



DATE ISSUED: October 24, 1989
CASE NO. 88-INA-276

IN THE MATTER OF THE APPLICATION
FOR AN ALIEN EMPLOYMENT CERTIFI-
CATION UNDER THE IMMIGRATION AND
NATIONALITY ACT

LIGNOMAT USA, LTD.
Employer

on behalf of

ULRICH PAUL HEIMERDINGER
Alien

John T. Wittrock, Esq.
For the Employer

BEFORE: Litt, Vittone, Brenner, Guill, Marden, Murrett,
Romano, Tureck, and Williams, Administrative Law Judges

NAHUM LITT
Chief Judge:

DECISION AND ORDER

This matter arises from an application for labor certification submitted by the Employer on behalf of the Alien pursuant to Section 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(14) (1982). The Certifying Officer (CO) of the U.S. Department of Labor denied the application, and the Employer requested review pursuant to 20 C.F.R. §656.26 (1988).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 there are not sufficient workers who are able, willing, qualified, and available at the time of the application for a visa and admission into the United States and at the place where the

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

alien is to perform such labor, and that 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 apply for labor certification pursuant to §656.21. 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 the Appeal File (A1-A130), and any written arguments of the parties. See §656.27(c).

Statement of the Case

On November 21, 1986, Employer filed an application for alien employment certification on behalf of the Alien for a position described as 67% marketing engineer and 33% electronics design engineer. (A99-A130). The job duties included overseeing and managing the American subsidiary of a foreign corporation which manufactures and sell electronic dry kiln equipment controls. (A101). The requirements for the position included a Bachelor of Science degree in engineering with the major field of study in business and five years experience in the design and manufacture of dry kiln control systems. "Other special requirements" included: fluency in German; training and or experience in marketing - 3 years, finance - 3 years, management - 2 years. (A101).

Applications from three U.S. workers were received in response to Employer's recruitment efforts. (A64-A79). A request for waiver of recruitment was submitted on July 29, 1987. (A62). Employer indicated that two of the three applicants were rejected because they lacked experience in microprocessor dry kiln control systems or the wood products industry. Employer stated that the third applicant, although submitting a short letter briefly discussing his qualifications, did not submit a resume, and thus his specific qualifications could not be determined. Further, he lacked specific experience. (A62-A63)

On December 10, 1987, the CO issued a Notice of Findings (NOF). (A43). The CO found that there was no employer employee relationship as defined by the regulations and no job opportunity for U.S. workers. (A44) According to the CO, §656.50 defines employment as "permanent full time work by an employee for an employer other than oneself; for purposes of this definition an investor is not an employee." The CO listed several factors in support of her conclusion: the Alien has been employed by Lignomat USA, Ltd., since April, 1982 and his duties include managing and supervising Lignomat USA, Ltd.; tax records list the Alien as President of Lignomat USA, Ltd., and Mr. Klinkmuller, who signed the application for certification on behalf of Employer, as Vice President, and thus "[i]t would seem highly unlikely that the Vice President would select an individual other than the President for the job listed; the internal posting advised applicants to contact Lignomat USA at the address listed as the Alien's residence, and thus "[i]t is inappropriate for the alien to participate in interviewing or considering

U.S. workers." (A44). Employer was required to submit documentation which would support a finding that a bona fide employer employee relationship exists and that a legitimate job opening exists. (A44)

On February 15, 1988, Employer submitted its rebuttal. (A11- A42). According to an affidavit signed by Employer's general counsel, (A16-A19), Lignomat USA, Ltd., incorporated in December, 1979, is a subsidiary of Lignomat GmbH, a German corporation. The German parent corporation originally owned 50% of Employer. In 1982, the German parent corporation obtained a 51% interest, and the Alien purchased the remaining 49% of the shares. The Alien later transferred half of his shares to his wife. The current directors of the corporation are Mr. Klinkmuller, Mr. Heimerdinger, (the ALien), and Mrs. Heimerdinger, with Mr. Klinkmuller as Chairman of the Board. The Alien is the President of the corporation, and his wife is the Secretary Treasurer. As President, the Alien is responsible for managing the day to day affairs of the corporation. "Corporate decisions outside of the ordinary course of business are required to be made by the Board of Directors of the Corporation. Lignomat, GmbH, as owner of 51% of the outstanding stock of the Corporation, determines who is elected as directors of the Corporation." (A18). The corporation has paid no dividends to its stockholders. The Alien does not receive any compensation from the corporation other than salary. According to an affidavit signed by a secretary, Employer has five employees, none of whom are related to the Alien. (A34). Employer also submitted the corporation's Articles of Incorporation, (A20- A23), the By-Laws, (A24-A33).

