



**Issue Date: 22 September 2011**

**BALCA Case No.: 2011-TLN-00037**

ETA Case No.: C-11201-55276

*In the Matter of:*

**TOP FLIGHT ENTERTAINMENT, LTD.,**  
*Employer*

Certifying Officer: William L. Carlson  
Chicago National Processing Center

Appearances: Saman Movassaghi, Esquire  
Florida Immigration Law Counsel  
Miramar, Florida  
*For the Employer*

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Office of the Solicitor  
Division of Employment and Training Legal Services  
Washington, DC  
*For the Certifying Officer*

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, seasonal, peakload, or intermittent basis, as defined by the Department of Homeland Security. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6); 20 C.F.R. § 655.6(b). Following the CO’s denial of an application under 20 C.F.R. § 655.32, an employer may request review by the Board of Alien Labor Certification Appeals (“BALCA” or “the Board”). 20 C.F.R. § 655.33(a).

### **STATEMENT OF THE CASE**

On July 20, 2011, the Department of Labor’s Employment and Training Administration (“ETA”) received an application for temporary labor certification from Top Flight Entertainment, Ltd. (“the Employer”) for 60 dancers. AF 141-156.<sup>1</sup> The Employer, a “high-end gentlemen’s club located in Wayne County, Michigan,” stated that it has a peakload need for the dancers from September 1, 2011 to April 30, 2012 due to conventions that are held in the Detroit metropolitan area during that time. AF 142. Specifically, the Employer described its temporary peakload need as follows:

Top Flight regularly employ[s] approximately 20 permanent full time staff members as dancers; when the high seasons approach, the clientele dramatically increases, therefore Top Flight desperately needs temporary workers to supplement the permanent staff during these peak load months of September until April. The need for additional employees is imperative during the high seasons to supplement the permanent staff of the facility. We require the H-2B workers requested in this petition to supplement the American temporary workforce in order to operate our club at its peak volume during this period in an entertaining, safe and effective manner for our clientele.

[...]

There are several conventions that the Detroit area caters too [sic], especially [in regard] to the automobile industry. These convention attendees afterwards regularly come to our facility to enjoy themselves after their long business days. These conventions are typically from the fall (September) until spring (April). Top Flight Entertainment is trying to help rebuild the local economy in Detroit by providing entertainment services to locals and tourists.

With the increase of tourism and events during these times we have difficulties keeping up with the demand of staffing Top Flight entertainers;

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<sup>1</sup> Citations to the 156-page appeal file will be abbreviated “AF” followed by the page number.

we would like to request the services of 60 temporary experienced dancers who will maintain high levels of technical proficiency, physical ability and physical fitness during Detroit's peak seasons – September through April.

*Id.* The Employer also indicated that the normal work schedule for the H-2B dancers would be 12:00 p.m. until 2:00 a.m., and that the dancers would work 35 hours per week. AF 144.

On July 27, 2011, the CO issued a *Request for Further Information* ("RFI"), notifying the Employer that the Employer failed to establish that its need for nonagricultural services or labor is temporary in nature and that it failed to satisfy all the requirements of the H-2B program. AF 136-140. The CO identified three deficiencies with the Employer's application. First, the CO determined that the Employer failed to establish that it has a peakload need for dancers from September until April. The CO required the Employer to submit additional information regarding the nature of its need. AF 138. Specifically, the CO required the Employer to provide a description of the Employer's business history and activities (i.e. primary products or services) and schedule of operations through the year, an explanation regarding why the nature of the employer's job opportunity and number of foreign workers being requested for certification reflect a temporary need, and an explanation regarding how the request for temporary labor certification meets one of the four regulatory standards of temporary need. AF 138-39.

Additionally, the CO required the Employer to provide evidence and documents to support its explanations. The CO required the Employer to submit signed work contracts and/or monthly invoices from previous calendar year(s) clearly showing work will be performed for each month during the requested period of need on the ETA Form 9142; annualized and/or multi-year work contracts or work agreements supplemented with documentation specifying the actual dates when work will commence and end during each year of service and clearly showing work will be performed for each month during the requested period of need on the ETA Form 9142; summarized monthly payroll reports for a minimum of one previous calendar year that identifies, for each month and separately for full-time permanent and temporary employment in the requested occupation, the total number of workers or staff employed, total hours worked, and total

earnings received. AF 139. The CO informed the Employer that this documentation must be signed by the Employer attesting that the information being presented was compiled from the Employer's actually accounting records or system; or other evidence and documentation that similarly serves to justify the chosen standard of temporary need. *Id.* The CO also requested a list of conventions that occur during the requested period and an explanation as to how these conventions differ from conventions during the non-requested period with respect to demand for the Employer's services. *Id.*

