U.S. Department of Labor

Board of Alien Labor Certification Appeals
1111 20th Street, N.W.
Washington, D.C. 20036

Date: MARCH 12, 1991
Case Nos.: 89-INA-320
89-INA-321
89-INA-322
89-INA-323
89-INA-324
89-INA-325
89-INA-326
89-INA-327

In the Matter of:

AMERICAN CHICK SEXING ASSOCIATION
and
ACCU-CO
Employer

on behalf of

YONG HYUN CHO
WOON SIK KANG
JEUNG-CHIL KIM
SOO-IL LEE
HYUN RYAI SHIN HONG
SOO SEOUK LEE
JUN HWAN KO
KYU HAN KIM
Aliens

Appearance: Jane W. Goldblum, Esq.
For the Employer

BEFORE: Brenner, Groner and Silverman
Administrative Law Judges

LAWRENCE BRENNER
Administrative Law Judge

DECISION AND ORDER

The above-named Employer requests review pursuant to 20 C.F.R. §656.26 of the United States Department of Labor Certifying Officer's denial of eight labor certification applications.

These applications were submitted by the Employer on behalf of the above-named Aliens pursuant to section 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(14) ("Act").

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 labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, 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: (1) there are not sufficient workers in the United States who are able, willing, qualified and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of the United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 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 labor certification is based on the record upon which the denial was made, together with the request for review, as contained in an Appeal File ("AF"), and any written arguments of the parties. 20 C.F.R. §656.27(c).

Statement of the Case

On May 23, 1988, the American Chick Sexing Association ("Amchick") applied for labor certification to enable the Aliens, Yong Hyun Cho, Woon Sik Kang, Jeung- Chil Kim, Soo-Il Lee, Hyun Ryai Shin Hong, Soo Seouk Lee, Jun Hwan Ko and Kyu Han Kim, to fill positions as chick sexers (AF 37).[1] The applications list the following duties for the positions:

> Using a high-powered lamp and at a speed of 800+ chicks per hour, alien must be able to pick up and examine day-old chicks, note the texture, size, color, prominences, etc. of the undeveloped sex organs and thereby determine the sex of such chicks with accuracy of at least 98%. Alien must segregate the cockerels from pullets, all without injury or mortality to baby chicks.

(AF 37). The chick sexing positions require 18 weeks of training and one year of experience (AF 37).

In its applications, Amchick altered certain questions on the standard form to reflect a contractor-subcontractor relationship between itself and the Aliens. First, Amchick amended the

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[1] The eight Appeal Files contain identical documentation and raise the same issue. Accordingly, they have been consolidated for consideration on review. For simplicity, citations to the Appeal File refer to the file of Yong Hyun Cho, 89-INA-320.

printed form for Part 750A, item 4 to seek the name of the "subcontractor" instead of the "employer" (AF 57). Similarly, it amended Part 750B, item 8 to seek the name of the "prospective subcontractor" instead of the "prospective employer" (AF 59).

From October 21 through 23, 1988, Amchick advertised for chick sexers in the Raleigh Times (AF 42). The advertisements did not indicate that successful applicants would be hired as subcontractors. Three persons responded to the ads: Jim Wakefield, Matsuo Tanaka and Roy Nishimoto (AF 23). On December 9, 1988, Amchick sent a letter to each applicant, enclosing "a Subcontractor's Agreement, to start in Henderson, NC Area, beginning February 13, 1989 and ending February 29, 1990" (AF 36-38). In each letter, Amchick noted that its acceptance and approval of the contract would be contingent on the applicant's passing a test of accuracy (AF 36-38). By letter dated December 14, 1989, Tanaka rejected Amchick's offer because it was "not the type of job [he] had in mind" (AF 32). Neither Wakefield nor Nishimoto responded to the December 9th letter (AF 23).

On February 27, 1989, the Certifying Officer ("C.O.") issued his Notice of Findings, proposing to deny labor certification on the ground that no bona fide employer-employee relationship existed between Amchick and the Aliens (AF 16).

On March 31, 1989, Amchick amended the applications in an effort to demonstrate that the Aliens would be parties to an employer-employee relationship. First, Amchick reversed the changes it had made to Part 750A, item 4 and Part 750B, item 8, so that the questions again referred to an "employer" (AF 57, 59). Then, it changed the corresponding answers from "Amchick" to "Accu-Co" (AF 57, 59). It also changed the answer to Part 750A, item 7 from "Alien will work at specific hatcheries with Amchick" to "Alien will work at specific hatcheries under contract with Accu-Co" (57).

Also on March 31, 1989, Amchick filed a rebuttal to the Notice of Findings, explaining its changes to the applications (AF 5-14). The rebuttal states, "we are finally in a position to fully rebut [the C.O.'s] findings by establishing that a bona fide employer-employee relationship exists" (AF 5). It explains that the amended 750A and 750B "reflect that, due to a change in circumstances, there is an offer of employment as required by 20 C.F.R. Part 656, which now makes certification possible" (AF 5) (emphasis added).

