



Issue Date: 21 November 2011

BALCA Case No.: 2012-TLN-00002

ETA Case No.: C-11252-55532

In the Matter of:

STADIUM CLUB, LLC
d/b/a
STADIUM CLUB, D.C.,
Employer

Certifying Officer: William L. Carlson
Chicago National Processing Center

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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 September 9, 2011, the Department of Labor's Employment and Training Administration ("ETA") received an application for temporary labor certification from Stadium Club LLC d/b/a Stadium Club DC ("the Employer") for 12 "adult entertainers." AF 164-232.¹ The Employer stated that it has a significant increase in clientele during the National Football League ("NFL") and National Hockey League ("NHL") seasons from August through April, and indicated its dates of need for the 12 adult entertainers as September 9, 2011 to April 9, 2012. AF 164. The Employer described the job duties for the position as:

Perform adult-themed burlesque dancing for an upscale adult entertainment club, devise and choreograph dance routines for a club environment, study and practice dance moves required in roles, and harmonize body movements to rhythm of musical accompaniment.

Id. The Employer also indicated that the normal work schedule for the H-2B dancers would be 6:00 p.m. until 2:00 a.m., 30+ hours per week. AF 165.

On September 12, 2011, the CO issued a *Request for Further Information* ("RFI"), requiring the Employer to submit evidence that the terms of employment applied equally to both the U.S. workers and foreign workers, and requiring the Employer to submit a complete ETA Form 9142. AF 160-163. The Employer responded to the RFI on September 19, 2011 and submitted the requested information. AF 141-159.

On September 16, 2011, the CO issued a second RFI, notifying the Employer that the Employer failed to establish that its need for nonagricultural services or labor is

¹ Citations to the 232-page appeal file will be abbreviated "AF" followed by the page number.

temporary in nature as required by Section 655.21(a).² AF 136-140. The CO found that the Employer failed to include sufficient attestations to justify the Employer's requested temporary need. AF 140. Specifically, the CO found that the Employer did not provide any additional support for its requested dates of temporary need other than a printout of the NFL and NHL schedules. *Id.* The CO noted that the Washington D.C. metro area has four major professional sports teams, and the National Basketball Association ("NBA") and Major League Baseball ("MLB") seasons cover the Employer's entire off-peak season. *Id.* The CO required the Employer to provide an explanation of how NBA and MLB seasons are distinguishable from NFL and NHL seasons as far as their impact on the Employer's business.³ AF 50. The CO required the Employer to submit a description of the Employer's business history and activities 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 reflect a temporary need, and an explanation regarding how the request for temporary labor certification meets one of the regulatory standards of a one-time occurrence, seasonal, peak-load, or intermittent need. *Id.*

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; and revenue information that identifies, for each month, the

² The CO also found one additional deficiency, which is not at issue on appeal. AF 51.

³ The last two pages of the second RFI were omitted from the appeal file. However, these pages were included as part of the Employer's response to the second RFI. Accordingly, citations to the second RFI will be to "AF 50-51."

Employer's sales of food and liquor for a minimum of one previous calendar year. AF 50-51.

On October 3, 2011, the Employer responded to the RFI. AF 44-137. The Employer stated that that it had demonstrated a temporary seasonal need based on a 22% increase in food and liquor sales and a 30% increase in worker shifts from September 2010 to April 2011 during the NFL and NHL seasons. AF 44. The Employer provided the following chart summarizing its monthly food and liquor sales:

Month	Food and Liquor Revenue
April 2010	\$71,614.25 (opened mid-month)
May 2010	\$317,797.60
June 2010	\$482,140.13
July 2010	\$415,495.88
August 2010	\$468,619.65

AF 69. The Employer stated that its "season average" revenue between September 2010 and April 2011 was \$512,911.11 per month.⁴ *Id.*

The Employer stated that it could not provide any payroll records for its 75 permanent full-time adult entertainers because they are all paid in tips. AF 57. Instead of providing the requested payroll records, the Employer provided information about the number of shifts that its adult entertainers worked in each month during the past year.

