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Board of Alien Labor Certification Appeals
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Issue Date: 09 January 2004

BALCA Case No.: 2001-INA-121
ETA Case No. P2000-WA-10238303

In the Matter of:

CRAWFORD & SONS,
Employer,

on behalf of

RIGOBERTO MEJIA-NARANJO,
Alien.

BEFORE: **Burke, Chapman, Huddleston, Neal, Wood and Vittone**
Administrative Law Judges

DECISION AND ORDER

The Board granted *en banc* review in this matter to consider whether the Board's decision in *In re Vito Volpe Landscaping*, 1991-INA-300 (Sept. 29, 1994) (*en banc*), should be overturned or modified. Upon review of the Appeal File and the arguments presented on appeal, the Board has determined that the ruling in *Vito Volpe* should not be disturbed. The panel decision is hereby affirmed and adopted by the Board.

The facts of this case are not in dispute. In 1998, Employer filed an application for permanent alien labor certification to enable the Alien to fill the position of Landscape Gardener. (AF 42). The Certifying Officer issued a Notice of Findings on February 7, 2001, proposing to deny labor certification because, *inter alia*, during a two and one-half month period in the mid-winter, no work could be performed by the Landscape Gardener. (AF 40-41). In its rebuttal, filed March 7, 2001, Employer conceded that the position entails approximately two and one-half months during the winter when work could not be performed; however, Employer argued that the Alien had been employed by the company for seven years, thereby evidencing the

permanence of the position. (AF 37). Employer further offered to apportion the required yearly salary over the full year and asserted that the Alien "has been paid at higher than the minimum required rate precisely because he is only paid for nine and a half months per year." (AF 37).

The CO thereafter issued a Final Determination on March 21, 2001, denying labor certification based on *In re Vito Volpe Landscaping*, 1991-INA-300 (Sept. 29, 1994) (*en banc*). (AF 31-35). In *Vito Volpe*, the Board held in six consolidated cases involving similar facts that:

> [A]lthough the[] landscaping jobs [at issue] may be considered "full time" during ten months of the year, and the need for these jobs occurs year after year, they cannot be considered permanent employment, as they are temporary jobs that are exclusively performed during the warmer growing seasons of the year, and from their nature, may not be continuous or carried on throughout the year.

Id. at 9.

A three-member panel of the Board issued a Decision and Order on June 13, 2002, also concluding that *Vito Volpe* was controlling. (AF 13-17). Employer thereafter petitioned for *en banc* review arguing that *Vito Volpe* was wrongly decided and should be overturned. (AF 11-12).

On May 5, 2003, the Board issued an Order granting *en banc* review. (AF 8-11). Although an extension of time was granted for the filing of briefs, the only formal brief filed in this matter was from Employer. The Certifying Officer submitted a letter contending that *Vito Volpe* was correctly decided. The American Immigration Lawyers Association and the American Immigration Lawyers Foundation were notified of the *en banc* proceedings, but did not file briefs.

DISCUSSION

Positions of the Parties

Employer's brief is grounded on the argument that the dissent in *Vito Volpe* stated the correct position on whether recurring employment of less than twelve months of duration in any particular year can qualify as full-time employment within the meaning of the applicable regulations. Employer argues that the decision in *Vito Volpe* attempted to posit an irrelevant distinction between occupations that "may" be performed twelve months per year but are not, and positions which cannot be performed for one or two months per year. (Empl. Br., at 1). Employer argues that a number of occupations have less than a twelve-month work schedule for "practical, meteorological, historical, and cultural reasons," *e.g.*, professional athletes, teachers, and college professors. (Empl. Br., at 1).

Employer argues that the *Vito Volpe* decision incorrectly cites the circumstance that specific statutory authority exists for permanent labor certification for teachers and college professors, but not for landscape gardeners, as support for the proposition that those occupations are not comparable. (Empl. Br., at 1). Employer argues that *Vito Volpe* incorrectly interpreted the statute, 8 U.S.C. § 1182(a)(5)(A)(ii)(I), which Employer argues only specifically mentions teachers and college professors for the purpose of clarifying that American workers who are not equally qualified for those positions may be lawfully rejected, whereas the normative standard for other positions is that American workers only need be minimally qualified. (Empl. Br., at 1 fn.1). Employer also observes that professional athletes are specifically addressed in 8 U.S.C. §1182(a)(5)(A)(iii), but again "only to expound upon an issue peculiar to their profession and not to specifically authorize their eligibility for permanent labor certification, which is assumed." (Empl. Br., at 1 (footnote omitted)). Employer notes that professional athletes often work for less than ten months during the year, frequently for weather-related reasons, and that this is not dissimilar from the reason why landscape gardeners work less than twelve months per year. (Empl. Br., at 1).

