00099, 2007-INA-00100, 2007-INA-00102, 2007-INA-00103, 2007-INA-00105, 2007-INA-00106, 2007-INA-00111, 2007-INA-00113, 2007-INA-00119, 2007-INA-00120, 2007-INA-00122, 2007-INA-00132, 2007-INA-00135, 2007-INA-00136, 2007-INA-00137, 2007-INA-00140, 2007-INA-00147, 2007-INA-00150, 2007-INA-00151, 2007-INA-00157, 2007-INA-00158, 2007-INA-00161, 2007-INA-00162, 2007-INA-00163, 2007-INA-00165, 2007-INA-00168, 2007-INA-00172, 2007-INA-00174, 2007-INA-00175, 2007-INA-00176, 2007-INA-00179, 2007-INA-00181, 2007-INA-00184, 2007-INA-00192, 2007-INA-00194, 2007-INA-00196, 2007-INA-00197, 2007-INA-00200, 2007-INA-00208, 2007-INA-00211, 2007-INA-00212, 2007-INA-00213, 2007-INA-00217, 2007-INA-00219, 2007-INA-00222, 2007-INA-00225, 2007-INA-00229, 2007-INA-00239, 2007-INA-00242, 2007-INA-00243, 2007-INA-00244, 2007-INA-00249, 2007-INA-00250, 2007-INA-00255, 2007-INA-00257, 2007-INA-00259, and 2007-INA-00266. Thus, for these 64 cases the Board is serving the Aliens’ copy of this decision care of attorney Jafri, and requests that he coordinate with the Employer to attempt to inform them of the Board’s decision.

We also note that in Case No. 2007-INA-00086, the note “He never live here Landlord” was handwritten on the returned envelope. In Case No. 2007-INA-00096, the note “D. They move” was handwritten on the returned envelope. In Case No. 2007-INA-00098, the note “Nobody this named lived This Address” was handwritten on the returned envelope. In Case No. 2007-INA-00242, the note “Not longer at this address” was handwritten on the returned envelope.

On April 30, 2001, the Employer, Elite Limousine Plus, Inc., filed an application with the New York State Workforce Agency (“SWA”) for alien employment certification on behalf of the Alien to fill the position of Limo Driver. (Appeal File (“AF”) 87-128). The Employer submitted the application in conjunction with 195 other labor certification applications for full-time permanent positions as limo drivers. (AF 84). The Employer requested Reduction in Recruitment processing. (AF 126).

On October 8, 2003, the SWA sent a “45-day letter” to the Employer requesting that it document that the employees would be regular salaried employees and not franchisees. (AF 84). The SWA noted that NYS Unemployment Insurance records showed that the Employer had only 106 employees. The SWA directed the Employer to document that the drivers would not be paid on a per-customer/per-ride basis, and submit copies of payroll records showing that the Employer regularly employed limo drivers on a full-time, year round basis. The SWA noted that the Employer’s recruitment flier referred to a “franchise opportunity,” and mentioned drivers owning their own vehicles. Thus, the SWA asked “[w]ho owns the limos – Elite Limousine Plus or the driver?” (AF 84). Additionally, the SWA directed that the Employer document that it notified a collective bargaining representative, if applicable, or that the job was posted in compliance with the regulations. Finally, the SWA stated that the prevailing wage was \$14.33 per hour (based on a June 1, 1999 survey), and directed the Employer to amend the ETA 750A accordingly. (AF 85-86).

On January 16, 2004, the SWA cancelled the application because the Employer had not filed a timely response to the 45-day letter. (AF 83).

In a letter dated January 21, 2004, and file stamped as received on February 5, 2004, the Employer belatedly responded to the 45-day letter. (AF 80-82). The Employer explained that it had over 100 salaried employees and more than 700 limo drivers employed as independent

In Case Nos. 2007-INA-00103, 2007-INA-00132, 2007-INA-00243, and 2007-INA-00249, the returned envelopes were marked NSN for “no such number.” Case No. 2007-INA-00249 is also marked “unknown.”

