U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Date: September 25, 1998

Case No. 97 INA 244

In the Matter of:

MR. and MRS. CHUAN CHI (ROBERT) CHANG, Employer

On behalf of

CHUNG YEN LI, Alien

Appearance: R. P. Gaffney, Esq., of San Francisco, California.

Before : Huddleston, Lawson, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of CHUNG YEN LI ("Alien") by MR. and MRS. CHUAN CHI (ROBERT) CHANG ("Employer") under § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) ("the Act"), and the regulations promulgated thereunder, 20 CFR Part 656. After the Certifying Officer (CO) of the U.S. Department of Labor at Denver, Colorado, denied the application, the Employer requested review pursuant to 20 CFR § 656.26.[1]

Statutory Authority. Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if 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 who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include Employer's responsibility to recruit U. S. workers at prevailing wages 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 at that time and place.[2]

STATEMENT OF THE CASE

On January 13, 1995, the Employer applied for alien labor certification for the Alien to fill the position of Child Tutor. The Job to be Performed was described as follows:

> Teach children the rudiments of oral communication in the Chinese language through conversation and through the reading of Chinese language story books and interactive teaching aids such as Chinese language children's audio video tapes. Teach reading using the Chinese phonetic script system and flashcards to promote Chinese character recognition; introduce children to the writing of Chinese characters; arrange, observe and monitor play activities of children. Observe for and solve behavior problems. Discipline if necessary. Dress and/or assist children to dress and bathe. Observe children's health, diet and deportment.

AF 01. The Employer's educational requirement was a baccalaureate degree, with the Major Field of Study in the Chinese Language or Literature. The other Special Requirements were fluency in written and spoken Mandarin; and "no smoking on job."[3] The job was classified as Child Tutor, under DOT Code No. 099.227-010.[4] No U. S. workers applied after the job was advertised.

Notice of Findings. By the Notice of Findings (NOF) issued on May 6, 1996, the Certifying Officer ("CO") said certification would be denied subject to rebuttal. AF 55- 60. The CO cited the following as grounds for denial. (1) The CO said the job requirements for a baccalaureate degree in Chinese Language or Literature with fluency in written and spoken

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[2]Administrative notice is taken of the Dictionary of Occupational Titles, published by the Employment and Training Administration of the U. S. Department of Labor.

[3]Employer offered $1,285 per month for this thirty-five hour a week position from 9:00 A.M. to 6:00 P.M., with time and a half for overtime work as needed. The Alien was qualified for this position. See AF 03.

[4]**099.227-010 CHILDREN'S TUTOR (domestic ser.)** Cares for children in private home, overseeing their recreation, diet, health, and deportment: Teaches children foreign languages, and good health and personal habits. Arranges parties, outings, and picnics for children. Takes disciplinary measures to control children's behavior. Ascertains cause of behavior problems of children and devises means for solving them. When duties are confined to care of young children may be designated Children's Tutor, Nursery (domestic ser.). GOE: 10.03.03 STRENGTH: L GED: R4 M2 L4 SVP: 5 DLU: 77

Mandarin and the Alien's qualifications coincided with the Alien's qualifications and compared them with the training prescribed by the DOT Occupational Code for the performance of the duties of this position. Citing 20 CFR §§ 656.3 and 656.20(c)(8), the CO inferred that the Employer wrote the job requirements to fit the Alien to the exclusion of qualified U. S. workers and questioned whether this job offer is a *bona fide* position to which a U. S. worker might be referred.[5] The CO then described the evidence required to rebut the issue. (2) Citing 20 CFR 1§ 656.21(b)(2). the CO said the requirements of a baccalaureate degree in the Chinese language or literature and special requirements of fluency in written and spoken Mandarin exceeded the Specific Vocational Preparation (SVP) standard of the DOT, which requires a period of six months to one year of combined training, education, and experience in the Job Offered.[6] The CO said the work for which the Employer sought certification "because there are no Chinese schools in or near Pueblo[, Colorado,]" is not sufficient to justify granting of labor certification, adding that the family situation and need did not support the requirement of a baccalaureate degree in the Chinese language. For these reasons the CO inferred that the Employer's job requirements were a preference, rather than a business necessity. By way of rebuttal, the CO directed Employer to establish the "actual need" for the position of a Chinese children's Tutor and the requirement of a baccalaureate degree in the Chinese language as a "business necessity," and specified nature and content of the evidence to be filed. (3) The CO cited the provisions of 20 CFR § 656.21(b)(2)(i)(C) in explaining that the employer must show the business necessity of facility in a language other than English. The CO observed that Employer's requirement of fluency in written and spoken Mandarin was not a business necessity. The CO said Employer could rebut this issue by deleting the language requirement or by showing its business necessity.[7]