The following chart summarizes the total number of shifts that the Employer's adult entertainers worked per month between May 2010 and April 2011.

⁴ The individual monthly revenue information from September 2010 to April 2011 is not legible in the appeal file. It appears that the CO may have used a dark highlighter to highlight this section, thereby rendering it unreadable when the copy was made. AF 69. Therefore, I have no way to assess the monthly fluctuations during this period or verify the accuracy of the Employer's reported average earnings during this time period.

Month	No. of 8-hour shifts per month	No. of 8-hour shifts per adult entertainer per month⁵
May 2010	524	6.99
June 2010	601	8.01
July 2010	504	6.72
August 2010	512	6.83
September 2010	597	7.96
October 2010	629	8.39
November 2010	677	9.03
December 2010	722	9.63
January 2011	717	9.56
February 2011	766	10.21
March 2011	741	9.88
April 2011	707	9.43

AF 22, 71. Additionally, with its response to the RFI, the Employer submitted lists of the celebrities and professional athletes who have patronized the Employer's restaurant and club, newspaper articles about the Washington Redskins' and Washington Capitals' revenue and stadium attendance, and articles about the economic benefit to the restaurant industry from the NFL. AF 44-137.

On October 20, 2011, the CO denied certification. AF 17-24. 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 did not submit monthly payroll reports, but instead submitted a chart of the number of shifts worked per month. AF 22. The CO found this document deficient because it did not include the number of employees, the total number of hours worked, or the total earnings received by these employees. *Id.*

The CO acknowledged that the Employer provided several newspaper articles indicating that restaurants and bars in several cities with NFL teams experience an

⁵ This calculation is based on the Employer's statement that it employs an average of 75 permanent, full-time adult entertainers, and that each shift is eight hours. AF 44, 57. Accordingly, the number of shifts worked per month is divided by 75 to arrive at the average number of eight-hour shifts worked by each of the Employer's full-time adult entertainers.

increase in business during the NFL season, but found that the Employer's sales and worker shift reports do not substantiate the Employer's request for an additional 12 adult entertainers from September 9, 2011 to April 9, 2012. *Id.* The CO noted that more adult entertainers worked shifts in June 2010, part of the Employer's "off-season," than in September 2010, which is part of the Employer's purported peakload time of need. *Id.* Likewise, the CO found that the Employer's monthly food and liquor sales report does not support the requested dates of need. AF 23. The CO explained that the Employer reported revenues in June and August that were similar or more than the reported revenue during the Employer's requested months of January, February, and March. *Id.*

Additionally, the CO determined that the Employer failed to show that NFL and NHL sporting events and seasons are distinguishable from other major sporting events and seasons, and, consequently, failed to establish that the NFL and NHL are responsible for creating the Employer's peakload need. *Id.* The CO also noted that the NHL generates the lowest revenue of the four major professional sports teams in the Washington area, and that the Washington Capitals NHL team has a significantly lower valuation than both the Washington Wizards NBA team and Washington Nationals MLB team. *Id.* Furthermore, the CO found that the Employer had not demonstrated that an increase in business associated with the NFL season would affect the entire period of temporary need, noting that there are only eight home games within the 214-day requested period. *Id.*

The Employer requested BALCA review on October 31, 2011. AF 1-16. The Employer argues that it demonstrated its need for temporary workers by showing a 22% increase in sales and a 30% increase in worker shifts during the requested period. In addition, the Employer disputes the CO's presumption that the Employer only has an increased need for adult entertainers during NFL and NHL home games, explaining that there is an increase in the number of clientele during both home and away games. The Employer asserts that a single, above-average month of worker shifts in an off-peak time of year does not negate the Employer's temporary need during the entire peak season. Likewise, the Employer asserts that the CO erred in finding that the Employer's high revenue in June and August 2010 negates its peakload need between September and April. The Employer also argues that it was improper for the CO to fault the Employer

for failing to submit payroll records because the Employer's adult entertainers are paid in tips, and no employee has ever made less than minimum wage, and therefore it does not maintain payroll records. AF 6.