According to the rebuttal, both Accu-Co and Amchick are wholly owned by David K. Nitta and are located at one address (AF 5). However, "Accu-Co, unlike Amchick, is an 'employer' in the business of hiring qualified chick sexers and does intend to hire each chick sexer for whom certification is sought" (AF 5) (emphasis added). The rebuttal attaches a sample employment agreement (AF 7-12) and an affidavit by Nitta regarding terms of employment (AF 13-14) as evidence of an employer-employee relationship between Accu-Co and the Aliens.

On May 25, 1989, the C.O. issued his Final Determination, denying certification on the ground that Amchick failed to provide any documentation showing that it was an employer and was proposing to enter into an employer- employee relationship with the Aliens when the applications were filed on May 23, 1988 (AF 2-4).

On June 21, 1989, David K. Nitta requested review of the C.O.'s denial of certification (AF 1). On August 30, 1989, he submitted a brief in support of his position ("Appeal Brief").

The C.O. did not file a brief in support of his position; however, on September 25, 1989, the Solicitor's office wrote a letter referring the Board to the Brief of the C.O. filed in American Chick Sexing Association, Case Nos. 89-INA-145 to 150 (Dec. 22, 1989) ("Amchick I")[2] and affirming its support for the Final Determination in the instant case (AF 2-4).

Discussion

In his Notice of Findings, the C.O. proposed to deny alien labor certification on the ground that no employer-employee relationship existed between Amchick and the Aliens (AF 16). The C.O. noted that, in the absence of such a relationship, two regulations would be violated: (1) section 656.21(a), which requires that an employer file the applications with the appropriate job service office; and (2) section 656.50, which defines employment as "permanent full time work by an employee for an employer other than himself" (AF 16).

The C.O. stated that, in order for his office to process the applications, Amchick would have to document that it has considered itself to be an employer of chick sexers in the past and proposes to employ the Aliens as chick sexers; and that an employer-employee relationship has existed between Amchick and individual chick sexers in the past and will exist between Amchick and the Aliens (AF 16). Then, the C.O. listed examples of relevant documentation:

> copies of employment contracts between Amchick and hatcheries; evidence that as an employer Amchick is responsible for paying employer social security and unemployment insurance taxes; that pursuant to a W-4 certificate, Amchick, as an employer withholds and will withhold Federal, State and local taxes from the earnings received by the individual chick sexers; and that Amchick has treated and will treat chick sexers as employees for applicable workers' compensation and occupational safety and health purposes.

(AF 16).

Clearly, the type of documentation solicited by the C.O. would not exist in a contractor-subcontractor relationship. Amchick elected to meet the C.O.'s requirements by transferring its interests in the Aliens' labor to Accu-Co, a successor company which would enter

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[2] The C.O.'s Brief in Amchick I is attached as Exhibit C to the Appeal Brief in this case.

into an employer-employee relationship with the Aliens.[3] Accordingly, the applications were amended to name Accu-Co as the prospective Employer (AF 57, items 4 and 7; AF 59, item 8).

The rebuttal letter explains that Amchick and Accu-Co share a common owner -- David K. Nitta -- and that Accu-Co was substituted for Amchick in order to satisfy the C.O.'s definition of an employer (AF 5-6). The rebuttal letter attaches a copy of the employment contract to govern the relationship between Accu-Co and the Aliens (AF 7-12). It also attaches an affidavit by David K. Nitta, which avers that Accu-Co will --

> (1) pay employer social security and unemployment insurance taxes; (2) withhold federal, state and local taxes from the earnings received by the individual chick sexers; (3) . . . treat the chick sexers as employees for applicable workers' compensation and occupational safety and health purposes; and (4) do whatever else is required of employers under existing federal, state and local law.

(AF 13). In short, the rebuttal provides substantial evidence that the documentary deficiencies listed in the Notice of Findings have been corrected.

The Final Determination acknowledges the amendments to the applications, and the explanations therefore. However, it maintains that the rebuttal evidence is inadequate because --

> Amchick has failed to provide any documentation showing that it was an employer and that it was proposing to enter into an employer-employee relationship with the alien beneficiary. Without an employer at the time the labor certification application was filed there was no job opportunity.

(AF 4). The C.O. alleges that "the rebuttal period may not be used to create an employer and/or job opportunity after the fact, when none existed at the time of application" (AF 4). We disagree.

Amchick acted properly in transferring its interests in the Aliens' labor to Accu-Co during the rebuttal period. Under sections 656.26(b)(4) and 656.27(c), the Board's review of the denial of labor certification must be based on the record upon which the C.O. denied certification. See, e.g., The University of Texas at San Antonio, 88-INA-71 (May 9, 1988); Faten Zaky, 89-INA-353 (Aug. 24, 1990). The transfer of interests from Amchick to Accu-Co was timely in this case, since it was accomplished in connection with the rebuttal to the Notice of Findings. In

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[3] In his brief, David K. Nitta argues that Amchick should have been considered an employer within the original contractor-subcontractor relationships (Appeal Brief at 3-6). Since the argument was not raised until after the Final Determination, it is not properly before the Board. See Huron Aviation, 88-INA-431 (July 27, 1989). Moreover, the record contains substantial evidence that Amchick did not consider itself to be an employer. The rebuttal states, "we are finally in a position to fully rebut [the] findings by establishing that a bona fide employer-employee relationship exists," and "Accu-Co, unlike Amchick, is an 'employer' in the business of hiring qualified chick sexers and does intend to hire each chick sexer for whom certification is sought" (AF 5).

