

**USDOL/OALJ Reporter****NAKAMO WAREHOUSE & TRANSPORTATION, 1992-INA-337 (Nov. 23, 1993)**

[Source: Immigration Law Systems, Inc., Columbus, OH \*]

**U.S. Department of Labor**Board of Alien Labor Certification Appeals  
Washington, DC

DATE: November 23, 1993

CASE NO. 92-INA-337

IN THE MATTER OF NAKANO WAREHOUSE & TRANSPORTATION CORP., Employer  
SHIN KOBAYASHI, AlienAllison-Claire Acker, Esquire  
Los Angeles, CaliforniaBEFORE: Clarke, Glennon and Litt, ALJ  
David A. CLARKE, Jr., Administrative Law Judge

REGION:9

## STATEMENT OF THE CASE

Employer, Nakano Warehouse & Transportation Corp., is engaged in public and bonded warehousing in Compton, California. (AF at 124.) On February 15, 1991, Employer filed an Application For Alien Employment Certification on behalf of Mr. Shin Kobayashi, Alien, for the position of Chief Executive Officer. (AF at 124.) Employer required a bachelor's degree in economics, six years of experience in corporate management, and spoken and written fluency in Japanese. (AF at 124.) The position offered an annual salary of \$53,796.00. (AF at 124.) The application was signed by Rudy Tsujimura, Vice President, Operations. (AF at 125.)

The job was advertised in the Press-Telegram, (AF at 127-129), and was posted on Employer's bulletin board, (AF at 131-32). No U.S. workers applied. (AF at 2.)

On October 1, 1991, the Certifying Officer (hereinafter "CO") issued a Notice of Findings, proposing to deny certification, because the job did not appear to be clearly open to qualified U.S. workers, 20 CFR Section 656.20(c)(8). (AF at 120-21.) The CO found that the Alien, Mr. Kobayashi,

directs and oversees U.S. operations with broad discretionary authority as enumerated in the job description. Mr. Kobayashi only receives general instructions from the Board of Directors of the company and Mr. Nakano, his immediate supervisor.

(AF at 121.) Therefore, the CO concluded that the Alien's broad discretionary power allowed him to "ultimately exercise a determining influence in assessing the qualifications of any U.S. worker who might apply." (AF at 121.) Considering it "doubtful that the alien would hire a U.S. worker to replace himself," the CO resolved that "[s]uch alien involvement mandates denial of certification without regard to whether any of the U.S. applicants were qualified and available for the job." (AF at 121.)

On September 18, 1991, Employer requested an extension of time for filing rebuttal, because the Alien was currently in Japan on a business trip and because the president of the company was permanently stationed in Japan. (AF at 118.)

On September 24, 1991, the CO issued a Supplemental Notice of Findings, which granted Employer's request for an extension of time and which described "other deficiencies" in Employer's application. (AF at 115.) The CO stated that the Alien Labor Certification Application indicated that the Alien had an E-2 Visa, indicating that the Alien was a Treaty investor, and that the state job service had indicated that the Alien had been signing documents for Employer as "Vice President" since April 28, 1986. (AF at 115.) Therefore, the CO inquired into whether the Alien had a financial investment in the firm. (AF at 115.) In addition, noting that the Alien appeared to hold the position of Executive Vice President and that Rudy Tsujimura, who signed the application for labor certification, was the Vice President of Operations, the CO questioned whether the Alien had authority over the individual signing the application. (AF at 115.) Moreover, the CO stated that since the Alien was part of the management staff, the Alien ultimately exercises a determining influence in assessing the qualifications of any U.S. worker who applies for the job. Consequently, the CO asserted that it was unlikely that the Alien would hire a U.S. worker to replace himself or that the corporation would attempt to replace the Alien. (AF at 115.) Accordingly, the CO found this to be contrary to 20 CFR Section 656.20(c)(8), which requires the

employer to document that the job opportunity has been and is clearly open to any qualified U.S. worker. (AF at 116.) Therefore, the CO questioned whether there had been a good faith effort by Employer to recruit a qualified U.S. worker to replace the Alien, required Employer to submit evidence that the Alien's position would not influence the selection process, and required that Employer document that the job was clearly open to qualified U.S. workers. (AF at 116.)

