

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
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**Issue Date: 04 June 2009**

**BALCA Case No.: 2009-TLN-00065**  
ETA Case No.: C-09063-44845

*In the Matter of:*

**DR. DONG KEUN & JIN PARK, INC.,**  
**d/b/a CALIFORNIA DENTAL GROUP,**  
*Employer*

Certifying Officer: William L. Carlson  
Chicago National Processing Center

Before: **JOHN M. VITTONI**  
Chief Administrative Law Judge

**DECISION AND ORDER**

This case arises from a request for review of a United States Department of Labor Certifying Officer's denial of an application for temporary alien labor certification under the H-2B non-immigrant program. The H-2B program permits employers to hire foreign workers to perform temporary nonagricultural work within the United States on a one-time occurrence, seasonal, peakload, or intermittent basis. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6); 20 C.F.R. Part 655, Subpart A (2008) (effective until Jan. 17, 2009); 20 C.F.R. Part 655, Subpart A, available at 73 Fed. Reg. 78,020 (Dec. 19, 2008) (effective Jan. 18, 2009).<sup>1</sup>

**Statement of the Case**

On February 25, 2009, the Department of Labor's Employment and Training Administration ("ETA") received an application for temporary labor certification from Dr. Dong Keun & Jin Park, Inc., d/b/a California Dental Group ("the Employer"). *See* AF 35-117.<sup>2 3</sup> The Employer requested

<sup>1</sup> Citations to the regulations that became effective January 18, 2009, will contain only the provisions as they will appear when codified.

<sup>2</sup> Citations to the 117-page Appeal File will be abbreviated "AF" followed by the page number.

<sup>3</sup> It appears that the Employer had a previous application returned after it initially filed the application with ETA instead of the appropriate State Workforce Agency ("SWA"), as required under the regulatory environment prior to January 18, 2009. *See* AF 54.

certification for one marketing manager from April 1, 2009, through December 31, 2010. AF 35. The Employer did not enter a State Workforce Agency (“SWA”) job order identification number in Item H.2 of ETA Form 9142, nor did the Employer enter a start date for the job order in Item H.2a. AF 39. In Item H.2b, the Employer indicated that the job order’s end date is December 31, 2010. *Id.*

On April 6, 2009, the Certifying Officer (“CO”) issued a *Request for Further Information* (“the RFI”). AF 30-34; *see* 20 C.F.R. § 655.23(c)(1). In the RFI, the CO stated that the Employer “had not complied with all requirements of the H-2B program” and identified several deficiencies in the Employer’s application, only one of which is relevant to this appeal. AF 31, 33-34. In particular, the CO wrote that the Employer “submitted an incomplete recruitment report.” AF 33. The CO explained how 20 C.F.R. § 655.15(j) required the Employer to prepare, sign, and date a recruitment report no fewer than two calendar days after the last date on which the job order was posted and no fewer than five calendar days after the date on which the last newspaper or journal advertisement appeared. *Id.* The CO found that the Employer had not complied with the regulation because the entry in Item H.2b of the ETA Form 9142 indicated that the Employer’s job order will not close until December 31, 2010. *Id.* The RFI instructed the Employer to submit a recruitment report within the required timeframe. AF 33-34.

On April 13, 2009, the Employer submitted a response to the RFI. AF 20-29. The response included a written recruitment report and an amended ETA Form 9142. AF 29, 21-28. The recruitment report was dated December 30, 2008. AF 29. The Employer did not change the entry in Item H.2b of ETA Form 9142. AF 25. Likewise, Items H.2 and H.2a remained blank. *Id.* On April 24, 2009, the CO issued a letter informing the Employer that its application had been denied and was “being returned.” AF 16-19. The CO explained that the Employer’s response to the RFI was deficient because “the recruitment report was submitted before the last day of the posted job order.” AF 19. The CO noted that Item H.2b of ETA Form 9142 indicated that the job order’s end date is December 31, 2010, and that the recruitment report was dated December 30, 2008. *Id.*

On May 12, 2009, the Employer filed a request for review with the Board of Alien Labor Certification Appeals (“BALCA” or “the Board”). AF 1-2. In its request for review, the Employer stated that “[n]o SWA order was received from California EDD” and that it mistakenly entered the end date for its requested certification period in Item H.2b of ETA Form 9142. AF 1. The Employer argued that BALCA should excuse its mistake pursuant to Federal Rule of Civil Procedure 60(b). AF 1. On May 14, 2009, I issued a *Notice of Docketing* permitting the parties to file briefs and requiring the parties to confer regarding resolution of this matter. The notice also stated that, if the parties file any briefs, they must provide a status report regarding their conference at that time. The Employer did not file a brief, and the CO’s brief contained no such report.

### **Discussion**

The CO correctly denied the Employer’s application due to the Employer’s failure to comply with the Department’s recruitment requirements. The regulations require that the Employer submit a job order to the appropriate SWA before filing an application for temporary labor certification. 20 C.F.R. § 655.15(d)(2), (e); *see* § 655.5(b)(c) (requiring employers who file their H-2B applications on or after January 18, 2009, for certification periods beginning prior to October 1, 2009, to conduct all pre-filing recruitment steps required by 20 C.F.R. Part 655, Subpart A). The regulations also require that the

Employer prepare, sign, and date its recruitment report no fewer than two days after the last date on which the job order was posted. 20 C.F.R. § 655.15(j)(1). The Employer appears to concede that no job order was posted, and explained that, when completing its application, it mistakenly indicated that the job order would close on December 31, 2010. AF 1. It is unclear why the SWA did not post a job order. While the Employer implied that it attempted to submit a job order by asserting that “[n]o SWA order was received from California EDD,” the record lacks any evidence of the Employer’s efforts.<sup>4</sup>

The CO issued the RFI on the narrow ground that the Employer completed its recruitment report and filed its application before the date the Employer stated the SWA job order would close. While this was a somewhat roundabout way of addressing the fact that it appeared that no job order was posted, it provided the Employer notice that the CO would not accept the application until the job order closed. Despite receiving such notice, the Employer’s response to the RFI failed to address the job order issue, and only on appeal did the Employer acknowledge what was otherwise apparent from the application: the SWA did not post a job order. Since the Employer technically did not comply with 20 C.F.R. §655.15(j)(1), I will affirm the CO’s denial on that basis. Even if I could excuse the Employer’s clerical mistake as urged in its request for review, doing so would not change the fact that the Employer still has not completed all pre-filing recruitment steps. Accordingly, I find that denial was proper under 20 C.F.R. § 655.32(b), and that the CO could not have certified that an insufficient number of qualified U.S. workers are available for the job opportunity for which the Employer seeks certification.

### **Order**

In light of the foregoing, it is hereby **ORDERED** that the Certifying Officer’s decision is **AFFIRMED**.

For the Board:

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**JOHN M. VITTON**  
Chief Administrative Law Judge

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<sup>4</sup> The record also contains a January 28, 2009, “Withdraw Notice” from the California Employment Development Department. AF 48. The notice reads, in pertinent part, “Your priority date has been canceled and the application is being returned because we received a request that it be withdrawn. You may resubmit this application at any time. A resubmitted application is treated as a new application and a new local office priority date will be established.” *Id.* Neither party has explained this document’s significance. While the notice could relate to the Employer’s initial attempt to file its application with ETA, the record lacks insufficient information to make such a finding.