U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 12 June 2007

In the Matter of:

CAFÉ VALLARTA,
Employer,

on behalf of

HUMBERTO VEGA-RUVALCABA, — **BALCA No.: 2007-PER-00029**, ETA Case No.: C-05252-31124

and

AGUSTIN ANGULO-BANUELOS — **BALCA No.: 2007-PER-00033**, ETA Case No.: C-05250-30402

Aliens.

Certifying Officer: Dominic Pavese
Chicago Processing Center

Appearances: Kevin M. Tracy, Esquire
Del Mar, California
For the Employer

Gary M. Buff, Associate Solicitor
Harry L. Sheinfeld, Counsel for Litigation
Frank P. Buckley, Attorney
Office of the Solicitor
Division of Employment and Training Legal Services
Washington, DC
For the Certifying Officer

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

DECISION AND ORDER

PER CURIAM. These matters arise 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] The central issue on appeal is whether, when a Form 9089 is submitted by mail rather than through the Employment and Training Administration's (ETA) on-line service, the date of filing of is the date of mailing or the date that the application is date stamped by the ETA Processing Center.

Because the same or substantially similar evidence is relevant and material to both of these appeals, we have consolidated these matters for decision. *See* 29 C.F.R. § 18.11.

BACKGROUND

The Employer submitted these applications for permanent alien labor certification for the position of Restaurant Cook. (AF1 11, AF2 21).[2] Rather than using ETA's electronic on-line application system, the applications were mailed on August 30, 2005.[3] The Employment and Training Administration, Office of Foreign Labor Certification's Chicago Processing Center date stamped the applications on September 6, 2005. (AF1 21; AF2 30). The applications were then processed with a filing date of September 6, 2005. (AF1 18; AF2 17). On September 27, 2005, the Certifying Officer (CO) issued a denial determination regarding the Vega-Ruvalcaba application based on two grounds. (AF1 7-9). A similar denial determination was issued regarding the Angulo-Banuelos application on October 4, 2005. (AF2 17). One ground was later successfully rebutted.

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[1] The PERM regulations appear in the 2006 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2006).

[2] AF1 refers the Appeal File in the Vega-Ruvalcaba application. AF2 refers to the Appeal File in the Angulo-Banuelos application.

[3] Although the Appeal Files do not contain envelopes showing the postmarks for the mailing of the applications, the Employer attached copies certified mail receipts to its motions for reconsideration that bear the date of August 30, 2005. (AF1 6; AF2). Moreover, in all of the pleadings in this matter, the parties have been in agreement as to the dates that underlie this dispute.

The other ground was that the advertisements used for the recruitment did not occur at least 30 days, but no more than 180 days from the date the application was filed, in violation of 20 C.F.R. § 656.17(e).

By letters dated October 3, 2005 and October 8, 2005, the Employer's representative requested review by BALCA. (AF1 4-6; AF2 5-7). The Employer argued that the advertisements did comply with the regulatory time frame because the date of filing should have been the date of mailing of the application. The Employer argued that "[a]ll filings with DOL prior to the implementation of PERM had to be entered the day of post mark…. In our research of the regulations we see no address of this issue. Hence, we believe the regulations have not changed and that the date the case is postmarked, is the actual date of filing in good faith." (AF1 5; AF2 6).

On January 30, 2007 (AF1 3) and April 20, 2006 (AF2 3) , the CO sent e-mails to the Employer's representative indicating that reconsideration had been denied by the CO, and that the Employer's options were to (1) withdraw the request for reconsideration/request for review and file a new application or (2) continue with an appeal to BALCA. The Employer's representative sent reply e-mails choosing to pursue the BALCA appeal.

On March 28, 2007, the CO issued letters formally denying reconsideration and forwarding the matter to this Board. (AF1 1-2; AF2 1-2). In this letter, the CO rejected the Employer's argument as to the date of filing, finding that the date of filing for a non-electronically filed application is the date that it is accepted for processing.

