



**Issue Date: 06 July 2010**

**BALCA Case No.: 2010-TLN-00068**

ETA Case No.: C-10118-50003

*In the Matter of:*

**RICHARD K. OWENS RACING STABLES,**  
*Employer*

Certifying Officer: William L. Carlson  
Chicago National Processing Center

Before: **WILLIAM S. COLWELL**  
Associate Chief Administrative Law Judge

**DECISION AND ORDER AFFIRMING DENIAL OF  
CERTIFICATION**

This case arises from a request for review of a United States Department of Labor Certifying Officer's ("the CO") 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 (2009).

**Statement of the Case**

On April 28, 2010, the Department of Labor's Employment and Training Administration ("ETA") received an application for temporary labor certification from Richard K. Owens Racing

Stables (“the Employer”). AF 56.<sup>1</sup> The Employer requested certification for seven “Nonfarm Animal Caretakers” from May 25, 2010, until October 1, 2010. *Id.* On the application, the Employer indicated that its need was seasonal. *Id.* In its statement of temporary need, the Employer stated that “grooms are hard to find. . . . Past efforts to recruit American workers for this position have produced minimal results.” AF 69. The Employer further asserted that:

Temporary work conditions for horse racing trainers throughout the nation are caused by three factors. . . . Racing dates in every state are issued by each states’ racing commission on an annual basis. . . . Contracts between owner and trainer for the care and training of a race horse is always terminable at will. . . . Trainers and training stables travel extensively to racing circuits or back to their ranches and the need for grooms sometimes is dramatically reduced temporarily.

AF 70.

The Employer also attached a copy of its 2008 and 2009 monthly payroll statements. AF 80. According to the Employer’s chart, it did not employ a permanent worker during the 2008 year, and it employed only one temporary worker from July until September. *Id.* During 2009, the Employer reported that it did not employ any permanent or temporary workers during the course of the year. *Id.*

On May 4, 2010, the CO issued a *Request for Further Information* (“RFI”). AF 47-55. In the RFI, the CO identified multiple deficiencies, including a failure to establish that the need was temporary. AF 54. In the RFI, the Employer was instructed to submit an explanation of the Employer’s business as well as an explanation of why the Employer’s need was temporary. *Id.* The CO also requested that the Employer submit an explanation “regarding how the request for temporary labor certification meets the regulatory standar[d] of a . . . seasonal . . . need.” *Id.*

On May 6, 2010, the Employer submitted a response to the RFI. AF 17-46. The Employer submitted a “Supplement Regarding Need for Temporary Alien Work Force,” which stated: “Although racing meets have been going on for many years, each one is on a seasonal basis. No race track in the United States has year round racing.” AF 18. The Employer also explained that many horse races limit the type of horse that may race at each track, and thus, a horse trainer was often required to move from place to place depending on the races that accepted the horses he or she was training. *Id.*

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<sup>1</sup> Citations to the 90-page appeal file will be abbreviated “AF” followed by the page number.

On June 3, 2010, the CO issued a *Final Determination* denying the Employer's request for labor certification. AF 10-16. Citing to 20 C.F.R. §§ 655.21(a) and 655.6, the CO determined that the Employer failed to "to establish how the employer's need for services or labor is traditionally tied to a season or pattern of a recurring nature and fails to specify the period of time during each year in which the employer does not need the requested services or labor." AF 16. The CO denied the Employer's application for failure to establish a temporary need. The Employer's appeal followed.

### Discussion

The Labor Department's H-2B regulations refer to the Department of Homeland Security regulation at 8 C.F.R. § 214.2(h)(6)(ii)(B) for the definition of temporary need. 20 C.F.R. § 655.6(b). That regulation provides:

(ii) *Temporary services or labor--(A) Definition.* Temporary services or labor under the H-2B classification refers to any job in which the petitioner's need for the duties to be performed by the employee(s) is temporary, whether or not the underlying job can be described as permanent or temporary.

(B) *Nature of petitioner's need.* As a general rule, the period of the petitioner's need must be a year or less, although there may be extraordinary circumstances where the temporary services or labor might last longer than one year.

To obtain certification under the H-2B program, an applicant must establish that its need for workers qualifies as temporary under one of the four regulatory need standards: one-time occurrence, seasonal, peakload, or intermittent. 20 C.F.R. § 655.6(b). The burden of proof to establish eligibility for a temporary alien labor certification is squarely on the petitioning employer. 8 U.S.C. § 1361. In the instant case, the employer attempted to establish a seasonal temporary need. To establish a seasonal need, the petitioning employer must demonstrate that "the services or labor is traditionally tied to a season of the year by an event or pattern and is of a recurring nature. The petitioner shall specify the period(s) of time during each year in which it does not need the services or labor. The employment is not seasonal if the period during which the services or labor is not needed is unpredictable or subject to change." 8 C.F.R. § 214.2(h)(6)(ii)(B).

In order for the Employer's temporary need to qualify as seasonal, the services must be predictable and tied to a season of the year. Moreover, the need must not be subject to change. In its statement to the CO, the Employer noted that each state sets its own racing schedule, and is subject to change. Moreover, according to the Employer, the racing schedule varies greatly from track to track, and in certain geographic areas, can take place during any portion of the entire year. Further, the Employer submitted payroll reports which suggested that the Employer did not have a temporary need for workers in 2009 during the requested period of need, and thus, the need is not recurring.

While the Employer may have proven that it has a temporary need in general, nothing submitted by the Employer demonstrates that the need is seasonal. By the Employer's own admission, the racing track is subject to change and is not tied to a season, but to the racing track's commission and its determination of racing dates. If, for example, the racing track decided to hold the races during a different part of the year, the Employer has submitted nothing that suggests that this would not be possible. Further, the Employer explained that the horses may only race at tracks where the horses qualify, which is also determined by the commission and subject to change. If, for example, the owners had more qualified horses, the Employer's responses implied that more races might be open, thus suggesting that the Employer's need is tied more to the quality of the horse rather than a season of the year.

While the Employer has argued that it could not find qualified horse grooms in the area, it is the nature of the Employer's need that determines whether it has met the regulatory standard, not the availability of workers. Ultimately, the Employer failed to prove that it had a temporary seasonal need tied to a specific season of the year. The Employer bears the burden of proving its need for the labor is temporary. *See Easter Seals Central California, 2009-TLN-00072 (July 10, 2009)*. Because the Employer failed to establish a temporary need, the CO properly denied 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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**WILLIAM S. COLWELL**  
Associate Chief Administrative Law Judge