



Issue Date: 05 January 2009

BALCA Case No.: 2008-PER-00213

ETA Case No.: A-07043-09528

In the Matter of

A & S MARBLE GRANITE INC.,

Employer,

on behalf of

RODRIGO GARCIA DA SILVA,

Alien.

Certifying Officer: Melanie Shay
Atlanta Processing Center

Appearances: Patrick P. Soleymani, Esquire
INET Inc.
Sterling, Virginia
For the Employer

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

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

DECISION AND ORDER

PER CURIAM. This matter involves an appeal of the denial by an Employment and Training Administration, Office of Foreign Labor Certification, Certifying Officer (“CO”) of permanent alien labor certification 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.

BACKGROUND

The CO accepted the Employer’s labor certification application for processing on August 17, 2006. (AF 1). The Employer is sponsoring the Alien for a position as a “Stone Carver” (AF 8). The Employer indicated in the ETA Form 9089, Section I-a-1, that this was a nonprofessional position. (AF 10). The Employer answered Section I-c-6 and I-c-7, by stating that the State Workforce Agency (“SWA”) job order started on July 5, 2006, and ended on August 5, 2006. (AF 10).

On July 30, 2007, the CO issued a denial letter. (AF 4-6). Among other grounds, the CO denied the application because the job order placed with the SWA was not completed at least 30 days prior to the submission of the application.

On July 18, 2007, the CO received a request for review from the Employer’s attorney. (AF 3). He wrote:

[T]he job order with the SWA was placed On July 5, 2006 and expired on August 5, 2006. The original application sent to you was received on August 17, 2006, this is not 180 days. You cannot count any modifications to the original documentation as new acceptance dates because the original application was modified and resent, not withdrawn.

On September 18, 2008, the CO issued a letter of reconsideration. (AF 1-2). The CO found that the Employer submitted the application 11 days after the job order ended. Because the regulation at 20 C.F.R. § 656.17(e) mandates that the job order end at least 30 days prior to the ETA Form 9089 filing date, the CO found that the denial was valid.

The Board issued a Notice of Docketing on September 24, 2008. The Employer did not file an appellate brief. The CO filed an appellate brief urging that denial of certification be affirmed.

DISCUSSION

The regulation at 20 C.F.R. § 656.17(e) provides, in pertinent part:

(e) *Required pre-filing recruitment.* [With certain exceptions, a]n employer must attest to having conducted the following recruitment prior to filing the application:

* * *

(2) *Nonprofessional occupations.* If the application is for a nonprofessional occupation, the employer must at a minimum, place a job order and two newspaper advertisements within 6 months of filing the application. The steps must be conducted at least 30 days but no more than 180 days before the filing of the application.

(i) *Job order.* Placing a job order with the SWA serving the area of intended employment for a period of 30 days. The start and end dates of the job order entered on the application serve as documentation of this step.

Thus, the placement of a job order with a SWA is mandatory; it must have been completed at least 30 days, but no more than 180 days before the filing of the application; and it must have been at least 30 days in duration. The start and end dates of the job order must be entered on the ETA Form 9089 to document the timing of the SWA job order.

Under the regulations, the SWA job order must have ended at least 30 days prior to the filing of the ETA Form 9089. *Luyon Corp.*, 2007-PER-27 (June 12, 2007); *Construction Pros Corp.*, 2007-PER-77 (Dec. 18, 2007). In the instant case, the

Employer clearly violated the regulation by filing its application less than 30 days after the SWA job order ended.¹

This regulatory requirement is designed to ensure that the employer has sufficient time to receive resumes, make contact with any applicants, conduct interviews, and make decisions regarding any U.S. applicants who may have applied for the job opportunity in response to the recruitment effort. *Golden Bridge Restaurant LLC, 2007-PER-00099* (Dec. 18, 2007). Filing before the end of the 30 day period reflects an employer's indifference to whether U.S. applicants are given adequate consideration for the job opportunity. *Id.*

Accordingly, we find that the CO properly denied certification.

ORDER

Based on the foregoing, **IT IS ORDERED** that the Certifying Officer's denial of labor certification in the above-captioned matter is **AFFIRMED**.

Entered at the direction of the panel by:

A

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:

¹ We take note of the Employer's attorney's argument in the request for review suggesting that there had been an earlier submission of an application that had been modified and re-sent, and not withdrawn. We are not sure of the point of this argument. Even if there had been an earlier application, it would not aid the Employer's appeal because it would only shorten the time between the end of the SWA job order and the filing of the application. Moreover, there is no evidence in the Appeal File of an earlier application.

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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.