



DATE: OCT 15 1987

CASE NO. 87-INA-545

IN THE MATTER OF

AMGER CORPORATION
Employer

on behalf of

RAINER KAMINSKI
Alien

BEFORE: Litt, Chief Judge, Vittone, Associate Chief Judge, and Brenner, DeGregorio, Fath,
and Tureck, Administrative Law Judges

STUART A. LEVIN
Administrative Law Judge
Member of the Board

DECISION AND ORDER DENYING CERTIFICATION

This proceeding was initiated by the Employer, Amger Corporation of Fort Pierce, Florida, which requested administrative judicial review pursuant to 20 C.F.R. Section 656.26 from the determination by a Certifying Officer of the Employment and Training Administration in Atlanta, Georgia, denying an application for labor certification, which the Employer submitted on behalf of the Alien, Rainer Kaminski, pursuant to Section 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(14) (hereinafter 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 a visa 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 certifications are set forth at 20 C.F.R. Part 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. 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 (hereinafter AF), and any written arguments of the parties. 20 C.F.R. § 656.7(c).

Statement of the Case

On July 16, 1986, the employer, Amger Corporation, filed an application for alien employment certification to enable the alien, Rainer Kaminski, to fill the position of General Manager-Lodging Facilities. The duties of the position include managing, maintaining, and developing lodging facilities such as motels and small hotels and handling the upgrading, repairing and supervision of improvements. The employer's requirement for the position is two years experience.

Following the issuance of a Notice of Findings dated February 10, 1987 (AF 31), the employer filed an undated rebuttal letter which was received by the Certifying Officer on March 23, 1987 (AF 5). On April 29, 1987, the Certifying Officer issued a Final Determination denying certification on the grounds that, in violation of 20 C.F.R. 656.20(c)(8), there was no bona fide job opening.

Discussion

The employer in this case, Amger Corporation, was founded by the alien, Rainer Kaminski. He and his family own one hundred percent (100%) of the closely held corporation. He is the President/General Manager of the corporation (AF 162) and was the sole member of the Board of Directors when it was founded (AF 53).

The employer has the burden of providing clear evidence that a valid employment relationship exists, and that a bona fide job opportunity is available to domestic workers, and that the employer has, in good faith, sought to fill the position with a U.S. worker. Pasadena Typewriter and Adding Machine Co., Inc. v. Department of Labor, Case No. CV-83-5516-AAH(T), Slip op. (C.D.Cal. March 26, 1984). The employer in this case has not met its burden.

Although the employer claims neither the alien nor his family have responsibility for the hiring and firing of employees (Brief for Employer at p. 3), and argues that its Executive Manager, David Amicon, “uses his independent judgment in the hiring and firing procedure of U.S. workers” (AF 5), these assertions are not convincing in light of the record.

Not only is the alien a 100% shareholder, a director, president, and founder of the closely held corporation, but the Executive Manager, Mr. Amicon, was hired by the employer as a result of its screening for the job opening in question. Instead of hiring Mr. Amicon to fill the position advertised, the employer hired him at a position allegedly higher in the organization of the

company, whereupon Mr. Amicon hired the company's owner to fill the position advertised. The fact that a position was created after a qualified U.S. worker applied for the job for which certification is sought suggests that it was created in a way to keep the original position open to the alien and to circumvent 20 C.F.R. 656.20. Moreover, the alien's present duties as President/General Manager of Amger Corporation and the description of the job duties for the job opportunity in question are strikingly similar (AF 141 and 162), and further suggest that the job opening at issue was slotted for the alien.

Under the totality of the circumstances, we conclude that the employment decision by Amger Corporation was not independent of the alien's control, that a valid employer-employee relationship does not exist, and that a valid test of the domestic labor market was not employed, in good faith, to fill the position with a U.S. worker. We find, therefore, that no bona fide job opening was available to U.S. workers and accordingly, uphold the Certifying Officer's decision to deny certification.

ORDER

IT IS ORDERED, that the denial of labor certification upon the application for a General Manager-Lodging Facilities be and it hereby is, affirmed.

For the Panel:

STUART A. LEVIN
Administrative Law Judge
Member of the Panel

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