Responding to the Notice of Findings, Employer argued that the job opportunity is not identical with the Alien's existing functions, and that if the position were filled by someone, the Alien would still be needed to manage the day to day affairs of the corporation. Employer stated that the affidavit of Mr. Craig establishes that Mr. Klinkmuller is not the Vice President of the corporation. Employer also argued that while the address for referral was the same as the address for the Alien, the alternative addresses were inappropriate, and that the Alien was not involved in the interview process. Employer concluded that there was an employer employee relationship, and that a bona fide job opportunity existed. (A11-A15).

On March 14, 1988, the CO issued a Final Determination denying labor certification. (A4-A6). Based upon the rebuttal and documentary evidence submitted, the CO concluded:

The record shows that the Directors of the Corporation and the Officers of the Corporation are the same individuals. Since the application was filed by Lignomat USA, Ltd., and Mr. Heimerdinger is President of Lignomat USA, Ltd., it seems both unlikely and incongruous that he would support the hiring of someone other than himself, especially when he would be the beneficiary of this labor certification.

The CO further stated:

Therefore, it is my opinion that no employer employee relationship exists as defined in 20 CFR §656.20 (see "employment"). As one of the owners, and

President of this Corporation, the Alien appears to be petitioning on his own behalf and is unlikely to displace himself with a U.S. worker.

Employer requested review of this decision in a letter dated April 15, 1988. (A1). An accompanying brief was filed on May 27, 1988.

Discussion and Conclusion

The CO denied certification on the ground that Employer failed to establish a valid employer employee relationship. Under §656.50 "employment" means permanent full time work by an employee for an employer other than oneself; an investor is not an employee. The Board has not held that where an alien has any ownership interest in the corporation that is seeking labor certification, an employer employee relationship cannot exist. However, the "employer has the burden of providing clear evidence that a valid employment relationship exists..." In re Amger Corp., 87-INA-545 (Oct. 15, 1987) (en banc).

The District of Columbia Court of Appeals recently identified a two prong analysis used in pre BALCA cases to determine whether a genuine employment relationship exists. In Hall v. McLaughlin, 864 F.2d 868, 873-874 (D.C. Cir. 1989), the Court identified the standards as (1) whether in light of the alien's part ownership, the corporation is a sham and a scheme for obtaining the Alien's labor certification (sham test), and (2) whether the corporation has come to rely heavily upon the alien's skills and contacts so that, were it not for the alien, the corporation would probably cease to exist (inseparability test).

The "sham" question determines only whether the corporation was fraudulently established for the sole purpose of obtaining certification for the alien. The "inseparability" question considers whether the corporation, even if legitimately established, relies so heavily on the pervasive presence and personal attributes of the alien that it would be unlikely to continue in operation without him. This latter question is appropriate because a company that depends so heavily on the alien that it would probably shut down without him is unlikely to make any real choice between him and a "qualified" United States worker." Id. at 874-875.

At the root of both tests is a consideration of whether, by virtue of a sham or inseparability, the employer would be unlikely to replace the Alien and whether there is a bona fide job opportunity clearly open to any qualified U.S. worker. "The two situations are the functional equivalents of one another in that a genuine test of the labor market is unlikely in both instances." Id. at 874.

In the instant case, the record does not indicate that the corporation was established solely for the purpose of obtaining certification for the alien. Employer was incorporated in December, 1979 and the Alien did not become involved until March, 1982. However, the record does establish that Employer and the Alien are sufficiently inseparable as to make a genuine test of the labor market unlikely. The Alien and his wife own 49% of the shares of the corporation. He and his wife are two of the three members of the Board of Directors. He and his wife comprise the officers of the corporation, with his holding the position of President. He is one of only five

employees of the corporation. He also developed the electronic microprocessor based kiln dry control system sought to be marketed by the corporation. Based on the above, we agree with the CO's conclusion that it is unlikely that Employer would displace the Alien with a U.S. worker.