The Board issued Notices of Docketing on April 3, 2007. On May 2, 2007, the Board received a brief from the Employer's attorney in Case No. 2007-PER-29[4] arguing that the Employer did file in time to comply with the time frame designated in 20 C.F.R. § 656.17(e). The Employer observed that the regulation at 20 C.F.R. § 656.17(c) states that "non-electronically filed applications accepted for processing shall be date stamped,"

[4] The Board did not receive a brief from the Employer in regard to Case No. 2007-PER-33.

but does not clarify the meaning of this language. Referring to a Labor Certification Handbook § 3:9,[5] the Employer argued that the meaning of terms such as "filed," "submitted," and "date stamped" are not explained and are ambiguous as to their meaning. The Employer argued that the Department of Labor's practice prior to PERM was to consider matters filed as of the date of a postmark, and, absent a new regulatory clarification, ETA should continue to follow that practice. The Employer argued, in essence, that it would be unfair to leave something as important as the filing date to the vagaries of when the CO's staff would get around to date-stamping a submission.

The Board received nearly identical briefs from the CO on May 4, 2007. The CO wrote:

> Although the employer may be correct with respect to its understanding with respect to the practice concerning the submission of documentation subsequent to the filing of the labor certification application, the regulations in effect prior to PERM made it clear that the priority date for obtaining visas was based on the date stamped on the application by the local employment service office and not on the employer's date of mailing of the application. 20 C.F.R. § 656.21(d) (2004) stated that "[t]he local office shall date stamp the application" and referred to section 656.30 for the significance of this date. Section 656.30(b)(1) (2004) stated that labor certifications were valid "as of the date of the local Employment Service office date-stamped the application." See 8 C.F.R. § 204.5(d) (2006) which states that "[t]he priority date of any petition for classification … which is accompanied by an individual labor certification from the Department of Labor shall be the date the request for certification was accepted for processing by any office within the employment service system of the Department of Labor."

(CO's Brief at 2-3). The CO went on to argue that the PERM regulation at 20 C.F.R. § 656.17(c) contains a date certain for the date of filing of an application submitted by mail – the date that the application was date stamped by the Processing Center.

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[5] The Employer's brief does not identify the publisher of this Handbook. The Board is not aware of a Labor Certification Handbook issued by ETA, and it appears that the Employer may be citing a publication of a commercial publisher.

DISCUSSION

The parties in these matters appear to agree that the recruitment would comply with the regulatory timing requirements if the application was filed as of the date that the applications were mailed, but not if the applications were filed as of the date that they were date stamped by the Chicago Processing Center. The regulation at 20 C.F.R. § 656.17(c) states:

> (c) *Filing date*. Non-electronically filed applications accepted for processing shall be date stamped. Electronically filed applications will be considered filed when submitted.

We concur with the Employer's contention that the language of Section 656.17(c) is imprecise when it states that "[n]on-electronically filed applications accepted for processing shall be date stamped." Does this just mean that the CO will date stamp receipt, or does it also create a rule on when a mailed application is filed? Upon review of the history of the program and the context of the regulations, however, we find that the regulation was intended to set the filing date for a mailed application as the date that the CO date stamped the application.

First, the Employer's premise that the CO had used postmarks for date of filing of applications under the pre-PERM regulations is not well founded. As the CO outlined in his brief, section 656.21(d) (2004) of the pre-PERM regulations explicitly cross-referenced section 656.30(b)(1) (2004). When read together with the USCIS regulation at 8 C.F.R. §204.5(d)(2006), it is clear that the import of a date stamp for the filing of an application was that a priority date would be based on the date of the local office's date stamp. Such an interpretation is confirmed in the Technical Assistance Guide No. 656 (Sept. 1981), which stated that

> The date on an Application for Alien Employment Certification as the date of acceptance for processing, is according to Department of State and Immigration and Naturalization Service regulations, used to establish an

> alien's position on a waiting list for an immigrant visa. This date is usually referred to as the alien's "priority date."
>
> The local office of the State employment service is generally the initial processing point for labor certification, other than Schedule A. The local office received date, therefore, becomes the aliens' priority date….

