

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
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**Issue Date: 15 August 2014**

**BALCA Case No.: 2014-TLC-00097**

**ETA Case No.: H-300-14162-401253**

*In the Matter of:*

**MANDHIR S. TUNG,**  
*Employer*

Certifying Officer: William L. Carlson  
Chicago National Processing Center

Before: **LARRY W. PRICE**  
Administrative Law Judge

**ORDER OF DISMISSAL**

This matter arises out of a request for administrative review of the Certifying Officer's denial of an H-2A temporary labor certification application. On August 11, 2014, the Office of Administrative Law Judges received the Administrative File (AF) from the Certifying Officer (the CO). The parties were afforded three business days after receipt of the AF in which to submit briefs. In administrative review cases, the administrative law judge has five working days after receiving the file to review the record for legal sufficiency and issue a decision. 20 C.F.R. § 655.115(a).

**STATEMENT OF THE CASE**

On June 11, 2014, the Employer filed Form ETA 9142 for the position of Heavy Equipment Operator. The period of intended employment was to begin on July 28, 2014. In Section H, Recruitment Information, the Employer provided State Workforce Agency (SWA) job order number 14078889. (AF 39-46). The CO contacted the California SWA to determine whether a job order had been placed in connection with the Employer's H-2A application and asked to confirm the job order number the Employer's listed on Form ETA 9142. The California SWA replied that it received no request for a job order relating to the Employer. (AF 25).

The CO issued a Notice of Deficiency on June 18, 2014, which notified the Employer that no job order had been placed. The Employer had the option to correct the deficiency or seek administrative review within five business days. (AF 21-24). The CO issued the Notice of Denial on July 9, 2014 because the Employer failed to take any action under the terms of the Notice of Deficiency. (AF 18-20). Both the Notice of Deficiency and the Notice of Denial were emailed to

the Employer “based on [the Employer’s] previous acceptance to participate in [the] email program.” (AF 18, 21).

On July 24, 2014, the Employer emailed the CO regarding the Notice of Denial and explained he does not regularly check email. The Employer asked if the case could be reopened or if he had to “begin over with a new case.” (AF 17). The CO responded on July 25, 2014, stating the Employer could request review within seven calendar days from the date of the Notice of Denial. (AF 15-16).

On July 28, 2014, the Employer filed a request for administrative review of the CO’s determination. The Employer explained that he does not use email often and did not receive the Notice of Deficiency. The Employer attached copies of job advertisements placed with CalJOBS and Craigslist. (AF 1-14).

The CO filed a Statement of Position on August 13, 2014, arguing that BALCA lacks jurisdiction as the Employer did not file a timely appeal.

## **DISCUSSION**

The H-2A regulations provide that an employer may appeal a Notice of Deficiency by timely requesting an expedited administrative review or de novo hearing before an ALJ. 20 C.F.R. § 655.141(c). Additionally, the regulations require that the Notice of Deficiency inform an employer that in order to obtain an administrative review or a de novo hearing, the employer must file its written request within five business days of the receipt of the Notice of Deficiency. 20 C.F.R. § 655.141(b)(4). Further, the regulations require that the Notice of Deficiency notify the employer that failure to request an appeal or comply with the requirements to file a modified application will result in a final denial of labor certification that cannot be appealed. 20 C.F.R. § 655.141(b)(5).

In this case, the Employer did not file a modified application and did not file a timely request for administrative review following the Notice of Deficiency.<sup>1</sup> The Notice of Deficiency is dated June 18, 2014, and the Notice of Denial is dated July 9, 2014. The CO provided sufficient notice to the Employer of the consequences of a failure to timely file a modified application or a timely appeal. The Employer did not request administrative review until July 28, 2014, forty days after the Notice of Deficiency was issued and nineteen days after the Notice of Denial.

Therefore, the Employer’s request for review is untimely, and the CO’s denial of certification is final.

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<sup>1</sup> It appears from the Employer’s request for administrative review that he is unfamiliar with the certification process. The Employer asked in the appeal letter whether he could continue with the process or needed to start the certification process anew following the denial. I suggest the Employer obtain legal counsel to determine whether filing a re-application is appropriate and to assist with future temporary labor certification applications.

**ORDER**

Based on the foregoing, it is hereby ordered that this matter is **DISMISSED**.

**SO ORDERED.**

For the Board:

**LARRY W. PRICE**  
Administrative Law Judge