Rebuttal. The Employer's rebuttal, dated June 10, 1996, 1995, addressed the issues discussed in the NOF, including (1) the existence of a bona fide job opening, (2) the unduly restrictive job requirement, (3) the unduly restrictive foreign language requirement, and (4) the CO's findings as to advertising and posting. (1) The Employer agreed that the job offer was based on a prospective employment of the Alien or another worker to be hired to fill a position to be created in connection with this Application. As Employer's capacity to pay and the need for the services proposed in the position were not challenged in the NOF, the Employer cited examples of parallel cases in which certification was granted in the past. **Dr. & Mrs. Steve C. Chang**, Dec. 24, 1987); **Mr. and Mrs. Timmy Wu**, 87 INA 735 (Jun. 28, 1988). The Board discussed a proposed position that was similar to this job and commented that

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[5]The CO also noted that the Alien was unlawfully working in the U. S. without a valid visa, and questioned whether Employer was using the hiring process as a facade to legitimize the Alien's immigration status, thus raising a further issue as to whether a job opening to which a qualified U. S. worker could be referred really existed.

[6]It is inferred that the CO found that the job requirement stated in the Employer's Application was unduly restrictive in violation of 20 CFR § 656.21(b)(2)(i)(A).

[7]The CO's further comments were addressed to the methods of rebuttal, including readvertising and reposting of the job offer after it was amended.

> The decisive issue in this case, however, is whether the position is a *bona fide* job opening for a full time tutor. We find that it is. The DOT does not state the approximate amount of time that a tutor should allocate to child care activities.

Dr. & Mrs. Steve C. Chang, *supra*. (2) The Employer supported the requirement of a baccalaureate degree with a major in the Chinese language or literature, with the opinion of Ms. Cheung, whose opinion and qualifications as an expert were discussed in the brief. Essentially, she finds Chinese is a difficult language to teach and requires collegiate training. (3) Employer's brief also supported the foreign language requirements that the CO found unduly to be restrictive under 20 CFR § 656.21(b)(2)(i)(A). Employer argued that because Chinese is a difficult language whose characters and organization are materially different from the Western phonetically based alphabet and speech patterns it was necessary to begin Chinese language training at a very early age in order to prepare for more formal instruction as the child grows older.[8]

Final Determination. The CO's Final Determination of January 27, 1997, denied Certification. AF 81-83. Noting the contents of the DOT description of the duties of a Child Tutor under Occupational Code No. 099.227-010, the CO said that the Specific Vocational Preparation (SVP) for a Child Tutor is 5, a period extending from six months to one year, while the requirement of a baccalaureate degree is equal to a job with an SVP rating of 7.[9] As a result, the CO found the Employer's requirement of an SVP of 7 to be an unduly restrictive job requirement as it is not normally required of U. S. workers in performing the job of Child Tutor.[10] The CO then considered and rejected the opinion of Employer's rebuttal expert on the need for a baccalaureate degree to teach the Chinese language, explaining:

> While the employer has submitted a letter from Ms. Cheung of Pacific Rim International School to endeavor to establish the business necessity of a Bachelor's Degree, it speaks to the requirements of an individual/teacher in a structured educational institution and not in a household. With all due respect to Ms. Cheung['s] educational attainment and expertise as an educator, this application is for a child tutor, not a Montessori teacher. The employer, therefore, has not adequately addressed the actual need for the position of Chinese Children's Tutor with a B.S. degree in Chinese Language or Literature.

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[8]As parts (4) and (5) of the NOF were conditioned on the result of Employer's response to parts (1) through (3), no substantive rebuttal appeared necessary to this party.

[9]See Appendix C, Dictionary of Occupational Titles (DOT).