Amchick I, the Board refused to recognize a similar transfer because it occurred subsequent to the final determination.[4]

The record evidence indicates that the Aliens will occupy the same positions, perform the same duties, work in the same area of intended employment, and earn the same salaries with Accu-Co as they would have with Amchick.[5] Since the transfer of interests from Amchick to Accu-Co preserves the particular job opportunities and area of intended employment, section 656.30(c)(2) has not been violated. See International Contractors, Inc. and Technical Programming Services, 89-INA-278 (June 13, 1990). Finally, the transfer to Accu-Co was timely and Accu-Co is a bona fide employer. Accordingly, Accu-Co may be recognized as the Employer in the labor certification applications at issue.

Since the chick sexers employed by Accu-Co will enjoy some different benefits within an employer-employee relationship than they would have enjoyed within a contractor-subcontractor relationship, Accu-Co must readvertise the position in order to retest the U.S. labor pool. See §656.21(g). The original advertisement did not suggest that the relationship between Amchick and the successful applicants would be anything other than the traditional employer- employee relationship (AF 42); therefore, the text of the advertisement need not change. However, Accu-Co must not send the applicants letters which contain contractor-subcontractor agreements. Only retesting the labor pool will reveal whether any U.S. workers are able, willing, qualified and available to fill the chick sexing positions offered by Accu-Co as an employer.

Finally, given the timely cure of the defects alleged in the Notice of Findings, Accu-Co, as the successor to Amchick, has inherited its predecessor's priority date for certification.

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[4] The Solicitor's reliance on its brief in Amchick I is misplaced. First, the brief focuses on Amchick's failure to establish an employer-employee relationship (Amchick I Brief at 1-4). Here, the relevant employer is Accu-Co, the successor company. Second, the brief attacks the transfer from Amchick to Accu-Co because it was not accomplished until after the final determination (Amchick I Brief at 5-6). Here, the transfer was timely made during the rebuttal period.

[5] The most substantial change is that the Aliens would acquire additional benefits, such as eligibility for social security and unemployment benefits, vacation time and sick leave (AF 13). The Panel in Amchick I disapproved such changes in dicta (Amchick I at 5). However, the holding in the Amchick I turned on the untimely character of the transfer from Amchick to Accu-Co (Amchick I at 4).

ORDER

The Final Determination denying labor certification is hereby **REVERSED** and the case is **REMANDED** to the Certifying Officer for action consistent with this opinion.

For the Panel:

LAWRENCE BRENNER
Administrative Law Judge

NOTICE OF 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. 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 the Chief Docket Clerk, Office of Administrative Law Judges, Suite 700, 1111 20th Street, N.W., Washington, D.C. 20036. 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 pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.

LB/SYT/gaf

[Dissent in *American Chick Sexing Assn. and Accu-Co.*, 89-INA-320 to 327]

I cannot agree with the majority's disposition of this case. Section 212(a)(14) of the Act is not a piece of remedial legislation that should be liberally construed so as to widen the opportunities for alien employment in the United States. It is, on the contrary, an exception to the general legislative scheme relating to immigration, and on that basis sets out requirements with respect to which merely substantial compliance seems to me not enough.

I do not see the applicable regulations as contemplating the transfer of rights in aliens the way a good football backfield can pass the ball around. The applicant in this case, American Chick Sexing Association -- we do not know what kind of a legal entity it is -- took good care to make clear that it was not an "Employer," which is the only kind of applicant recognized under Section 656.21(a) and indeed throughout Section 656.21. When that lack of status was noted, it simply passed off the applications to another name, Accu-Co, which may or may not be the same or a separate legal entity, of whatever kind. This was somehow done "due to a change in circumstances," which is not described, and we are told that both outfits are "owned" (in what sense of that word is not made clear) by an individual, who is named David K. Nitta. It seems to me inappropriate that the prescribed requirements of the alien labor certification process should be disposed of with such agility.

The majority's comfort taken from the fact that Section 656.30(c)(2) has not been violated seems to me unreliable; it is incapable of being violated in the situation before us, inasmuch as it relates only to the validity of labor certifications, necessarily after they are issued. I recognize that the decision in *International Contractors., Inc. and Technical Programming Services*, 89-INA-278, does support their position; nevertheless, it still seems wrong to me.

While I acknowledge that no serious harm is done by the majority's decision, in view of the fact that it requires that the case go back for proper recruitment, I would affirm the denial of certification by the Certifying Officer on the basis that the applicant, which seems to me to be Amchick, was and is no employer.

Samuel B. Groner
Administrative Law Judge