Finally, Employer argues that the permanent and temporary labor certification regulations are "entirely separate, and qualification for one does not necessarily preclude qualification for the other." (Empl. Br., at 2). To this extent, Employer draws on the *Vito Volpe* dissent, asserting that "the permanent labor certification regulations require only that a position last indefinitely and for a substantial portion of the year. A break in service in a position does not necessarily render that position under the purview of the temporary labor certification regulations." (Empl. Br., at 2). Therefore, according to Employer, "a landscaper should be eligible for permanent as well as temporary labor certification." (Empl. Br., at 2).

In its position statement, the CO argues that Employer's analogy between landscape gardeners and school teachers who often do not work for twelve months a year "ignores the essential element of the *Volpe* reasoning which concluded that landscape laborers, at least as employed by Volpe, were temporary workers under the applicable regulations and therefore not eligible to seek a permanent labor certification." (CO Position Ltr., at 1). The CO argues that the *Volpe* dissent's reasoning that the temporary and permanent labor certification programs are not mutually exclusive is undercut by the fact that Congress set up two programs, and that if a temporary worker could file as permanent there would be no need for a temporary worker program. The CO argues that regulatory changes would need to be made for the dissent's approach to be workable in practice. (CO Position Ltr., at 2). For instance, if a CO

> … determined that a certain occupation in a certain location, while involving a job opportunity encompassing less [than] one year, was nonetheless "permanent" for the purposes of the labor certification program, would that be a ground for denying temporary applications from similarly situated employers? Otherwise a scenario is created where job opportunities are not temporary or permanent because of the nature of the job but rather based on which program the employer chose to file under.
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> [A] [l]egitimate question exist[s] as to the proper line to be drawn between the temporary and permanent programs. Those questions need to be addressed by rulemaking. Until that takes place, the rule in Volpe contains a reasonable and predictable solution.

(CO Position Ltr., at 3).

Holding

The issue in the instant case must be decided in consideration of the overriding principle of *stare decisis*. *Stare decisis* teaches that once a point of law has been settled, a court should follow that precedent. Doing so "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). To be sure, *stare decisis* "is not an inexorable command; rather, it is 'a principle of policy and not a mechanical formula of adherence to the latest decision.'" *Id*. at 828 (quoting *Helvering v. Hallock*, 309 U.S. 106, 119 (1940)). However, we must also be mindful that *stare decisis* "is at its most powerful in statutory interpretation which Congress is always free to supersede with new legislation." *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 362-63 (2000) (citing *Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991)). *Stare decisis* reaches not only Congress, but the general public as well. "*Stare decisis* has added force when the legislature, in the public sphere, and citizens, in the private realm, have acted in reliance on a previous decision, [when] overruling [a] decision would dislodge settled rights and expectations or require an extensive legislative response." *Hilton*, 502 U.S. at 202. *Stare decisis* should not be departed from "without some compelling justification." *Id*.

In *Vito Volpe*, the Board would not certify a landscaping position as permanent employment because the job duties could only be performed ten months during the year, finding that the position fell into the definition of "seasonal employment." *In re Vito Volpe Landscaping*, 1991-INA-300, at 5 (Sept. 29, 1994) (*en banc*). The position at issue, that of landscaper gardener who would work approximately ten months a year, is not dissimilar to those addressed in *Vito Volpe*. The form ETA-750 Part A lists job activities that are almost identical to those in *Vito Volpe*. (AF 42); *see Vito Volpe*, 1991-INA-300, at 3. Abiding by the principles of *stare decisis*, then, we must find that the position at issue constitutes seasonal and temporary employment under 20 C.F.R. Part 655, unless the Employer provides compelling justification to do otherwise and overrule *Vito Volpe*.

Employer puts forth a similar argument in the instant case as was posited in *Vito Volpe*, that an analogy can be made between landscape gardeners and school teachers, college professors, and professional athletes. However, just as discussed in *Vito Volpe*, the landscape gardener in this case cannot be equated with such positions when the job is one in which the work will be performed on a seasonal basis since it is "of the kind exclusively performed at certain seasons or period of the year" and that cannot be continuous or carried on throughout the year. *Vito Volpe*, 1991-INA-300, at 5.