[10]**20 CFR § 656.21(b)(2)** The employer shall document that the job opportunity has been and is being described without unduly restrictive job requirements:(i) The job opportunity's requirements, unless adequately documented as arising from business necessity: (A) Shall be those normally required for the job in the United States; **(B) Shall be those defined for the job in the Dictionary of Occupational Titles (D.O.T.) including those for subclasses of jobs**; (C) Shall not include requirements for a language other than English. (Emphasis added.)

AF 82. The CO then concluded that the Employer had failed to sustain the burden of proof under § 212(a)(14) of the Act and denied alien labor certification.

Appeal. On February 28, 1997, the Employer appealed to the Board from the CO's denial of alien labor certification. The Employer's argument relied on the following quotation from **Information Industries, Inc.**, 88 INA 082(Feb. 9, 1989)(*en banc*):

> The job requirement bears a reasonable relationship to the occupation in the context of the employer's business and are essential to perform, in a reasonable manner, the job duties as described by the employer.

The appeal contends that the CO failed to accord proper weight to the expert testimony and other probative evidence of record that established the business necessity of the preparation level that Employer required for the job at issue.

DISCUSSION

The Employer in this appeal challenged the CO's rejection of an expert's opinion that a baccalaureate degree is necessary to teach the Chinese language. In analyzing the issue presented we have turned to the decision in **Richard Lum**, 94 INA 219(Jun. 27, 1995), where the facts before the panel closely paralleled the circumstances controlling the disposition of the issue in the instant appeal. Both the panel in **Richard Lum** and the CO in the present case applied a critical element in the excerpt from the decision in **Information Industries,** (*supra*) that the Employer quoted but apparently overlooked in the course of this argument. In deciding **Information Industries** the panel said it was required to consider the employer's job requirements in the context of the employer's business in determining whether they bear a reasonable relationship to the occupation at issue and whether they are essential to the performance of the job duties described in the employer's application.

At the time this Employer filed this present application, the children to be tutored were four and two years of age. It thus appears that the object of hiring a Children's Tutor was to teach them to speak Chinese, perhaps before they learned English but certainly before they started school. There was no possibility that they would need training in any academic subject for several years. On the other hand, nothing in Ms. Cheung's opinion related to the nature or content of the elementary instructional methods that this Employer's application discussed. The position of the Employer is similar that of the employer in **Richard Lum**, whose child was two years old at the time of application. That employer explained that he anticipated that by the time alien labor certification was approved, a final determination reached, and the alien arrived in the United States the child would be seven and would be ready for the instruction in academic subjects. Saying that he contemplated permanent and long term employment, the employer in **Richard Lum** conceded that his application was premature. In affirming the rejection of certification by that CO the panel emphasized that § 212(a)(5) of the Act requires the Secretary of Labor to consider whether any U. S. workers are available at both the place and the time when the services

of the alien will be needed. For this reason the panel in **Richard Lum** concluded that,

> At the time of the filing of this application, the Employer did not have a need for any person, whether U. S. applicant or the Alien, to tutor academic subjects to his two year old child. Therefore, at the relevant time period the Employer's needs were simply for a Children's Tutor. Thus, the CO correctly found that the B. A. degree plus one year experience requirements were unduly restrictive. Accordingly, we find that certification was properly denied by the Certifying Officer.

Concurring in the reasoning of the panel in **Richard Lum**, this panel agrees that in this case the CO correctly found that this Employer failed to establish that the position at issue required the academic qualifications at an SVP level of 7 and failed to demonstrate the business necessity of such qualifications above SVP level 5 for the position of Children's Tutor.[11]

Accordingly, the following order will enter.

ORDER

The Certifying Officer's denial of labor certification is hereby Affirmed.

For the Panel:

FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor 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

[11] At Appendix C the DOT defined the SVP as the amount of elapsed time required by a typical worker to learn the techniques, acquire the information, and develop the facility needed for average performance in a specific job-worker situation. "This training," Appendix C continued, "may be acquired in a school, work, military, institutional, or vocational environment. It does not include the orientation time required of a fully qualified worker to become accustomed to the special conditions of any new job. Specific vocational training includes: vocational education, apprenticeship training, in-plant training, on-the-job training, and essential experience in other jobs."

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 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.