TAG No. 656 at 125. Thus, under the pre-PERM regulations the date the local office date stamped the application set the validity date for the application and was used to set the alien's priority date. Although there may be an argument for distinguishing between a "filing" date, and the date of "validity" of an application, or the alien's priority date, we know of no authority that made a separate, postmark date of any significance as a filing date under the pre-PERM regulations. Thus, the Employer's contention in the instant proceedings that there was a historical practice under pre-PERM processing to base the date of filing on the date of a postmark is not accurate.

Second, the PERM regulation at section 656.17(c) appears under the title "Filing date." Thus, in context, there would be no reason to mention date stamping an application in this section if it was not tied to the filing date. If a postmark was intended as the filing date, the drafters of the regulation would have required the CO to record the date of the postmark rather than the date of the date stamp.

Third, the PERM regulation at section 656.30(b) states that "[a] labor certification involving a job offer is validated as of the date the ETA application processing center date-stamped the application or the date an electronically filed application was submitted…[.]" Here, the regulation makes it clear that a validity date for a PERM application is considered the date a date-stamp is applied by the Processing Center, except for those applications submitted electronically.

Fourth, it is not unfair for an agency to use the date of receipt (which is evidenced by a date stamp) as the date of filing of a document. For example, the Rules of Practice and Procedure for the Office of Administrative Law Judges, which is the parent agency of this Board, provide that "[d]ocuments are not deemed filed until received by the Chief

Docket Clerk…." 29 C.F.R. § 18.4(c)(1). Similar to the PERM regulations deeming an electronic filing to occur upon submission, OALJ's Rules of Practice deem the time of transmittal printed on a fax filing as the Chief Docket Clerk's date stamp. 29 C.F.R. § 18.4(d). The PERM filing date structure is not inconsistent in setting the filing date as the date stamped where electronic filing is not used, and upon submission where it is. In both situations, the filing date is based on the first instance in which a confirmed receipt by the CO occurs. The Employer's brief contains an argument that use of the date stamp as the filing date would be unfair because it would be dependent on the CO's staff's diligence in stamping mail that is received. However, there is no evidence in these cases that the CO's staff delayed in date stamping the applications. In fact, in Case No. 2007-PER-33, the Employer's motion for reconsideration includes a copy of the certified mail return receipt stamped by the U.S. Postal Service in Chicago on September 6, 2005 (AF2 7) – which is the same date that the CO date stamped the application. (AF2 30).

Fifth, the regulatory history of the PERM regulations strongly suggests that the date stamp was intended to be the date of filing. In the preamble to Notice of Proposed Rulemaking, ETA wrote:

> 3. Filing Date
>
> Applications accepted for processing will be date stamped. Applications which are not accepted for processing and returned to employer will not be date stamped to minimize the administrative burden, and to discourage employers from filing an application merely to obtain a filing date, which under the regulations of the INS and Department of State becomes the priority date for processing petitions and visa applications, respectively.

ETA, *Proposed Rule, Implementation of New System, Labor Certification Process for the Permanent Employment of Aliens in the United States ["PERM"]*, 20 CFR Part 656, 67 Fed. Reg. 30466, 30470 (May 6, 2002). This language suggests that ETA considered the date an application was accepted for processing, the application of a date stamp, the filing date, and the priority date all to be the same date. The proposed regulation stated:

§ 656.17 Basic labor certification process.

> * * *
>
> (c) *Filing Date.* (1) Applications accepted for processing shall be date stamped.
>
> (2) Applications not accepted for filing and returned to employers shall not be date stamped.

When subsection (c)(1) and (c)(2) are read together, it is clear that "accepted for processing," "date stamped," and "filing" were all considered to be the same date.

In the Final Rule, ETA decided not to refuse to date stamp and then return an incomplete application, and therefore modified the final language of section 656.17(c). In the discussion of comments on the filing date proposal, ETA wrote, in pertinent part:

> 3. *Filing Date and Refiling of Pending Cases to New System*
>
> * * *
>
> a. *Filing Date*
>
> * * *
>
> In the preamble to the NPRM (see 67 FR at 30470), we stated applications that are not accepted for processing will not be date-stamped to minimize the administrative burden and to discourage employers from filing incomplete applications <u>merely to obtain a filing date</u>. We do not believe it is unreasonable to require the employer to enter all required information on the application form. Further, employers could immediately refile any application that is rejected for processing, so any delay in obtaining a filing date will be minimal and largely in the employer's control.