Employer argues that despite the Alien's position, the parent corporation, Lignomat GmbH, controls Lignomat USA, Ltd. While the parent corporation may indeed have control, the Alien, by virtue of his position as shareholder, director and president, is so inseparable with the corporation as to make genuine test of the labor market unlikely. Employer has not demonstrated a valid employment relationship; therefore, the CO properly denied certification.

ORDER

The Final Determination of the Certifying Officer denying certification is hereby AFFIRMED.

NAHUM LITT
Chief Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 30 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, NW, Washington, DC 20036. 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.

NL:AS

Judge Jeffrey TURECK, Dissenting:

To determine if there is a genuine employment relationship under §656.50, we have looked to whether "the Alien is such an integral part of the Employer that it is difficult to believe that Employer is really seeking a U.S. worker to fill this position." In re Keyjoy Trading Co., 87-INA-592 (Dec. 15, 1987) (en banc), slip op. at 4; see also In re Friendly Starts, Inc., 87-INA-517 (Jan. 29, 1988); In re Edelweiss Manufacturing Co., 87-INA- 562 (March 15, 1988) (en banc). The test we applied in Keyjoy is consistent with what the U.S. Court of Appeals for the D.C. Circuit has recently called the "inseparability" test. In Hall v. McLaughlin, 864 F.2d 868, 874 (D.C. Cir. 1989), the Court found that the Secretary has traditionally applied a two tiered test ("inseparability" and "sham") to determine if there is a genuine employment relationship, both parts of which must be satisfied for certification to be granted:

[The employer must establish that it] is an ongoing business that is not likely to cease to exist without the alien. The employer [must] also [establish] that its corporate shell is not a sham or scheme for obtaining the alien's labor certification.

(Emphasis in original). Although the majority appears to adopt the standard set out in Hall, its decision that there is not a valid employment relationship in this case is inconsistent with Hall, and is not mandated by our previous decisions.

It is significant in the present case that not only was the Alien uninvolved in the organization of the Employer corporation and has had no interest or control in the parent corporation, but he has never been employed by the parent corporation. The record establishes that Lignomat USA, the Employer corporation, was formed in late 1979 as a subsidiary of Lignomat GmbH, a German corporation. The Alien held no interest in either the parent or subsidiary corporation at that time; rather, Employer had been incorporated and doing business for over two years when, on March 31, 1982, the Alien began to work for Employer and obtained an ownership interest in the corporation.¹ On that date the Alien purchased 49% of the shares of Lignomat USA, and the parent corporation, which originally had owned a 50% interest in its subsidiary, purchased an additional 1%, thus gaining a 51% controlling interest.² There is no indication that the nature of Employer's business changed in response to the Alien's involvement. The Alien continues to have no interest or control in the parent corporation.

Further, as established by the evidence of record, the Alien not only has less than a controlling ownership interest in the Employer, he also does not have de facto control. The de facto control. The de facto employer is the Chairman of Lignomat GmbH, Horst Klinkmuller. Moreover, since a single owner owns 51% of the corporation, that the Alien owns or controls the other 49% gives him as little control as if he owned a single share. While as a Director, and in his position as President of the Employer corporation, the Alien is involved in the day to day management of the corporation, the record establishes that Horst Klinkmuller is the Chairman of the Board and the President of the majority stockholder, and as such as ultimate control over the major decisions regarding Lignomat USA (AF 17-18, 28-31). Further, the CO was incorrect in stating that Mr. Klinkmuller is Vice President of Lignomat USA, and thus is subject to the Alien's authority. Rather, Mr. Klinkmuller is the Chairman of the Board of Lignomat, USA, and was its President until the Alien took over that job (AF 16-19). In addition, there is no indication in the record that the relationship between the Alien and Mr. Klinkmuller is anything but an arms length business relationship.