Secondly, the CO determined that two sections of the Employer's application were not accurately completed. AF 139-140. The CO required the Employer to submit an amended ETA Form 9142 so that the hours of work information is consistent and to enter any special requirements for the job.<sup>2</sup> Finally, the CO requested the Employer to file Appendix B.1, which includes the Employer's declaration that "[t]he offered wage equals or exceeds the highest of the most recent prevailing wage that is or will be issued by the Department to the employer for the time period the work is performed, or the applicable Federal, State, or local minimum wage, and the employer will pay the offered wage." The CO noted that an amended Appendix B.1 was published on April 14, 2011. AF 140.

On August 3, 2011, the Employer responded to the RFI. AF 27-135. The Employer submitted a copy of its payroll records from May 2010 to April 2011 which shows:

<b>Month</b>	<b>Number of Permanent Workers</b>	<b>Number of Temporary Workers</b>	<b>Total Number of Hours worked</b>	<b>Total Earnings Received</b>
May 2010	24	0	2,160	\$31,869.60
June 2010	25	0	1,992	\$29,314.40
July 2010	20	0	2,368	\$34,954.40
August 2010	21	0	1,848	\$27,280.00
September 2010	22	0	1,808	\$26,694.00
October 2010	22	0	2,352	\$34,761.60
November 2010	21	0	1,893	\$27,939.25
December	20	0	2,056	\$30,346.00

<sup>2</sup> The Employer's application indicated that the work hours were 12:00 p.m. to 2:00 a.m., but that the work week was 35 hours and there was no overtime. AF 144.

2010				
January 2011	23	0	1,664	\$24,584.40
February 2011	24	0	1,752	\$25,892.40
March 2011	23	0	1,936	\$28,588.00
April 2011	21	0	1,840	\$27,230.40

AF 42. Additionally, the Employer submitted copies of its dancers' schedules from May 31, 2010 through April 24, 2011. The schedules show the following number of dancers that the Employer employed, on average,<sup>3</sup> each month.

<sup>3</sup> During the week of May 31–June 6, 2010, the Employer had 16 dancers. AF 59. During the week of June 7-13, 2010, the Employer had 9 dancers. AF 60. During the week of June 14-20, 2010, the Employer had 12 dancers. AF 61. During the week of June 21-27, 2010, the Employer had 10 dancers. AF 62. On average, the Employer had 11.75 dancers during June 2010.

During the week of June 28-July 4, 2010, the Employer had 10 dancers. AF 63. During the week of July 5-11, 2010, the Employer had 11 dancers. AF 64. During the week of July 12-18, 2010, the Employer had 8 dancers. AF 65. I am excluding one dancer during this week because there is a note next to her name indicating "Russian girl not ours." *Id.* Presumably, this dancer is not one of the Employer's employees. During the week of July 19-25, 2010, the Employer had 7 dancers. AF 66. During the week of July 26-31, the Employer had 9 dancers. AF 67. Therefore, the Employer had an average of 9 dancers in July 2010.

During the week of August 1-8, 2010, the Employer had 9 dancers. AF 68. During the week of August 9-15, 2010, the Employer had 10 dancers. AF 69. During the week of August 16-22, 2010, the Employer had 7 dancers. AF 70. During the week of August 23-August 29, 2010, the Employer had 10 dancers. AF 71. Therefore, the Employer had an average of 9 dancers in August 2010.

During the week of August 30-September 5, 2010, the Employer had 11 dancers. AF 72. During the week of September 6-12, 2010, the Employer had 11 dancers. AF 73. During the week of September 13-19, 2010, the Employer had 13 dancers. AF 74. During the week of September 20-26, 2010, the Employer had 12 dancers. AF 75. On average, the Employer had 11.75 dancers during September 2010.