ETA, *Final Rule, Labor Certification Process for the Permanent Employment of Aliens in the United States ["PERM"]*, 20 CFR Part 656, 69 Fed. Reg. 77326, 77341 (Dec. 27, 2004) (emphasis added). Thus, ETA in the regulatory history tied the obtaining of a "filing" date to acceptance for filing as memorialized by a date stamp. Explicit support in the regulatory history for such an interpretation of section 656.17(c) is found in the Final Rule's discussion of one commenter's suggestion that the filing date should be

considered the date when the prevailing wage determination request is filed with the State Workforce Agency. ETA wrote:

> (2) *Prevailing Wage Determination Requirement*
> Sections 656.15 through 656.19 of the proposed rule would require an employer to obtain a PWD from the SWA before filing a labor certification application. One commenter suggested this could delay filing the application if there is disagreement about the prevailing wage. The commenter recommended employers be allowed to submit the application to DOL before receiving the PWD. A<u>nother commenter recommended the filing date should be established when the PWDR (ETA Form 9088) is filed with the SWA, rather than when the labor certification application is filed with DOL</u>. A third commenter noted information on the PWDR form, such as the job description and special requirements, also should go to the DHS.
>
> The recommendation to use the date the PWDR is filed with the SWA as the filing date is not practical under this final rule. As indicated above, we will have only one form in the streamlined labor certification system. We have combined the PWDR (ETA Form 9088) with the Application for Permanent Employment Certification (ETA Form 9089). Employers will not be submitting a DOL form to the SWAs to obtain a prevailing wage determination. Instead, employers will make a request to the SWAs for a PWD, and will receive the wage determination from the SWA as they do now. This final rule does not require a particular form for employers to submit requests for wage determinations to SWAs or for SWAs to use in responding to requests for wage determinations. Employers will, however, be expected to provide the PWD they received from the SWAs in the event of an audit or other request from the CO.
>
> <u>Further, we do not believe it prudent to depart from our longstanding practice of assigning the filing date at the time an application is accepted</u>. Basing the filing date on the date a request for a PWD is made with the SWA may lead to program abuses. For example, such a change could encourage employers to file more wage requests than needed to obtain an earlier filing date, or encourage employers to file many applications at the end of the year, before the upcoming year's Occupational Employment Statistics (OES) wages are released. Also, due to local variations in the time it takes SWAs to issue wage determinations, the wage determination would be an inconsistent source of a filing date.

Id. (emphasis added).

In sum, although the regulatory language could have been more precise, we find that section 656.17(c) means that an application not submitted electronically is deemed

filed on the date on which the ETA Processing Center applied its date stamp memorializing receipt of the application. This, of course, means that an employer who chooses not to use ETA's electronic process for filing an Form 9089 must build in sufficient time for transmittal by postal service or other courier, and initial processing by the CO's mail room staff to ensure that its recruitment advertisements will comply with the timing requirements of section 656.17(e).

In the instant cases, the Employer's applications were date stamped too late for the Employer's recruitment documentation to comply with the timing requirements of section 656.17(e). Although this result appears harsh at first blush, it was the Employer who decided not to file on-line and not to mail its applications until two days prior to exceeding the 180 day time limit of section 656.17(e). The applications were being mailed from California to Chicago, but it appears that the Employer did not use an overnight courier, and instead used regular, certified mail to transmit the applications. We have discovered nothing in the regulations, the regulatory history, or ETA's historical practice to reasonably lead an employer to believe that ETA would use the postmark as the date of filing. Thus, we find that the CO properly denied certification.

ORDER

Based on the foregoing, **IT IS ORDERED** that the Certifying Officer's denials of labor certification in the above-captioned matters are **AFFIRMED**.

Entered at the direction of the panel by:

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Todd R. Smyth
Secretary to the Board of Alien Labor
Certification Appeals

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. 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:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW Suite 400
Washington, DC 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. 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.