In Case Nos. 2007-INA-00143 and 00226, the Aliens contacted the Board and provided new mailing addresses.

contractors at the time of filing. (AF 80). The Employer explained that it had applied for certification for 196 drivers because, under the LIFE Act, it had been encouraged to sponsor workers who were unlawfully present in the United States. (AF 80). The Employer argued that it should not have to document that the driver positions are for regular, salaried employees because the Act only requires that the proposed employment be prospective and that the offered position need only exist after the alien labor application is certified. (AF 81). The Employer stated that its intention was to hire the Aliens as W-2 salaried employees upon certification. (AF 81). The Employer then stated that “it is not relevant to the adjudication of the Application for Alien Employment Certification who owns the limos” as franchisees because, “[u]pon certification of the applications, each driver/alien will be employed by the employer as a W-2 worker.” (AF 81). In regards to the recruitment fliers described by the SWA, the Employer stated that the advertisements it had in *The New York Daily News* and *New York Post* were for a “driver” position and not a franchise opportunity. (AF 81). Finally, the Employer amended the offered wage as directed in the 45-day letter. (AF 82).

The SWA transmitted the application to the federal CO on March 8, 2004. (AF 77-79). In the transmittal memo, the SWA stated that the 196 original applications had been cancelled because of lack of a timely response to the 45-day letter, but that the applications had been resubmitted on February 5, 2004, and assigned new case numbers and a new filing date of February 5, 2004.⁶

On December 4, 2006, the CO issued a Notice of Findings denying certification for the Alien. (AF 70-74). The CO made two findings, the first being that the Employer was not offering a bona fide job opportunity that “has been and is clearly open to any qualified U.S. worker,” as required under 20 C.F.R. § 656.20(c)(8). (AF 71). The CO noted that the Employer was unable to provide the SWA with documentation of an employer/employee relationship and that a U.S. Department of Labor investigation revealed that the Employer does not hire drivers as full-time employees. (AF 71). Specifically, in an interview with an investigator, the Employer’s

⁶ The ETA Form 750A’s contained in the Appeal File have the original filing date crossed out, and a new file stamp date of February 5, 2004. Although not at issue on this appeal, the new filing date may have impacted the Alien’s eligibility for adjustment of status in the U.S. under section 245(i) if these applications had been certified. *See* n.13, *infra*.

General Manager admitted that all drivers were independent contractors and that the Employer “would not be able to survive if the drivers were salaried employees.” (AF 71).⁷ As a result, the CO determined that the “applications do not offer bona fide full-time employment opportunities.” (AF 71). The CO then informed the Employer that it could rebut the first Finding by providing particular documentation.⁸ (AF 71-72). The CO’s second Finding was that the Employer had not demonstrated sufficient income to pay the wage offered to the Alien or that the Employer will be able to place the Alien on its payroll on or before the Alien’s proposed date of entry into the United States. (AF 72). The CO indicated that the Employer could rebut by supplying evidence of sufficient income, such as “a lease agreement, payroll records, tax returns or other records documenting the financial soundness of the business.” (AF 72).

⁷ The Investigative Report is contained in the Appeal File at pages 75-76. The investigation was conducted by the U.S. Department of Labor, Office of Inspector General (“OIG”), and consisted of an interview with the Employer’s General Manager. (AF 75). During the interview, the General Manager stated that the Employer would not hire any driver as a salaried employee because they would have to pay taxes and offer health insurance and other benefits. (AF 76). The General Manager went on to state that the Employer “would not survive if the drivers were salaried employees.” *Id.* The General Manager also explained that the Employer’s drivers are independent contractors who are expected to own their own vehicles, set their own hours, and rent the computer terminal for dispatches from the Employer. *Id.* The OIG report indicates that the OIG investigators identified who they were, and the General Manager talked to them voluntarily. The Employer’s General Manager informed the OIG investigators that “CHAUDRY’S attorneys are JAFRI and JAFRI.” (AF 76). Shafquat Chaudry is the Employer’s owner.

⁸ The information required to rebut the first Finding included:

1. A list of each employee in your company, the job title of each employee, and the annual wage of each employee.
2. A list of the all [sic] corporate officers and shareholders of the corporation, their title and position in the corporate structure, and a description of their relationship to each other and to the alien applicant.
3. The name of the corporate official with primary responsibility for interviewing and hiring applicants for positions within the organization and the name(s) of the corporate official(s) having control or influence over hiring decisions involving the position for which labor certification is sought.
4. Payroll records for the past two calendar years (January through December) for all drivers in your company; position descriptions; organization charts; and resumes of former incumbents. ***Payroll records must be weekly and must show each employee by name, the number of hours worked and gross wages. W-2 Forms are not acceptable.***
5. Signed income tax returns for Elite Limo for the last two years (January through December).
6. Copies of the last four (4) quarterly reports that you filed with your state for unemployment insurance, along with your state unemployment insurance account number. **These reports list wages by employee name and total unemployment insurance contributions.**
7. A signed statement as to whether the owner, employer, or signatory of the ETA 750, Part A, received any payment from the alien, or a representative for the alien, in return for filing this application.