During the week of September 27-October 3, 2010, the Employer had 13 dancers. AF 76. During the week of October 4-10, 2010, the Employer had 10 dancers. AF 77. I am excluding the four individuals whose names are crossed out. The notes besides the names read, "didn't work," "fired and didn't pay," "not here," and "Eugene's girl." *Id.* During the week of October 11-17, 2010, the Employer had 11 dancers. AF 78. During the week of October 18-24, 2010, the Employer had 16 dancers. AF 79. During the week of October 25-31, the Employer had 13 dancers. AF 80. On average, the Employer had 12.6 dancers during October 2010.

During the week of November 1-7, 2010, the Employer had 13 dancers. AF 81. During the week of November 8-14, 2010, the Employer had 14 dancers. AF 82. During the week of November 15-21, 2010, the Employer had 19 dancers. AF 83. During the week of November 22-28, 2010, the Employer had 15 dancers. AF 84. On average, the Employer had 15.25 dancers during November 2010.

During the week of November 29-December 5, 2010, the Employer had 17 dancers. AF 85. During December 6-12, 2010, the Employer had 17 dancers. AF 86. During December 13-19, 2010, the Employer had 25 dancers. AF 87. During December 20-26, 2010, the Employer had 25 dancers. AF 88. During December 27, 2010-January 2, 2011, the Employer had 21 dancers. Therefore, the Employer had an average of 21 dancers during December 2010.

<b>Month</b>	<b>Number of Dancers (average)</b>
June 2010	12
July 2010	9
August 2010	9
September 2010	12
October 2010	13
November 2010	15
December 2010	21
January 2011	Inconclusive (missing documents)
February 2011	26
March 2011	Inconclusive (missing documents)
April 2011	Inconclusive (missing documents)

AF 59-97. Additionally, the Employer submitted a list of events in the Detroit area from September 2011 to April 2012. AF 131-135. Included in this list are the seasons of the Detroit Red Wings, Detroit Lions, and Detroit Pistons professional sporting events, musical performances at various theaters in Detroit, and conventions. AF 132-133. The Employer states that “[d]uring the non-requested period of time [...] demand for workers is not as great due to summer vacations and summer being the time of more family-oriented activities versus going out for entertainment. Specifically, in

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During the week of January 10-16, 2011, the Employer had 25 dancers. AF 90. The weeks of January 17-31 are not included with the Employer’s RFI response materials.

During the week of January 31-February 6, 2011, the Employer had 22 dancers. AF 91. During the week of February 14-20, 2011, the Employer had 21 dancers. AF 92. During the week of February 21-27, the Employer had 35 dancers. AF 93. Therefore, the Employer had an average of 26 dancers during February 2011.

During the week of February 28-March 6, 2011, the Employer had 27 dancers. AF 94. During the week of March 7-13, 2011, the Employer had 27 dancers. AF 95. The weeks of March 14-31, 2011 are not included in the Employer’s RFI response materials.

The weeks of April 1-10 and 25-30, 2011, are not included in the Employer’s RFI response materials. During the week of April 11-17, 2011, the Employer had 30 dancers. AF 96. During the week of April 18-24, 2011, the Employer had 27 dancers. AF 97.

Detroit there are [fewer] events, shows, professional sporting events, concerts, comedians, expos, etc.” AF 133. The Employer argues that “[f]or each and every event that is going on within Detroit, we promote specials for the guests/fans of these events to join us at Top Flight. This gives us an increased business where we need to increase our staff in order to take care of the customers, so they will visit us again in the future.” AF 134.

On August 24, 2011, the CO denied certification. AF 20-25. The CO found that the Employer failed to establish that the nature of its need was temporary, as required by 20 C.F.R. § 655.21(a). The CO found that the Employer’s monthly payroll indicates that no temporary dancers were employed from May 2010 through April 2011. AF 24. Additionally, the CO found that the total number of permanent dancers ranged between 20 and 25, with 25 dancers employed in June 2010, a non-peakload month. *Id.* Noting that the Employer’s dancers worked an average of less than 26 hours in December 2010 and less than 22 hours in April 2011, the CO found that the Employer’s payroll summary does not support the Employer’s purported need for an additional 60 temporary dancers to work a 35-hour weekly schedule. *Id.* The CO determined that the Employer’s statement that it has an increased need for dancers from September 1, 2011 to April 30, 2012, is not supported by the Employer’s payroll records.<sup>4</sup> *Id.*

The Employer requested BALCA review on September 2, 2011. AF 1-19. The Employer argues that because professional sports seasons do not occur in the summer, the peakload need does not include the summer. AF 4-5. The Employer adds that it “is looking to expand [its] clientele and business and the current American workers [...] must be supplemented for [the Employer’s] business to grow.” AF 5. The Employer also argued that it “has been given an opportunity to completely expand [its] business and [it] must have the workers to perform the job duties of a Dancer.” *Id.*

On September 9, 2011, BALCA received the administrative file from the CO. Counsel for the CO filed a Statement of Position on September 15, 2011, urging that the CO’s determination be affirmed because the Employer failed to establish that it has a temporary, peakload need for 60 dancers.