Additionally, the Employer argues that the Final Determination was improper because it was issued more than seven business days after it receiving the Employer's response to the second RFI. AF 7. Finally, the Employer contends that the CO erred by failing to consider the evidence of the appearances, parties, and events held by celebrities and professional athletes at the Employer's establishment during the Employer's peak season, which attract more clientele. AF 8.

On November 7, 2011, BALCA received the administrative file from the CO, and counsel for the CO filed a Statement of Position on November 15, 2011. The CO argues that denial of certification was proper because the Employer failed to produce the evidence necessary to justify a peakload need for adult entertainers from September 9, 2011 to April 9, 2011. The CO contends that it is the Employer's burden to establish why the job opportunity and number of workers requested reflect a peakload need under the H-2B regulations, and argues that the Employer failed to meet that burden by not submitting the documentation requested in the second RFI. The CO asserts that the Employer's failure to submit payroll records or evidence to establish the existence or extent of a peakload need as requested by the CO precludes certification. The CO did not respond to the Employer's argument regarding the CO's delay in issuing a final determination.

DISCUSSION

CO's Delay in Issuing Final Determination

The H-2B regulations provide that "[t]he CO will issue the Final Determination or the additional RFI within 7 business days of receipt of the employer's response, or within 60 days of the employer's date of need, whichever is later." 20 C.F.R. § 655.23(c)(3). In this case, the CO received the Employer's response to the second RFI on October 3, 2011, but did not issue a Final Determination until October 20, 2011. The Employer sent status inquiries to the CO on October 11, 2011 and October 14, 2011. AF 25-32. In one

of Employer's emails to the CO on October 14, 2011, it notified the CO that it had failed to timely adjudicate the application. AF 29-30.

Despite the Employer's inquiries, the CO did not adjudicate the Employer's case within the expedited time frame articulated by Section 655.23(c)(3). Nevertheless, I find that the regulations provide no procedural or substantive rights or remedies to the CO's noncompliance with this procedural requirement. Accordingly, the CO's noncompliance with the time frame specified by Section 655.23(c)(3) does not render the CO's denial of certification invalid. *See Frey Produce & Frey Bros. #2 and Frey Produce & Frey Bros. #3*, 2011-TLC-403 and 404 (June 3, 2011) (finding that the CO's failure to comply with the H-2A regulation that the CO provide a notice of deficiency or determination within seven calendar days of receipt of the application did not invalidate the notice of deficiency). Therefore, I will review the substantive basis of the CO's denial.

Temporary Need

The H-2B regulations at 20 C.F.R. § 655.21(a) require each application for temporary employment certification to include a statement of temporary need.⁶ 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).

1. Seasonal Need

The Employer asserts that its need for adult entertainers is seasonal, as defined by the DHS regulations. The DHS regulations define seasonal need as follows:

⁶ Although the Employer asserts that the CO's Final Determination did not correctly identify the regulatory basis for denial, my review of the October 20, 2011 denial letter clearly indicates that the Employer's application is being denied pursuant to 20 C.F.R. § 655.21(a) based on the Employer's failure to establish temporary need. AF 19. Accordingly, I find that the Employer had full notice of the basis for denial.

The petitioner must establish 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 or is considered a vacation period for the petitioner's permanent employees.

8 C.F.R. § 214.2(h)(6)(ii)(B)(2). In order to determine if the employer's need for labor is seasonal, it is necessary to establish when the employer's season occurs and how the need for labor or services during this time of the year differs from other times of the year. *Altendorf Transport*, 2011-TLC-158, slip op. at 11 (Feb. 15, 2011). Denial is appropriate where the employer has not put forth any evidence that it needs more workers in certain months than other months of the year. *Lodoen Cattle Company*, 2011-TLC-109 (citing *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (en banc) (a bare assertion without either supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof)).