(AF 71-72) (emphasis as in original).

On December 28, 2006, the Employer responded to the CO's December 4, 2006, Findings. (AF 15-89). In response to the first Finding that a bona fide job opportunity does not exist, the Employer provided all of the documentation that the CO requested in the Notice of Findings, except for payroll records because "[a]lthough the employer employs over 400 drivers, it presently does not employ them as W-2 employees and therefore has none on its payroll." (AF 15).

In response to the second Finding, the Employer stated "[a]s evidenced by the payroll records, previous tax returns and financial analysis of transferring all 1099 employees to W-2 and hiring all other aliens that were sponsored, the employer has sufficient funds available to pay the offered wage to the above alien." (AF 16). The Employer argued that this was "clear, convincing and irrefutable evidence" that the Employer has the ability to pay the Aliens as salaried employees, "[n]otwithstanding what the employer's General Manager may have stated to a [Department of Labor] officer during an unexpected interview." (AF 16). The Employer reiterated its argument that "an Application for Alien Employment is for *prospective* employment and that there is no statutory or regulatory requirement that the sponsored alien be an employee at the time the application is filed or adjudicated." *Id.* (emphasis in original).

Payroll records provided by the Employer indicated that it had 101 salaried employees in 2006 who were paid a total of \$3,017,925.21. (AF 17-19).

A Worksheet titled "Proof of Sustainability of the Company After Taking 196 Drivers on Payroll" indicated that the Employer's gross income in 2006 totaled \$37,000,000 and that 450 drivers were employed by the Employer as independent contractors in 2006, with payments to those drivers totaling \$27,750,000 – leaving a Gross Margin of \$9,250,000. (AF 22). The Employer projected that by taking 196 drivers onto payroll rather than paying them as independent contractors, \$12,086,667 of the \$27,750,000 would be initially added back into the Gross Margin figure, making that total \$21,336,667. *Id.* The Employer also provided calculations for the costs of employing the 196 drivers as employees rather than independent contractors – estimating a weekly payroll cost of \$688.33 per driver. *Id.* The Employer also calculated "Per Week Vehicle Re-imbursment Expenses to Each Driver," including cost of the

vehicle, gas expenses, insurance expenses, repairs, and licenses and taxes. *Id.* This figure totaled \$1,156.18. *Id.* By adding the payroll costs and the vehicle costs, the Employer concluded that the total cost per week for drivers who are employees rather than independent contractors would be \$1,156.18, for a total of \$11,783,756 in costs for 196 drivers switched to employee status. *Id.* The Employer then calculated that it would increase its Gross Margin by \$302,911 by converting the 196 drivers to employee status. *Id.*

Attached to the Employer's response was a letter dated December 20, 2006, from Safquat Chaudhary, the president of Elite Limousine Plus, Inc. ("resident"). (AF 89). In the letter, the president stated that the Employer's intention was to switch the 196 drivers who were currently independent contractors over to employees, or "W-2 status" once their applications for labor certification are approved. *Id.* The president noted that the Employer currently maintained Workers Compensation insurance on behalf of all of the drivers, which he argued was consistent with the intention to switch the drivers over to W-2 status. *Id.* The president stated that the Employer would be able to pay the 196 drivers who would be switched over to payroll. *Id.* The Employer wrote:

Please note that when Elite filed the 196 applications it was done so with the good faith intention of assisting its hard working drivers and others who sought to obtain relief and benefits under the LIFE Act. We remain committed to these individuals and will offer employment to each such person upon approval of a corresponding Application.

Id.