Employer's offer to spread out the payments of the salary over twelve months does not remedy the problem that the applicant would not be working in the job duties for two and one-half months in the winter. Employer's assertion that it has paid the Alien "at higher than the minimum required rate precisely because he is only paid for nine and a half months per year" likewise does not cure the lack of performance of job duties during part of the winter months. Just as in *Vito Volpe*, "there is no evidence that during the winter months, when landscaping services are not needed, such is considered a vacation period for the Employers' permanent employees." *Id*. at 8

Because Employer fails to provide compelling justification that the position is permanent, full-time and that these activities could be performed on a year-round basis, the decision in *Vito Volpe* will not be overturned, and the position cannot be certified as a permanent position.

The decision in *Vito Volpe* essentially expounded upon the principle of statutory construction followed by Congress of *inclusio unius est exclusio alterius*, in other words, to include one thing implies the exclusion of another. *Russello v. U.S.*, 464 U.S. 16, 23 (1983). Congress chose not to reference seasonal or temporary workers in 8 U.S.C. § 1182(a)(5)(A), which addresses the requirements for permanent labor certification. As we stated in *Vito Volpe*, Congress did, however, set forth separate requirements for seasonal or temporary workers in 8 U.S.C. § 1101(a)(15)(H)(i).

The Secretary has also set forth separate regulations for these two categories of certifications. *Vito Volpe* discussed the definitions for seasonal and temporary work and

permanent work found at 20 C.F.R. Parts 655 (temporary certifications) and 656 (permanent labor certifications). In that decision we noted the distinction in the two types of work—more particularly, that seasonal or temporary work encompassed that work which was "exclusively performed at certain seasons or periods of the year and which, from its nature, may not be continuous or carried on throughout the year." 29 C.F.R. § 500.20(s)(1) (2003). It is this category, that of seasonal or temporary work, in which the positions in *Vito Volpe* fell, and in which the similar position in the instant case falls. Therefore, *stare decisis* commands adherence to our previous decision.

The Board's decision in *Vito Volpe* was issued almost ten years ago. In that time, Congress has had more than ample opportunity to introduce and pass new legislation to supersede the Board's interpretation of the pertinent statutes. Similarly, no new rulemaking procedures have been undertaken by the Secretary to revise the pertinent regulations. The Certifying Officer is in agreement that the decision in *Vito Volpe* controls the instant matter as well. Therefore, we adhere to the principle of *stare decisis* in light of the lack of action to change or alter the outcome in *Vito Volpe*. For these reasons, the decision in *Vito Volpe* shall not be disturbed.

For the Board:

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JOHN M. VITTONE
Chief Administrative Law Judge

Judge Pamela Lakes Wood, dissenting.

I agree with the majority that our prior *en banc* decision in *Vito Volpe Landscaping, et al.*, Case Nos. 1991-INA-300, 301 (Sept. 29, 1994) (*en banc*) is controlling and would mandate denial of labor certification in the instant case. Because I would overrule *Vito Volpe*, I respectfully dissent.

As the dissent in *Vito Volpe* stated, the analysis applied by the majority in that decision was flawed for the following reasons: (1) the majority failed to consider the distinction between permanent and temporary labor certification and incorrectly applied the temporary regulations to the inapposite permanent labor certification situation; (2) the majority misapplied provisions from the temporary regulations, which do not address the issue of whether recurring, seasonal employment would constitute permanent full-time work, as required by the permanent regulations; and (3) the majority's analysis fails to consider the policy underlying permanent labor certification, which is premised upon the need for employers to be able to recruit aliens to fill bona fide job opportunities for which there are no qualified and available U.S. workers, taking into consideration the specific circumstances of each occupation. The dissent set forth a workable method for analyzing this type of situation:

> . . . Proof of . . .permanence [of the job offered] in individual cases requires that the employer demonstrate that the job duties are performed on a continuing basis, the job is career-oriented and for which the applicant has demonstrated a commitment, and that, historically, occupants of the position have remained year after year and are not financially dependent on obtaining other employment or unemployment compensation during intermittent breaks in the year. A short-term position, on the other hand, is inappropriate for permanent labor certification. Similarly, a job which is subject to one or more lengthy intermittent breaks during the course of a year, or demonstrates a high turnover of occupants from one year to the next is suspect because of the risk that the alien will obtain employment for which the labor market has not been tested or become a public charge. Proof of permanence may include documented experience of similar employers and occupations in the area where the work is to be performed. . . . In each case, the Certifying Officer must weigh the evidence to determine whether the employer has demonstrated a legitimate need for permanent, ***i.e.*** indefinite and substantially continuous, employment.

Vito Volpe, slip op. at 11-12 (dissent). Although applied in a different context, the majority in *Vito Volpe*, slip op. at 6, noted that the INS has found workers to be temporary and not permanent if employed less than nine months on an annual basis. A similar requirement, together with the criteria set forth above, could be applied to cases such as the instant case. I would overrule *Vito Volpe* to so provide.