Employer responded to the Notice of Findings on October 28, 1991. (AF at 78-79.) First, Employer explained that while the Alien held an E-2 Treaty Investor Visa, he had obtained the visa as an employee of the company, not as a principal investor. (AF at 78.) Employer provided a certified copy of its Articles of Incorporation and By-Laws, (AF at 81-98), a memorandum of Action Without a Meeting by the Sole Shareholder, (AF at 110-11), and copies of stock certificates issued to Nakano Warehouse & Transportation, Co., Ltd., (AF at 99-109). Employer stated that these documents established that it was a wholly owned subsidiary of Nakano Warehouse & Transportation Co., Ltd., "a Japanese corporation privately held by the Nakano family." (AF at 78.) Further, Employer stated that the Alien held no stock interest in its parent company or in any other affiliated company. (AF at 79.) In addition, Employer stated that the Alien "is not related to any of its corporate officers whom are listed on the Action Without A Meeting By The Sole Shareholder," (AF at 79), which was signed by Mr. Junichi Nakano, President, (AF at 110-11).

Second, Employer provided an affidavit by Rudy Tsujimura, who had signed the Application for Alien Labor Certification, (AF at 125), stating that he was authorized by the company's president to direct recruitment in order to replace the Alien on a permanent basis, that he possessed the authority to recommend qualified U.S. applicants independent of the Alien's participation, and that he reported directly to the president in all matters concerning the selection process. (AF at 79, 112.)

Third, Employer provided an Organization Chart, indicating that the Alien was the "E.V.P.", the third ranking position within the corporation and the highest ranking position in the United States, and indicating that Mr. Tsujimura reported to the Alien. (AF at 113.) Employer explained that both the Alien and Mr. Tsujimura were board members, that the Alien was the more senior vice president, and that while both held joint responsibility for overall management, "all ultimate decisions rest with Mr. Nakano." (AF at 79.) Further, Employer stated that the corporation had been established in 1971 and the Alien had joined the company in 1977. (AF at 79.)

Fourth, citing Paris Bakery Corp., 88-INA-337 (Jan. 4, 1990), Employer stated that since no U.S. worker applied for the job, none could have been prejudiced by the Alien's position as management staff, thereby making moot the issue of whether a bona fide job offer exists. (AF at 80.)

On November 13, 1991, the CO issued his Final Determination, denying labor certification on the ground that Employer had not supported his burden of proof to show that the job was clearly open to U.S. workers and therefore was in violation of the regulations at 20 CFR Section 656.20(c)(8) (AF at 65-68.)

Specifically, the CO stated that while Mr. Tsujimura had stated that he was responsible for operational aspects, namely overseeing personnel matters and warehouse and transportation services, item #13 on the Application for Alien Labor Certification indicated that the Alien would supervise four departments and twenty-one employees. (AF at 66.) Further, the job duties and the Alien's position, as indicated on the organization chart, indicated that the Alien was second-in-command. (AF at 66.) Therefore, the CO found it "unlikely that the alien and/or corporation would hire a U.S. worker to replace him." (AF at 67.)

In addition, noting that eleven days after applying for labor certification, the President had confirmed and reelected the Alien to the Board of Directors for the ensuing year, the CO stated that the Alien was "an integral part of the company, and it is doubtful that the alien would hire a U.S. worker to replace himself." (AF at 67.) Further, the CO stated that although Mr. Tsujimura submitted an affidavit stating he was completely independent of the Alien's authority in regard to the hiring decision, the duties described in the application and the organization chart revealed that this was not correct. (AF at 67.) In addition, Mr. Tsujimura admitted that the Alien was more senior than he. (AF at 67.) The CO also stated that even if Mr. Tsujimura was free to interview and select a replacement for the Alien, because the hiring official was the direct subordinate of the Alien, significant control existed based on his position within the organization. (AF at 67.) Accordingly, the CO found that Employer failed to show that the job was clearly open to U.S. workers. (AF at 68.)

