



DATE: MAY 17 1989
CASE NO. 88-INA-121

IN THE MATTER OF

YOUNG SEAL OF AMERICA, INC.
Employer

on behalf of

CHUNG KOU CHANG
Alien

John T. Ko, Esq.
Los Angeles, CA

BEFORE: Litt, Chief Judge; Vittone, Deputy Chief Judge;
and Brenner, Tureck, Guill and Williams,
Administrative Law Judges

JEFFREY TURECK
Administrative Law Judge

DECISION AND ORDER

This application was submitted by the Employer on behalf of the above-named Alien pursuant to Section 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(14) (hereinafter "the Act"). The Employer requested review from U.S. Department of Labor Certifying Officer Paul R. Nelson's denial of a labor certification application pursuant to 20 C.F.R. §656.26.¹

Under Section 212(a)(14) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive a visa unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

¹ All of the regulations cited in this decision are contained in Title 20 of the Code of Federal Regulations.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of Part 656 of the regulations have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means, in order to make a good faith test of U.S. worker availability.

This review of the denial of a labor certification is based on the record upon which the denial was made, together with the request for administrative - judicial review, as contained in an Appeal File ("AF"), and any written arguments of the parties [see §656.27(c)].

Statement of the Case

Young Seal of America, Inc., the employer corporation, is a travel and tour agency located in Whittier, California (AF 29). The Alien, Chung Kou Chang, came to the United States from Taiwan to become the General Manager of Employer in 1982 (AF 11). On July 16, 1986, Employer filed an application for alien employment certification on behalf of the Alien for the position of General Manager. Requirements for the position, as set forth in Form ETA 750-A, included a high school education and two years experience in the job offered or in the related occupation of travel agent. Other special requirements included an ability to read, write and speak Mandarin and Taiwanese Chinese (AF 29-30).

In a Notice of Findings ("NOF") issued on June 22, 1987 (AF 25-27), Employer was found to be in noncompliance with 20 CFR §656.20(c)(8), which requires the existence of a bona fide job opening to which qualified U.S. workers can be referred. Employer was advised that in order to rebut the NOF, it should submit documentation establishing the existence of a bona fide job opportunity. Specific rebuttal evidence suggested in the NOF included documentation as to the number of employees and capacity in which they are employed; identification of the employees the Alien will supervise, and an explanation regarding how the Employer was able to conduct business on an ongoing basis prior to the hiring of the Alien (AF 26). Employer also was advised to submit documentation "that specifies the names and addresses of each corporated (sic) officer and member at the time the application was in process, their relationship to the Alien, if any, and the financial interest of each member and the duties and responsibilities of each person involved in the corporation." (AF 26-27)

In a July 2, 1987 rebuttal to the NOF (AF 10-24), Employer identified three employees other than the Alien, all of whom the Alien would supervise. Employer stated that the Alien had been with Employer since 1982 as an intra-company transferee, managing the Employer's business, in the position applied for.

Copies of stock certificates submitted show two shareholders, Tao Shu and Hsueh Chen Shu.² A "Statement By Domestic Stock Corporation" filed with the State (AF 22) identifies three

² The existence or absence of any relationship between these individuals and the
(continued...)

officers of the Corporation, including the Alien's wife, Show Ping Chen, as Chief Financial Officer, and lists the same three people as Directors. The Alien's wife is the designated agent for service of process. Alien's wife is identified as the Corporate Secretary in the statement of rebuttal prepared by Employer's attorney and on one of the Certificates of Stock.³ She also is identified as Employer's owner (e.g., AF 30, 32), and simply as the employer (AF 31). Employer states that "[a]ll other officers of the corporation are not related to the Alien." (AF 11)

Based upon his review of all of the rebuttal documentation submitted, the CO issued a Final Determination on July 29, 1987 finding that Employer had failed to satisfactorily rebut the indicated findings. The CO stated:

Based on the documentation submitted, the alien's wife, Shuw Ping Chen,⁴ is the Corporate Secretary of the corporation. The signator of form ETA 750, Part A, shows that Show Ping Chen is the owner of the petitioning employer. On forms 3DP, Rev. 10 (12-85), DE 3 Quarterly Contribution Return and Report of Wages Under the Employment Insurance Code, for December 31, 1986 and March 31, 1987, Show Ping Chen signed as the Chief Financial Officer of the petitioning employer.

In the instant application, there does not appear to be a bona fide job opening to which U.S. workers can be referred and considered. The alien's wife is petitioning on the alien's behalf. In addition, the Alien has been employed by the petitioning employer since January 1982. It appears highly unlikely that the alien's wife would displace the alien (her husband) with a U.S. worker.

Employer requested review of the denial for certification on August 10, 1987. (AF 1-4).

²(...continued)

Alien has not been established by the evidence of record. We note that a third certificate of stock was submitted at the time of the request for review. Employer offers no explanation as to why this certificate was not submitted at the time of rebuttal, thus raising a question as to the accuracy and completeness of Employer's documentation on rebuttal. Of course, this third stock certificate will not be considered by the Board, since it was not part of the record before the CO. See, e.g., In re University of Texas at San Antonio, 88-INA-71 (May 9, 1988).

³ Two other certificates of Stock identify Shih Ping Young as the Corporate Secretary.

⁴ The Alien's wife's name appears in the record both as Show Ping Chen and Shuw Ping Chen.

Discussion

The Employer has the burden of providing clear evidence that a valid employment relationship exists, that a bona fide job opportunity is available to domestic workers, and that the Employer has, in good faith, sought to fill the position with a U.S. worker. In re Amger Corporation, 87-INA-545 (October 15, 1987). We find that Employer has not met this burden.

The record establishes that the Alien was sent to the United States to become the General Manager of the Employer in 1982, which apparently was when Employer began to operate. Thus, the Alien has held the position for which certification is being sought since Employer's organization and incorporation in 1982.

Also of significance is the fact that the Alien's wife, in addition to being one of three Directors, the Chief Financial Officer and the Corporate Secretary, is listed as the contact person regarding the position. Her title is listed as owner. All correspondence with respect to the position is signed by the Alien's wife as owner as well.

In light of the marital relationship and the amount of control exercised by the Alien's spouse, it appears evident that the Alien is unlikely to be displaced by a U.S. worker. This fact, taken together with the fact that the Alien came to the United States at what appears to be the time of incorporation in the position for which certification is being sought, makes it hard to believe that a bona fide job opening was in fact available to U.S. workers. Therefore, we agree with the CO's finding that the Employer has not met its burden to prove that the position represents a legitimate job opportunity for U.S. workers (AF 9), and uphold his denial of certification.

ORDER

The decision of the Certifying Officer to deny labor certification is affirmed.

JEFFREY TURECK
Administrative Law Judge

JT/jb