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<sup>4</sup> The CO also denied certification on one additional ground. Because I find that the Employer has failed to establish that it has a peakload need for 60 dancers, I need not reach the second ground for denial.

## DISCUSSION

In order to establish eligibility for certification under the H-2B program, an employer must establish that its need for workers qualifies as temporary under one of the four temporary need standards: one-time occurrence, seasonal, peakload, or intermittent basis, as defined by the Department of Homeland Security. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6); 20 C.F.R. § 655.6(b). The DHS regulations provide that employment “is of a temporary nature when the employer needs a worker for a limited period of time. The employer must establish that the need for the employee will end in the near, definable future.” 8 C.F.R. § 214.2(h)(6)(ii)(B). In order to establish a peakload need, the employer “must establish that it regularly employs permanent workers to perform the services or labor at the place of employment and that it needs to supplement its permanent staff at the place of employment on a temporary basis due to a seasonal or short-term demand and that the temporary additions to staff will not become a part of the petitioner’s regular operation.” 8 C.F.R. § 214.2(h)(6)(ii)(B)(3).

I find that the Employer has not submitted sufficient documentation to establish that it has a peakload need for 60 additional dancers from September 1, 2011 to April 30, 2012. The Employer’s 2011-2012 payroll records show that the Employer employed between 20-25 permanent employees, and no temporary employees, during the 2011-2012 calendar year. AF 42. During several of these months, which are purported to be within the Employer’s peak time, the Employer had fewer employees than it did during its purported non-peak months. For example the Employer had only 21 employees in November 2010, 20 employees in December 2010, and 21 employees in April 2011, while it had 24 employees in May 2010 and 25 employees in June 2010. *Id.* Furthermore, these payroll records are of limited probative value regarding the Employer’s need for dancers, because the records are not separated by occupation.

The only evidence related to the number of dancers needed by the Employer are the dancers’ weekly schedules. This evidence also does not support the Employer’s assertion that it needs an additional 60 dancers between September 1, 2011 and April 30, 2012. While I note that the Employer did have several more dancers during a few weeks

in January, February, March, and April, the Employer did not submit complete records of the weekly schedules in January, March, and April. Therefore, the Employer failed to establish that it has a greater need for dancers during these months. Even if the Employer had submitted this documentation, however, it would be insufficient to establish that the Employer has a need for 60 additional dancers. Although the Employer argues that it has a permanent staff of 20 dancers, the Employer's weekly schedules show that during the months of June 2010-November 2010, the Employer has an average of 12 dancers on staff, which reflects its baseline need. However, the evidence shows that the Employer never has had more than 35 dancers, or 13 more than its permanent staff, at a time. AF 93. Therefore, the Employer's request for 60 additional dancers, where the Employer has never hired more than 13 additional dancers, is not consistent with the Employer's need.

Moreover, although the Employer seems to have employed more dancers during several weeks in January, February, March, and April, the dancers' schedules show that during the weeks that the Employer has more dancers, many dancers worked only one or two shifts per week. For example, during the week of February 21-27, 2011, a week where the Employer had 35 dancers, 11 of these dancers only worked one shift during the week, and 12 dancers only worked two shifts during the week. AF 93. This undermines the Employer's assertion that the 60 requested dancers will work 35 hours per week, and also raises doubt as to whether the employment would be full-time, as defined by the regulations at 20 C.F.R. § 655.4.

Finally, the Employer's statement that it has an increased need for dancers during non-summer months because there are fewer concerts, sporting events, and shows during the summer in Detroit is also not supported by the evidence that the Employer submitted with its RFI response materials. The Employer's RFI response only includes events in Detroit from September 2011-April 2012, and does not include an explanation of how the conventions and events that are held between May and August are different. AF 131-135.

As the Employer has failed to demonstrate that it has a peakload need for 60 additional dancers from September 1, 2011 to April 30, 2012, I find that 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