



DATE: 15 DEC 1987
CASE NO. 87-INA-592

IN THE MATTER OF

KEYJOY TRADING COMPANY
Employer

on behalf of

WEN-WEI YANG
Alien

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

Jeffrey Tureck
Administrative Law Judge

DECISION AND ORDER

The above-named Employer requested review pursuant to 20 C.F.R. Section 656.26, of the U.S. 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) (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. §656.27(c).

Statement of the Case

Keyjoy Trading Co. of Texas is located in Dallas and is engaged in the business of importing and distributing jewelry. On March 28, 1986, the company filed an application on behalf of the Alien, Wen-Wei Yang. (AF 107). The Alien's job title is Import/Export Manager, and the duties of the position are to negotiate contracts with suppliers and buyers in Taiwan, and to direct and coordinate the import/export of jewelry. The requirements of the position were listed as fluency in the Chinese language, knowledge of international trade procedure with Taiwan, familiarity with the quality, market price and classification of jewelry, and the willingness to travel to Taiwan at least two times per year with a two-week stay at each visit. The Alien has occupied this position since December, 1983 (AF 108), when he came to the United States to organize employer. (AF 10).

The Notice of Findings was issued on November 7, 1986. (AF 29). The Certifying Officer required the Employer to document the relationship between Keyjoy Trading Co. of Texas and Key-Joy Enterprises Co. of Taiwan and Keyjoy Trading Corp. in Taiwan. The Certifying Officer also noted that the Alien and the President of the company have the same last name and requested information as to the Alien's relationship to the company and all prior parent companies.

Employer responded on December 3, 1986. (AF 10). Employer first clarified that the Alien and the President of the company are not related by blood or by marriage even though they share the same last name. Next, Employer provided the following history of the Alien's relationship to the present and parent companies.

From March 1978 until May 1982, the Alien was President of Key-Joy Enterprises Co. of Taiwan (Keyjoy Enterprises). That company ceased its operations and was succeeded by Keyjoy Trading Corp. in Taiwan (Keyjoy Taiwan). The Alien was employed by Keyjoy Taiwan as Sales/Export Manager from July 1982 until December 1983. At that time, the Alien came to the United States to organize an American branch of Keyjoy Taiwan. In March 1984 this branch was incorporated in Texas as a wholly-owned subsidiary of Keyjoy Taiwan and was named Keyjoy Trading Co. of Texas (Keyjoy Texas). The Alien served as manager of this company and as one of two directors. In March, 1986 Keyjoy Taiwan ceased doing business, and Keyjoy Texas was reorganized. Following this action, the Alien was one of three directors, owned 270 of 3,000 shares (slightly less than 10) and was employed as manager.

The Final Determination was issued on April 10, 1987. (AF 5). The Certifying Officer denied labor certification stating that there is no employer-employee relationship between the

Alien and the company and that the position does not represent a legitimate job opportunity for U.S. workers. Denial was based upon 20 C.F.R. 656.50.¹

The Employer requested review of this decision on May 6, 1987. (AF 3). The request was accompanied by a brief, also filed on May 6, 1987. (AF 7).

Discussion

The record demonstrates that the Alien not only is a 10 shareholder in the corporation, but also that he is one of only four such shareholders, one of three directors, and manager of the company. Moreover, he came to this country specifically to organize employer. As such, the Alien's control over the corporation is much greater than his 10 ownership interest would appear to indicate.

Keyjoy Texas is a closely held corporation, and its three officers are three of the four shareholders. (AF 18). The managerial authority of the corporation is therefore concentrated in a small number of individuals, one of whom is the Alien. Furthermore, in his positions as shareholder, director and manager, the Alien is involved in each of the three levels of management present in the corporation.

Also significant is the fact that the Alien was an important party in each of the two parent companies of Keyjoy Texas. Indeed, the Alien has had a history of continuous involvement in the three Keyjoy corporations and was a pivotal figure in both the organization and subsequent reorganization of Keyjoy Texas, the Employer in this appeal (AF 10), which effectively moved the operation of Keyjoy from Taiwan to Texas.

These facts indicate that 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. Rather, it appears that, through the mechanism of alien labor certification, Employer is attempting to keep one of its key people in this country to enable him to continue doing the job he has been doing for the last three years.

Therefore, we agree with the Certifying Officer's finding that the Employer has not met its burden to prove that the position represents a legitimate job opportunity for U.S. workers (AF 5), and uphold his denial of certification. Since we are affirming the Certifying Officer on this ground, there is no reason to address the issue of whether there was an employer-employee relationship under the facts of this case.

¹ Section 656.50 defines "Employment" as permanent full-time work by an employee for an employer other than oneself.

ORDER

The decision of the Certifying Officer to deny labor certification is affirmed.

JEFFREY TURECK
Administrative Law Judge

DeGregorio, Administrative Law Judge, dissenting:

I would agree that where, as here, the alien has a significant connection with a corporation applying for a labor certification, the case warrants close, even skeptical, scrutiny. But if suspicions are not to amount to an irrebuttable presumption, it must be possible to dispel them with facts.

In this case, the application for labor certification was signed by Wen-Chang Yang, as president of Keyjoy. Yang is a 50 shareholder, and president and director, of the corporation; a U.S. citizen; and no relation of Alien. AF 10, 18, 21. In the application Yang declared, under penalty of perjury, that the ""job opportunity has been and is clearly open to any qualified U.S. worker." AF 107. Yang then posted a notice of the job opportunity, and advertised it in a newspaper of general circulation, while the local office was attempting to recruit U.S. workers through the Job Service recruitment system. AF 32, 33, 35-37. There were several applicants for the job, two of whom were referred by the local office. Yang interviewed the applicants and made a written report of the results to the local office. AF 38-42, 52-53.

The Board, without even advertng to these facts, implies, among other things, that Yang's declaration in the application and his recruitment efforts were all fraudulent, presumably in that he had all along the intent and power to deny the job to everybody other than Alien. I would need much more than what is stated in the majority opinion in order to join in such a serious imputation.

NICODEMO DeGREGORIO
Administrative Law Judge