On May 9, 2007, the CO issued a Final Determination, denying certification. (AF 10-14). First, the CO found that the application did not present a bona fide job opportunity, as required under 20 C.F.R. § 656.20(c)(8), and did not constitute employment as defined in 20 C.F.R. § 656.3. (AF 11). The CO noted that the Employer submitted a letter signed by the president of the company, stating that all drivers currently work as independent contractors but that the 196 aliens applying for labor certification will be switched over to become payroll employees (W-2 employees) upon receiving labor certification. (AF 12). The CO noted that the president's statement was "completely contradictory to the advertisements used to test the U.S. labor market

for these positions,” quoting the Employer’s advertisements as stating “Own your own business,” “Buy a franchise: \$35,000,” “Lease a franchise: \$100 per week,” and contained requirements that the drivers purchase or lease their own vehicles.⁹ *AF 12*. The CO concluded that this sentiment, as confirmed by the OIG interview with the General Manager, indicated that drivers would be treated as independent contractors who must purchase their own vehicles. *Id.*

The CO also based her determination that there was not a bona fide job opportunity on the fact that the Employer “did not submit any documentation that itemizes payments from [the Employer] to the 450 Drivers” the Employer claims to utilize. (*AF 12*). Instead, the Employer offered payroll records of 101 employees who were not drivers for the company. *Id.* The CO stated that the lack of documentation indicated that the drivers were not presently employed by the Employer as anything other than independent contractors. *Id.* Additionally, the CO noted that the Employer appeared to indicate in the worksheet entitled “Elite Limousine Plus, Inc., Proof of Sustainability of the Company after Taking 196 Drivers on Payroll” that the drivers were expected to finance their vehicles through the Employer. *Id.* The CO stated that she could not “find a job opportunity to be bona fide and clearly open to U.S. workers, when one must first either purchase or finance a \$25,000 vehicle before being hired.” *Id.* The CO concluded: “It appears as if these positions were not truly open to U.S. workers, but were instead earmarked for foreign nationals seeking labor certification” because only the 196 foreign nationals applying for labor certification would be converted to employee status out of 450 drivers. *Id.*

The second Finding by the CO was that the Employer did not have the ability to pay the wage offered. (*AF 13*). The CO noted that the Employer did not currently employ the 450 drivers it “claims to utilize” and that the General Manager confirmed in the OIG interview that the company could not survive financially if the drivers were converted to salaried employees. *Id.* The CO noted that the Employer

⁹ A review of the record reveals no advertisements with those statements quoted by the CO. One of the four advertisements and notices in the record states “Come and explore the franchise opportunities at Elite Limo Plus” and makes no mention of drivers purchasing their own cars. (*AF 118*). The advertisements placed in the *New York Daily News* on March 12, 2001, and in the *New York Post* on March 5, 2001, state that the Employer is looking for “drivers with or without owned vehicle.” (*AF 115-116*).

submitted tax returns showing gross receipts of approximately \$33,000,000 for 2005, payroll records for 101 non-driver employees totaling more than \$3,000,000 for 2006, and the above noted worksheet attempting to show sustainability after putting the 196 Drivers onto the payroll. We note that this worksheet contains a significant error, as it failed to deduct the weekly payroll costs of the 196 Drivers from the company's gross sale income. Adding in the payroll costs of these employees brings the "Total Cost of Sale due to 196 Drivers on Payroll" line item to \$18,799,215. When this figure is added to the 2006 payroll total for non-Divers, the total payroll costs increase to \$21,817,140.

According to the spreadsheet, once the company makes "payments" to the remaining 254 non-employee Drivers, it will be left with \$21,336,667 in income. This leaves [the Employer] \$480,473 in the red after adding the 196 foreign nationals to the payroll. We further note that the spreadsheet lists projected gross receipts of nearly \$4,000,000 more than the actual figure listed on the 2005 tax return, and even still, the company could not afford to place the 196 Drivers on the payroll.¹⁰

Id. The CO then concluded that the Employer's rebuttal failed to demonstrate that there is a bona fide job opportunity or that the company has the ability to pay the wage offered.

On June 11, 2007, the Employer requested that the Board of Alien Labor Certification Appeals review the CO's Final Determination. (AF 1). As noted above, the Employer asked that the Request for Review be applied to all 191 cases because the issues are identical in all of the cases. *Id.* In response to the first Finding that there was not a bona fide job opportunity, the Employer argued that all sponsored aliens would be offered full-time employment once the cases are certified. (AF 2). The Employer then argued that it is inappropriate to consider the statements made by the General Manager to the Department of Labor investigator because he is not a financial officer of the company and because the Department of Labor knew the Employer was represented by an attorney. *Id.*

In response to the second Finding that the Employer does not have the ability to pay the offered wage, the Employer argued that the CO's conclusion that the Employer would lose \$480,473 was incorrect. (AF 3). The Employer argued that the CO's analysis and conclusion

