



DATE: FEB 21 1989  
CASE NO. 88-INA-52

IN THE MATTER OF:

IMPORT S.H.K. ENTERPRISES, INC.,  
Employer,

on behalf of,

SANG HOON CHUNG,  
ALIEN.

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

MICHAEL H. SCHOENFELD  
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 a labor certification application. This application was submitted by 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.

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 28, 1985 S.H.K. Enterprises, Inc. ("Employer"), filed an application for labor certification on behalf of Sang Hoon Chung, ("Alien") for the position of "importer." (AF 33-34). The duties of the position were listed as importing merchandise from Brazil for the retail and wholesale market as well as arranging for the purchase and transportation of imports. The requirements for the position consisted of a Bachelor of Arts degree in economics or business and four years of experience in the job offered. A special requirement of fluency in the Portuguese language was also listed.

On November 6, 1986, the Certifying Officer issued her first Notice of Findings (NOF) (AF 28). She stated that the job opportunity contained a foreign language requirement which had not been supported by evidence of business necessity as required by §656.21(b)(2). Employer responded by stating that it would eliminate the language requirement and would readvertise (AF31). On January 5, 1987,<sup>1</sup> the New York State Department of Labor issued a job order notification which requested of employer a copy of the posting of the corrected job description deleting the language requirement with dates and results. (AF35). On April 1, 1987, Employer was again asked to submit a copy of the job posting as well as a statement describing the results of its most recent job order and advertising. It was further asked to specify the job-related reason in each instance where a referral did not result in a hire (AF37).

On July 24, 1987, a second NOF was issued. (AF41). Employer's application for labor certification was rejected for two reasons. First, Employer had not documented that it had posted a new notice of the job opportunity after the Portuguese language requirement had been deleted. Second, Employer failed to document that it had placed a new job order and had readvertised the job opportunity. The Certifying Officer stated that copies of advertisements were requested but never received. If the new ads were placed, Employer had to submit the tearsheets reflecting the name of the publication in which they ran and the dates on which they appeared.

By letter dated August 10, 1987, Employer rebutted stating that the job order was placed on the dates indicated in the NOF but that the New York Times failed to run the advertisements. Employer further stated that it was willing to place a new job order as soon as the Department of Labor made the request. (AF42).

On September 14, 1987, the Certifying Officer issued a final determination denying labor certification. (AF45). The Certifying Officer stated that the second NOF had informed Employer of the need to repost the notice of the job at the place of business with the language requirements

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<sup>1</sup> The date on this document is listed as January 5, 1986. However, it appears that the correct date should be January 5, 1987 as this communication concerns the corrected job description which was not submitted until December 17, 1986.

deleted. The rebuttal failed to document compliance with this requirement. The final determination also stated that, although the Employer indicated a willingness to comply with the placement of a new job order and to re-advertise, it was not requested to do so because it had failed to comply with the posting requirement.

In a letter dated October 1, 1987, Employer requested review (AF59). It attached a copy of a job notice with a cover letter dated May 4, 1987, addressed to the New York Department of Labor. Employer stated that the notice had been posted for a period of ten consecutive business days. It did not, however, provide the dates or the results of the posting.

### DISCUSSION

Section 656.21(b)(3) states, in pertinent part, that ". . . the employer shall document that it has posted notices of the job opportunity at its place of business. . . ." The final determination issued on September 14, 1987 was based solely on Employer's failure to document that it had met this requirement. In its October 1, 1987 request for review, Employer, for the first time enclosed evidence which, it maintained, showed that the requirement had been complied with. This Board's review of the denial of labor certification is based solely on the record upon which the denial was based, the request for review, and legal briefs. This Board does not consider additional evidence submitted in conjunction with a request for review. The University of Texas at San Antonio, 88-INA-71 (May 9, 1988). Accordingly, the evidence submitted by Employer after the final determination was issued is not considered at this time.

Since Employer argues that it had previously complied with the directives of §656.21(b)(3), it is suggesting that the evidence attached to its request for review was in the possession of the Certifying Officer prior to the final determination and that this evidence documents that Employer had complied with the posting requirements. For the following reasons, we find the record establishes that the Certifying Officer was not in possession of that evidence. In the second NOF issued on July 24, 1987, approximately 2 months after Employer claims to have submitted the copy of the posting, the Certifying Officer stated, inter alia, that labor certification could not be granted unless Employer documented that the job vacancy had been posted. Employer therefore was given specific notice that the Certifying Officer had not received evidence of the posting which Employer claims to have submitted at an earlier date. If the May 4, 1987 letter had been in the Certifying Officer's possession there is no reason the second NOF would have requested documentation of the posting. In fact, prior to the issuance of the second NOF, Employer was asked on two occasions by the state agency to document the posting of the corrected job description. Employer was given ample notification that posting documentation had not been received and was to be submitted. Yet it failed to do so. Accordingly, the Certifying Officer's final determination of September 14, 1987 properly denied labor certification because Employer failed to meet its burden of proof by producing the documentation required by §656.21(b)(3). The application for labor certification was thus properly denied by the Certifying Officer.

ORDER

The Certifying Officer's determination denying certification is AFFIRMED.

MICHAEL H. SCHOENFELD  
Administrative Law Judge

MHS/MKG/mlc