

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 28 April 2008

BALCA Case No.: 2008-PER-00040
ETA Case No.: C-053313-51732

In the Matter of:

SELECT IMPORTS, INC.,
Employer,

on behalf of

ANTONIO J. ESTRADA,
Alien.

Certifying Officer: Dominic Pavese
Chicago Processing Center

Appearances: Hossein F. Berenji, Esquire
Canoga Park, California
For the Employer

Gary M. Buff, Associate Solicitor
R. Peter Nessen, Attorney
Office of the Solicitor
Division of Employment and Training Legal Services
Washington, DC
For the Certifying Officer

Before: **Burke, Chapman, Vittone and Wood**
Administrative Law Judges

JOHN M. VITTON
Chief Administrative Law Judge

DECISION AND ORDER

This matter arises under Section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and the "PERM" regulations found at Title 20, Part 656 of the Code of Federal Regulations.¹ In this case, the Employer – a Marble and Tile Company – filed a pre-PERM ETA Form 750A application for permanent alien labor certification on April 27, 2001 for the position of Installer. (AF 47).

Several years later the Employer re-filed under the PERM regulations. The Chicago Processing Center accepted the new PERM ETA Form 9089 application for processing on November 17, 2006, and granted certification on February 12, 2007.² (AF 29). By letter dated August 15, 2007, and filed stamped as received by the Certifying Officer on August 21, 2007, the Employer stated that the certification had been issued with an erroneous priority date – namely, the date that the PERM application was accepted for processing rather than the date of filing of the pre-PERM application.³ The Employer asked that the CO revise the Form 9089, and stated that it had filed its Form I-140 with the USCIS explaining the situation.

On February 12, 2008, the CO issued a letter explaining that the priority date of the pre-PERM application was not retained because the pre-PERM and PERM applications were not identical as required by 20 C.F.R. § 656.17(d). Specifically, the CO found that the Employer's name and worksite locations were not the same on the ETA 750A and the Form 9089. The CO then forwarded the case to this Board as an appeal.

The Board docketed the appeal on February 12, 2008, and issued a Notice of Docketing on February 21, 2008.

¹ The Final PERM regulations were published on December 27, 2004, 69 Fed. Reg. 77326, and are applicable to permanent labor certification applications filed on or after March 28, 2005. The regulations were amended on June 21, 2006, 71 Fed. Reg. 35522, and May 17, 2007, 72 Fed. Reg. 28903.

² On December 29, 2006, the Dallas Backlog Elimination Center issued a "Confirmation of Withdrawal" letter confirming that the pre-PERM application had been withdrawn.

³ In the Appeal File, the terms filing date and priority date are sometimes used interchangeably. For purposes of the present appeal, it is sufficient to note that the USCIS may use the filing date assigned by the DOL labor certification as the priority date for purposes of the I-140.

The CO filed an Appellate Brief dated March 31, 2008, and received by the Board on April 2, 2008. The CO observed that the name of the Employer had changed from “Select Marble, Inc.” to “Select Imports, Inc.” and the job location from Burbank, California to Los Angeles, California.” (Compare AF 31 with AF 45 and AF 32 with AF 45). Thus, the CO argued that there were obvious differences with the applications and that the decision had been properly made to set the priority date as November 17, 2006.

The Employer filed an Appellate Brief received by the Board on April 8, 2008. In the brief, the Employer argued that it properly notified the SWA of its address change and the change of its business name in 2003. Attached to the brief was an April 1, 2003 letter from the Employer to the SWA asking that the ETA 750A be amended to show the new address (Exhibit A), and an August 1, 2003 letter from the Employer to the SWA notifying the SWA that Select Marble, Inc. had been sold to new owners effective June 1, 2003, that the business’s name had changed to “Select Imports, Inc.,” and requesting that the form ETA 750A and B be amended accordingly.

In view of the Employer’s documentation that it requested relevant amendments to its application several years prior to the withdrawal of the pre-PERM application, the Board ordered the CO to show cause why the Board should not reverse the CO’s decision not to retain the original application’s priority date. In this regard, the Board noted that the regulation at 20 C.F.R. § 656.17(d)(4) states that “[f]or purposes of determining identical job opportunity, the original application **includes all accepted amendments up to the time the application was withdrawn**....” (emphasis added).

On April 24, 2008, the CO filed a letter with the Board stating that, upon review of the Employer’s documentation (which had not been contained in the CO’s file), he had no objection to reversal of the decision not to retain the original application’s filing date. The CO’s letter stated:

If the employer returns the original certification application, the CO will amend the certification to reflect a filing date of April 27, 2001, and a new certification date reflective of the date the CO makes the amendment. If the employer cannot

return the original certified application, then a duplicate will be issued reflecting the April 27, 2001 filing date. No change will be made to the original certification date on the duplicate.

Thus, we find that the CO has conceded that the Employer had made relevant amendments to the pre-PERM application prior to the time that it was withdrawn for the purpose of re-filing under PERM. The conditions stated by the CO for issuance of an amended or duplicate certification reflecting the original filing date are reasonable.

Based on the foregoing, **IT IS ORDERED** that the CO's decision not to retain the original application's filing date is hereby **REVERSED**. This matter is **REMANDED** for issuance of an amended or duplicate certification.

For the Board:

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JOHN M. VITTON
Chief Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board of Alien Labor Certification Appeals. 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 Board decisions; or (2) when the proceeding involves a question of exceptional importance. Petitions for review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400 North
Washington, D.C., 20001-8002.

Copies of the petition must also be accompanied by a written statement setting forth the date and manner of that service. The petition must specify the basis for requesting review by the full Board, with supporting authority, if any, and shall not exceed five double-spaced typed pages. Responses, if any, must be filed within ten days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition the Board may order briefs.