¹⁰ It is unclear where the CO obtained the figures addressed. However, the CO's analysis appears to be incorrect as the Employer added back the payments to the 196 independent contractors but subtracted them as an expense. (AF 22).

was incorrect. In further support, the Employer supplied two additional Worksheets based on the actual audited figures for 2006 and the projected sales figures for 2007. The regulations, however, preclude consideration of evidence by BALCA which was not "within the record upon which the denial of labor certification was based." 20 C.F.R. §656.26(b)(4). *Fried Rice King Chinese Restaurant*, 1987-INA-518 (Feb. 7, 1989) (en banc). These Worksheets include new figures rather than computations using the previous figures. Thus we have not considered these new Worksheets on appeal.

The Board docketed the 191 appeals over the course of several weeks, and issued Notices of Docketing during the period of late-August through mid-September 2007. Neither the CO nor the Employer filed appellate briefs.

DISCUSSION

The regulation at 20 C.F.R. § 656.20(c)(8) requires an employer to attest that the "job opportunity has been and is clearly open to any qualified U.S. worker." In this regard, the job opportunity must be bona fide, which means the job must truly exist and not merely exist on paper. There must be a true opening and not merely the functional equivalent of self-employment. *Bulk Farms v. Martin*, 963 F.2d 1286, 1288 (9th Cir. 1992); *Modular Container Systems, Inc.*, 1989-INA-228 (July 16, 1991) (en banc). Whether a job opportunity is bona fide is gauged by a "totality of the circumstances" test. *Modular Container Systems, Inc.*, *supra*. Where the factual circumstances reveal the employer's intention to hire the aliens as its only "employees" with all other workers considered to be contractors, the question arises of whether the position is possibly being used to promote immigration rather than bona fide employment. *Eastlake Pools & Landscape Inc.*, 2003-INA-276 and 277 (Sept. 13, 2004). Thus, a CO reasonably may inquire into the bona fides of a job offer where the employer is sponsoring a permanent alien labor certification application for a position that had previously been filled by an independent contractor. See *Al-Or International, Ltd.*, 1994-INA-427 (Jan. 17, 1996); *Adacle Carvalho Cleaning Service*, 2003-INA-1 (Dec. 9, 2003); *Scott Avenue Builders*, 2003-INA-296 (Sept. 27, 2004); cf. *American Chick Sexing Assn.*, 1989-INA-320 (March 12, 1991) (aff'd en

banc) (holding that an employer may refashion its employment relationship from contractor to direct employer by using a different corporate entity).

The factual circumstances in this case reveal the Employer's intention to hire the Aliens – and only the Aliens – as employees, with all other limo drivers remaining as franchisees/independent contractors.¹¹ This circumstance suggests that the driver-as-employee status was created solely to promote immigration. In responding to the SWA's inquiry into why the Employer was seeking 196 drivers when NYS Unemployment Insurance files indicated that it had only 106 employees, the Employer's attorney wrote:

In addition to its 100+ salaried employees, at the time of filing the employer had more than 700 drivers,^[12] all of whom were employed as independent contractors. Therefore, the need for 196 drivers was self-evident. However, many of these drivers' immigration status was not finalized. When in 2000 President Clinton signed the LIFE Act into law, employers that had workers unlawfully present in the U.S. were encouraged to sponsor those same workers. Therefore, in an effort to help its employees and in the spirit of the LIFE Act, the employer undertook to file the instant applications.

(AF 80).¹³ The remedial purpose of the LIFE Act, however, was only to temporarily allow aliens who were previously ineligible to apply for adjustment of status without leaving the country to adjust status within the U.S. under certain conditions in order to lessen the burden on both the alien and their families, and the U.S. embassies and consulates.¹⁴ Nothing about the LIFE Act

¹¹ For example, the December 20, 2006, letter from the Employer's president refers only to switching the 196 alien independent contractors over to employee status. (AF 89). In fact, the president specifically stated, "We are providing a spreadsheet analysis establishing our ability to pay said 196 drivers a W-2 salary." (AF 89). The attached Worksheet titled "Elite Limousine Plus, Inc. Proof of Sustainability of the Company After Taking 196 Drivers on Payroll" specifically refers to only 196 drivers being added to the payroll both in the title and as a line item. (AF 22). Clearly, the Employer's intention is to keep the remaining 254 drivers on as independent contractors.