The record demonstrates that Lignomat's corporate structure was not created with alien employment certification in mind. Nor was the job created to benefit a family member. It is a

¹ The Alien spent the previous 11 years working for an unrelated business in Portland, Oregon. See AF 105-06.

² The record indicates that the only other transfer of stock was a half interest from the Alien to his wife in January 1985 (AF 18).

legitimate job with an established company. The evidence establishes that Employer actively recruited qualified U.S. workers for the position. A notice of the job opportunity was posted, and it was advertised in a newspaper of general circulation in addition to recruitment efforts conducted through the Job Service recruitment system. The three U.S. applicants for the job were rejected for lawful job related reasons, and it is not contended otherwise.

This record further indicates that Employer is not a sham or scheme for obtaining certification, and the majority does not contest this point. In addition, Employer existed without the Alien and there is no evidentiary basis to conclude that it could not continue to exist without him if a qualified U.S. worker was available to fill the position.

Since Hall's inseparability test is similar to the test employed by the Board in analogous cases, it is instructive to look at our decisions in these cases. These decisions fall into two groups. First, there are those cases in which the Alien or his immediate family owns a majority of the employer's stock. See In re Edelweiss, *supra*; In re Pan Ocean Aquarium, 87-INA-691 (Feb. 17, 1988); In re Kica, Inc., 88-INA-169 (July 18, 1988); In re Amger Corp., 87-INA-545 (October 15, 1987) (*en banc*); In re Sifer, Inc., 88-INA-206 (Aug. 2, 1988) (alien's wife owned 100 percent of the corporation); In re Shehrazade, Inc., 88-INA-170 (July 29, 1988) (alien owned 48 percent of stock, wife and children owned the other 52 percent). These cases should be considered separately, since I believe that the Board ultimately will deny certification in these case on a per se basis. For where an alien owns a controlling interest in a business, in a practical sense he is the business, and would be employing himself, contrary to the dictates of §656.50.

Other than the majority ownership cases, in the cases in which certification was denied the alien was the incorporator of the employer corporation. In In Re Friendly Starts, Inc., 87-INA-517 (Jan. 29, 1989), the alien, in addition to being the incorporator, served as President until shortly before the employer applied for labor certification. Unlike the Employer in the present case, which has been incorporated and was doing business for seven years prior to applying for labor certification on the alien's years prior to applying for labor certification on the alien's behalf, Friendly Starts, Inc., had only been in existence for five months prior to filing its application for labor certification. Similarly, in In re Hong Kong Metal Works (U.S.A.), 87-INA-705 (1988), the alien was one of only three directors, one of three officers, and one of two employees with authority to hire and fire. Employer also did not respond to the CO's request to document the alien's stock ownership, leading to an inference that the alien was a major shareholder. Significantly, the Alien was also the Employer's incorporator, and worked for the Employer's parent company for the previous 21 years.

Also, in Keyjoy, *supra*, the Alien was one of only four shareholders, owning 10% of the stock, was one of three directors, and was manager of the company. Further, the Board found it significant that the alien was an important party in each of the two parent companies of the employer corporation, had a history of continuous involvement in all three corporations, and was a pivotal figure in both the organization and reorganization of the employer corporation. Even in Shehrazade, *supra*, which I have grouped with the majority ownership case despite the Alien's 48 percent ownership, since his wife and children own the rest of the stock, that the alien was the Employer's incorporator was a significant factor in the Board's decision.

Thus, the Board's decision in this case goes well beyond our previous decisions, clearly foreshadowing the pro se denial of certification in any case in which the Alien has a significant ownership interest in the Employer and or is a high ranking corporate officer or director. There is no justification for this approach in §656.50, our decisions, or the D.C. Circuit's Hall decision. There is no evidence to support a finding that Lignomat USA will be unable to function without the Alien. It was a viable entity for almost 2 1/2 years prior to his involvement in the business, and the evidence indicates that his involvement with Lignomat, USA is a legitimate business relationship which is severable at any time by Lignomat's parent corporation and/or its principal, Mr. Klinkmuller.

I would find that the Employer has met its burden of establishing that a valid employer/employee relationship exists and that the position for which labor certification is sought represents a legitimate job opportunity for U.S. workers. Therefore, the Certifying Officer's determination denying certification should be reversed.