On December 17, 1991, Employer requested administrative judicial review of the CO's decision. (AF at 1.)

#### DISCUSSION

The issue presented in this case is whether the job offer was clearly open to U.S. workers.

This Board has held that an employer seeking certification for an alien with whom it has a special relationship cannot merely engage in a recruitment effort and show that no qualified U.S. worker is available; it must also establish that it has a bona fide job opportunity open to qualified U.S. workers. Modular Container Systems, Inc., 89-INA-228, at 9 (July 16, 1991) (en banc). Thus, in determining whether the job opportunity is clearly open to U.S. workers, the Board in Modular Container Systems, Inc. adopted a totality of the circumstances test, which considers whether the Alien exercises control or influence over the recruitment process; is related to directors, officers or employees; is the company incorporator or founder; has an ownership interest in the company; manages the company; is on the board of directors; is one of only a small number of employees; has qualifications identical to unusual job requirements; or is inseparable from the sponsoring employer due to her or his pervasive presence and personal attributes. Modular Container Systems, Inc., 89-INA-228, at 10-12 (July 16, 1991) (en banc). Some of those factors are pertinent to this case as well.

In the instant case, the Alien was Employer's highest ranking, senior manager in the United States and a member of the Board of Directors. Moreover, the Alien had responsibility for the day-to-day operations of the company since 1977, purportedly in all matters except the selection process.

The record also establishes that as the senior officer in this country, the Alien directly supervised Mr. Tsujimura, the individual who signed the application for certification. While I note that Mr. Tsujimura provided an affidavit stating that his authority to recruit a replacement for the Alien was independent of the Alien's participation and that he reported directly to the President in all matters concerning the selection process, I also note that when the CO sent his Notice of Findings, Employer's initial response was to request a filing extension, because:

The alien, Shin Kobayashi, is currently in Japan on a business trip. Additionally, we need to coordinate our response with the President of the company, who is permanently stationed in Japan.

(AF at 118.) This reply confirms that the Alien's presence was needed or preferred in order to formulate a response and therefore contradicts Mr. Tsujimura's assertion of independence from the Alien's participation in matters concerning the selection process. Therefore, the Alien did exert influence or control over the recruitment process.

Considering these factors, it is highly unlikely that Employer would replace the Alien with a U.S. worker. Accordingly, we find that the circumstances surrounding this application indicate that the position was not available to qualified U.S. workers. Consequently, Employer has failed to show that a bona fide job opportunity existed for U.S. workers. Accordingly, the CO properly denied Employer's Application for Alien Labor Certification.

#### ORDER

Wherefore, the denial of labor certification is AFFIRMED.

Chief Judge LITT, concurring;

Pursuant to Modular Container Systems, supra, the CO's denial must be affirmed because Employer has not convincingly shown that the job opportunity is available to any qualified U.S. worker. However, as was stated by the undersigned in J.V. (U.S.) Company, Ltd., 91-INA-159 (July 22, 1993), the denial of certification in this, and other similar instances, does not seem consistent with the purpose behind certification, namely increased employment opportunities for U.S. workers.

By denying certification in cases such as this one, where a foreign corporation is endeavoring to establish a U.S. based subsidiary managed by someone from the ranks of the foreign corporation, the Board is limiting rather than increasing job opportunities available to U.S. workers. Since it will become more difficult for foreign corporations such as this one to establish U.S. subsidiaries, there will be an attendant reduction in the number of overall jobs available to U.S. workers. Nonetheless, until Congress or the Secretary of Labor see fit to revisit this issue and create an exception to the certification requirements for foreign executives establishing U.S. based subsidiaries, certification must be denied.