¹² The Appeal File contained a variety of statements as to the total number of the Employer's drivers. Based on the rebuttal documentation, it appears that 700 is an exaggerated number, and that true number of drivers is closer to 450.

¹³ See also the December 20, 2006 letter from the Employer's president to the CO, in which he indicated that the purpose of the applications was to assist drivers in obtaining relief and benefits under the LIFE Act. The letter indicates that employment would be offered to these drivers only once labor certification was granted. (AF 89).

¹⁴ See *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004), in which the court wrote:

suggests that it was intended to promote the creation of jobs in the U.S. earmarked specifically for aliens.

Even if these applications were not so clearly based solely on the Employer's owner's intent to assist his out-of-status drivers to become permanent residents rather than bona fide employment clearly open to U.S. workers, its rebuttal documentation was not convincing or credible.

The Employer's rebuttal rests principally on the Worksheet it provided to attempt to establish that converting its business model from drivers engaged as independent contractors to employees would make business sense. But there is no indication on the Worksheet or elsewhere

[Section 245(i)] was originally enacted in 1994 in order to allow individuals who would qualify for adjustment of status but for their unlawful immigration status to apply for adjustment from within this country, rather than forcing them to undertake the time, cost, and risk of leaving the country in order to apply. The amendment was extended in 1997 and again in 2000, in order to allow "spouses, children, parents and siblings of permanent residents or U.S. citizens [to] be able to adjust their status in the U.S. and avoid needless separation from their loved ones." *See* Joint Memorandum, Statement of Senator Kennedy, 146 Cong. Rec. S11850-52 (daily ed. Dec. 15, 2000).

See also 59 Fed Reg. 51091 at 51092 (October 7, 1994) and 62 Fed Reg. 39417 (July 23, 1997). These Immigration and Naturalization Service Federal Register notices detailed the purpose of Section 245i. To summarize, the Immigration and Nationality Act allows a person who is neither a citizen nor a national of the U.S. to live and work in this country for an unlimited period of time if he or she has been granted lawful permanent resident status. The Act generally requires a qualified intending immigrant to obtain an immigrant visa abroad before seeking admission to the U.S. for lawful permanent residence. It also allows certain persons who have not obtained an immigrant visa abroad to adjust status to that of a lawful permanent resident after arrival in the United States.

The 1994 INS Notice further explains that Section 245(a) of the Act restricts eligibility for adjustment of status by prohibiting adjustment unless the applicant entered the U.S. after having been inspected and admitted or paroled by an immigrant officer. Section 245(c) of the Act also bars the adjustment of most applicants who have been employed in the U.S. without authorization; who have not complied with the terms of temporary nonimmigrant status; or who entered in transit without visa status, under a visa waiver program, or as crewmen. The requirements of sections 245(a) and 245(c) of the Act were established to discourage intending immigrants from moving to the U.S. before becoming fully eligible for permanent residence and bypassing the orderly immigrant visa issuance process abroad. These requirements caused many persons who were in the U.S. to be unable to adjust status in this country, but to have to leave the country and apply for an immigrant visa at a U.S. consulate or embassy abroad. Public Law 103-317 (Aug. 26, 1994), added a new section 245(i) to the Act, which allowed a person who was physically present in the U.S., and who had applied for labor certification under section 212(a)(5)(A) on or before the applicable deadline, and who would otherwise have been eligible for immigrant visa issuance abroad, to adjust status to that of an alien lawfully admitted for permanent residence.

Although section 245(i) originally contained a Jan. 14, 1998 deadline, LIFE Act amendments extended the deadline to April 30, 2001. *HealthAmerica*, 2006-PER-1 (July 18, 2006) (en banc), slip op. at 15 and n.11.

in the file about who prepared it, whether the financial assumptions made therein were based on generally accepted accounting principles, or whether an independent auditor had verified the document. We note, for example, that the Worksheet is based on an assumption of a four million dollar increase in income – without any explanation of why such an assumption would be valid.¹⁵ Moreover, if in fact the Employer could increase its gross margin by over \$300,000 a year by converting drivers from independent contractors to employees as the Worksheet purports to establish, it begs the question of why would the Employer wait years until labor certification had been approved to do the conversion, and why would it only convert drivers who were interested in being sponsored for permanent alien labor certification and not all its drivers. If such additional profit could be achieved by converting drivers to employees, it would seem that the credible business decision would be to convert all drivers to employees as soon as possible.

