



DATE: FEB 7 1989

Case No.: 87-INA-518

In the Matter of

Fried Rice King Chinese Restaurant,  
Employer

on behalf of

Piao Chang Cheng,  
Alien

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

JOHN M. VITTONI  
Deputy Chief 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 a labor certification application. 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) (the 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 United States workers similarly employed.

The procedures governing labor certification are set forth at 20 C.F.R. §656. An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. §656.21 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. 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 herein] and any written arguments of the parties. 20 C.F.R. §656.27(c).

### STATEMENT OF THE CASE

Employer, Fried Rice King Chinese Restaurant, filed an application for alien labor certification on September 15, 1986, on behalf of the Alien, Piao Chang Cheng, for a position as a Chinese Specialty Cook (AF 35). On January 26, 1987, the Certifying Officer (C.O.) issued a Notice of Findings (N.O.F.) which denied certification on the basis of sections 656.20(c)(1) and 656.21(a)(1). The Certifying Officer stated that section 656.20(c)(1) "requires documentation showing that employer has enough funds to pay the wage offered the alien" (AF 28), and section 656.21(a)(1) "requires alien to provide documentation of his qualifications and evidence of his work history" (AF 28). To cure the deficiencies cited in the N.O.F. the C.O. required Employer to supply the following documentation as rebuttal:

- (1) The average number of restaurant patrons served on a daily basis,
- (2) the number of employees currently working at the restaurant and the job title of each,
- (3) A current certified financial statement, and
- (4) Alien's work history since December 1983.

(AF 28).

Employer's rebuttal, dated March 3, 1987, specifically addressed each of the above requirements. In response to requirement 1, Employer stated that the average number of customers served daily is approximately 130 (AF 20). In response to requirement 2, Employer stated as follows:

The restaurant presently has 5 employees (including the owner)

- 2 Cooks (full time)
- 1 Kitchen helper (part time)
- 1 Waiter and cashier (full time)
- 1 Cashier and Waitress (full time)

(AF 20). In response to requirement 3, Employer provided a Statement of Income for the 10-month period ending December 31, 1986. In response to requirement 4, Employer stated as follows:

During the period January 1, 1984 to May 31, 1986 the alien was working as a Business Manager with Grand Enterprises Co. Ltd. and enclosed is a copy of the

experience certificate. During the period June 1986 to September 1986, the alien was visiting U.S. and did not work. Since October 1986 the alien has been working at the Petitioner's place of business.

(AF 20).

On April 24, 1987, the C.O. issued a Final Determination denying certification on the basis of §656.20(c)(1). Employer requested review of the denial by letter postmarked May 5, 1987. Attached to the request for review were copies of two letters and a copy of Employer's tax return for its 1986 fiscal year. The originals of the above-mentioned letters and a notarized copy of the tax return were filed by Employer with this office on August 6, 1987, under a cover letter dated July 23, 1987.

### DISCUSSION

The regulations preclude consideration of evidence which was not "within the record upon which the denial of labor certification was based." 20 C.F.R. §656.26(b)(4). Accordingly, the two letters and the tax return submitted after the Final Determination was issued will not be considered.

The Certifying Officer's denial of labor certification in this case was based on §656.20(c)(1). The Certifying Officer determined that Employer had not provided a certified financial statement and that the documentation submitted by Employer was insufficient to establish that there are enough funds available to pay the wage offered to the alien. (AF 16).

In rebuttal to the NOF, Employer submitted a certified "statement of income" for the ten months ending December 31, 1986. Said statement is attached hereto as Exhibit "A." This statement indicates Employer's financial situation and lists Employer's net income as \$25,758.26. After reviewing the financial statement, the Certifying Officer concluded that "[i]t is unknown whether owner's salary is included in the total salaries listed in the financial statement" and that [t]he documentation submitted is insufficient to establish that enough funds are available to pay the wage offered alien which would amount to \$14,400 per year."

We find that the statement submitted by Employer is a certified financial statement and that by providing the statement, Employer has complied with the Certifying Officer's NOF request. The statement submitted by Employer was prepared by "Accounting Business Concepts," and was certified by a notary public. The Certifying Officer has failed to indicate why the statement does not constitute a certified financial statement. Furthermore, because the business is a corporation and the financial statement was prepared by an independent firm, we have no reason to believe (and the Certifying Officer has not provided one) that "salaries" as indicated on the financial statement does not include the owner's salary. As Employer has complied with the Certifying Officer's NOF instructions, denial of alien labor certification is improper.

The Certifying Officer's denial of labor certification is REVERSED, and labor certification is hereby GRANTED.

JOHN M. VITTONI

Deputy Chief Judge

In the Matter of FRIED RICE KING CHINESE RESTAURANT, 87 INA 518  
Chief Judge NAHUM LITT, with whom Judge BRENNER joins, dissenting.

I would remand this case to the Certifying Officer for a determination (Notice of Findings and opportunity for rebuttal) of whether the employer has enough funds to pay the alien.

NAHUM LITT  
Chief Judge

LU-HWA INC  
 FRIED RICE KING  
 STATEMENT OF INCOME  
 FOR THE 10 MONTHS ENDING 12/31/86

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--- YEAR TO DATE ---  
 ACTUAL    PERCENT  
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SALES	155,369.51	100.0	
PURCHASES	45,425.79	29.2	
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* GROSS PROFIT	109,943.72	70.8	
OPERATING EXPENSES			
SALARIES	46,750.00	30.1	
ADVERTISING	174.92	0.1	
FREIGHT	178.00	0.1	
INSURANCE	480.00	0.3	
LAUNDRY & UNIFORMS	250.27	0.2	
LEGAL & ACCOUNTING	550.00	0.4	
MAINTENANCE	1,134.71	0.7	
NON DURABLE EQUIPMENT	184.25	0.1	
RENT	9,350.00	6.0	
SUPPLIES - PAPER GOODS	2,275.66	1.5	
TAXES	11,921.94	7.7	
LICENSES	820.75	0.5	
TELEPHONE	941.59	0.6	
UTILITIES	9,173.37	5.9	
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* TOTAL OPERATING EXPENSES	84,185.46	54.2	
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* NET PROFIT	25,758.26	16.6	
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* NET INCOME	25,758.26	16.6	
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