The Employer failed to comply with the CO's request for monthly payroll records, which alone is reason for denial.⁷ 20 C.F.R. § 655.23(d). Based on the documentation submitted by the Employer, I am unable to discern a definite and distinct the time of year that the Employer has a need for more adult entertainers. More shifts were worked by adult entertainers in June, which is part of the "off-season," than in September, which is part of the Employer's "season." Additionally, the Employer reported monthly food and liquor sales during the months of June and August that were similar or greater than the Employer's reported revenue during the in-season months of January, February, and March. Moreover, the evidence in the record does not establish that the Employer's "season" is tied to the NFL and NHL. The Employer acknowledges that the NFL season begins in late August; however, August is the month in which the second-fewest shifts were worked by adult entertainers. AF 44, 71. Based on the

⁷ I am skeptical of the Employer's argument that it does not maintain payroll records because its adult entertainers are paid solely in tips. I remind the Employer that the fact that the Employer's adult entertainers are paid in tips does not negate the Employer's payroll and record-keeping duties under the Fair Labor Standards Act. See 29 C.F.R. § 516.28. Additionally, presumably the Employer maintains payroll records in order to pay its share of payroll taxes on tips and prepare its employees' Forms W-2.

foregoing, I find that the Employer has not established a seasonal need for adult entertainers from September 9, 2011 to April 9, 2012.

2. *Peakload Need*

As the Employer has a need for adult entertainers on a year-round basis, the CO analyzed the Employer's request for 12 adult entertainers under a "peakload" standard. 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 established a need for 12 adult entertainers based on a peakload standard of temporary need.

The Employer argues that it has 75 permanent, full-time adult entertainers who work four, 8-hour shifts per week. AF 44, 57. The Employer asserts that it needs 12 additional adult entertainers from September 9, 2011 to April 12, 2012 to coincide with its increased business stemming from the NFL and NHL professional football and hockey seasons. The only documentation submitted to show that the Employer needs more adult entertainers during this time frame is a chart summarizing the total number of shifts that the Employer's adult entertainers worked per month between May 2010 and April 2011.

As noted above, the Employer's adult entertainers worked more shifts in the "offpeak" month of June than in the "peakload" month of September. An increase in need during an off-peak month severely undermines an employer's purported peakload dates of need. *See Top Flight Entertainment, Ltd.*, 2011-TLN-37, slip op. at 8 (Sept. 22, 2011). Additionally, if the Employer indeed has 75 permanent adult entertainers as it purports to have, the dancers only worked approximately seven 8-hour shifts per month, or fewer than two shifts per week. AF 71. Based on the evidence submitted by the Employer, during its "peakload" season between September and April, its dancers worked between nine and ten shifts per month, or just more than twice a week. The evidence simply does not support the Employer's argument that it has a "peakload" need for dancers, and it also raises doubt as to whether the job opportunities that are the

subject of this application are full-time, as defined by the regulations at 20 C.F.R. § 655.4. If indeed the Employer seeks to hire the 12 H-2B adult entertainers on a full-time basis, it seems probable that these H-2B workers would be displacing the Employer's permanent employees, who are only working approximately two, eight-hour shifts per week.

I am also not convinced by the Employer's argument that the CO erred by disregarding the Employer's documentation pertaining to the professional athletes and celebrities who have parties and events at the Employer's establishment, which draws more people to frequent the Employer's business. There is no indication from the evidence in the record that these professional athletes and celebrities only frequent the Employer's business during the NFL and NHL seasons. Indeed, the documentation submitted by the Employer shows that several professional athletes and celebrities held events at the Employer's business in the Employer's "off-peak" time between mid-April to mid-September. AF 183-84, 188, 195-96.

As the Employer has failed to demonstrate that it has a seasonal or peakload need for 12 adult dancers from September 9, 2011 to April 9, 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:

A

WILLIAM S. COLWELL
Associate Chief Administrative Law Judge