Moreover, the Worksheet indicates that the drivers who would be added as employees would still be required to finance a vehicle through the Employer. We agree with the CO's statement that she could not "find a job opportunity to be bona fide and clearly open to U.S. workers, when one must first either purchase or finance a \$25,000 vehicle before being hired." (AF 12). Although the Worksheet suggests that the employees would be reimbursed for the vehicle expenses, it would appear that the liability for the vehicle loan would be squarely on the shoulders of the employees. Moreover, agreeing to take on such a liability would be a significant barrier or condition to employment.

The Employer argued in its request for review that its General Manager's statements made to the OIG investigators should not be considered because the Department of Labor knew the Employer was represented by an attorney, and the attorney was not present during the investigatory interview. We reject the suggestion that Employer's General Manager was entitled to a *Miranda*-style warning, informing him of his right to counsel. As this interview was neither criminal nor custodial in nature, *Miranda* is inapposite. Additionally, the right to counsel found in the Sixth Amendment of the United States Constitution is not properly applied, as it is

¹⁵ As the CO noted, the Employer's 2005 corporate income tax return reported gross income of slightly over \$33,000,000. (AF 13, 23). The Worksheet was based on gross income for 2006 of \$37,000,000. (AF 22). The Worksheets submitted with the request for review are purportedly based on audited financials; but the Employer's rebuttal documentation did not make that representation.

specifically limited to “criminal prosecutions.” U.S. Const. amend. VI ; *see Hannah v. Larche*, 363 U.S. 420 (1960); *Federal Communications Commission v. Schreiber*, 329 F.2d 517 (9th Cir. 1964); *Smith v. United States*, 250 F. Supp. 803 (D.N.J. 1966). However, the Administrative Procedure Act provides that any person “compelled to appear in person before an agency or representative thereof” is entitled to be represented by counsel. 5 U.S.C. § 555(b) (2000). Courts have determined that this provision entitles an individual to have counsel present during compulsory investigations before agency investigators. *See Schreiber, supra; Backer v. Commissioner of Internal Revenue*, 275 F.2d 141 (5th Cir. 1960). Those cases dealt with appearances made pursuant to subpoena, and they do not make reference to situations where, as here, a witness voluntarily discloses information to an investigator. Nor do they require a *Miranda*-type affirmative warning of an individual’s right to counsel. Although we recognize that the best practice may be for investigators to include counsel in interviews such as this, Employer’s General Manager spoke with the investigator of his own volition. He was not “compelled to appear,” and he was never refused an attorney. As such, we decline to exclude the OIG report and the General Manager’s statements therein.

The Employer also argued that the General Manager’s statements to the OIG investigators should be excluded because the General Manager was not a financial officer of the company. We concur that it is not clear that the General Manager would have all of the facts necessary to support his statement that the Employer could not survive if the drivers were paid as employees. Thus, we have viewed this portion of his statement with appropriate consideration of the fact that the General Manager may have been stating an opinion rather than a fact about the survivability of the business if drivers became employees – but we decline to exclude the statement altogether. Rather, we find that the General Manager was in a position to know that drivers were currently being treated as independent contractors who owned their own vehicles, and to state an informed opinion that the Employer would be unlikely to treat aliens sponsored through labor certification as employees rather than independent contractors in the future.

In light of the totality of the circumstances, the Employer has failed to meet its burden of establishing that its applications for limo drivers represent bona fide job opportunities clearly open to U.S. workers.

These applications were before the CO in the posture of a request for RIR. In *Compaq Computer Corp.*, 2002-INA-249 (Sept. 3, 2003), a panel of the Board held that when the CO denies an RIR, such a denial should result in the remand of the application to the local job service for regular processing. A remand, however, is not required where the application is so fundamentally flawed that a remand would be pointless, such as here, where the Employer failed to document that a bona fide job opportunity exists. *Beith Aharon*, 2003-INA-300 (Nov. 18, 2004).

Based on the foregoing, we find that the CO properly denied labor certification.¹⁶

ORDER

The Certifying Officer's denials of labor certification are hereby **AFFIRMED** and labor certification is **DENIED** for all 191 of the above-captioned matters.

For the panel:

A

JOHN M. VITTON
Chief Administrative Law Judge

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**

¹⁶ In light of this holding, we do not reach the CO's citations under section 656.3 (definition of employment) and section 656.20(c) (sufficiency of funds to pay the aliens' wages).

**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.