



Issue Date: 11 September 2018

**BALCA Case No.: 2018-TLN-00159**  
**ETA Case No.: H-400-18160-818906**

*In the Matter of:*

**TOP NOTCH TURNOUT LLC.,**  
*Employer.*

Certifying Officer: William L. Carlson, Ph.D.  
Chicago National Processing Center

Appearances: Leonard J. D'Arrigo, Esq.  
Whiteman Osterman & Hanna, LLP  
Albany, New York  
*For the Employer*

Before: **COLLEEN A. GERAGHTY**  
Administrative Law Judge

**DECISION AND ORDER**  
**AFFIRMING DENIAL OF CERTIFICATION**

This case arises from the Employer's request for review of the Certifying Officer's ("CO") decision to deny 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, as defined by the United States Department of Homeland Security. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6);<sup>1</sup> 20 C.F.R. § 655.6(b).<sup>2</sup> Employers who seek to hire foreign workers under this program must apply for and receive labor certification from the United States Department of Labor using a Form ETA-

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<sup>1</sup> The definition of temporary need is governed by 8 C.F.R. § 214.2(h)(6)(ii)(B). Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, Division H, Title I, § 113 (2018).

<sup>2</sup> On April 29, 2015, the Department of Labor ("DOL") and the Department of Homeland Security jointly published an Interim Final Rule ("IFR") amending the standards and procedures that govern the H-2B temporary labor certification program. *See Temporary Non-Agricultural Employment of H-2B Aliens in the United States; Interim Final Rule*, 80 Fed. Reg. 24,042 et seq. (Apr. 29, 2015). The rules provided in the IFR apply to applications "submitted on or after April 29, 2015, and that ha[ve] a start date of need after October 1, 2015." IFR, 20 C.F.R. § 655.4(e). All citations to 20 C.F.R. Part 655 in this opinion and order are to the IFR.

9142B, *Application for Temporary Employment Certification* (“Form 9142”). A CO in the Office of Foreign Labor Certification (“OFLC”) of the Employment and Training Administration reviews applications for temporary labor certification. Following the CO’s denial of an application under 20 C.F.R. § 655.53, an employer may request review by the Board of Alien Labor Certification Appeals (“BALCA” or “the Board”). 20 C.F.R. § 655.61(a).

For the reasons set forth below, the CO’s denial of temporary labor certification in this matter is affirmed.

### **STATEMENT OF THE CASE**

On July 3, 2018, the Employment and Training Administration (“ETA”) received an application for H-2B temporary labor certification from Top Notch Turnout LLC. (“the Employer”) for employment of two “Assistant Braiders,” from October 1, 2018 to May 30, 2019. (AF 476).<sup>3</sup> The Employer indicated a seasonal need, stating:

Our need for additional Assistant Braider is directly tied to the Winter Horse Show season in Palm Beach County, Florida from October through May. In 2017 our business experienced such high demand that it became necessary to hire subcontractors to complete the nightly orders periodically. . . . At the end of 2017, Top Notch Turnout interviewed and provided a proposal to a single large client . . . . The volume of work for this contract is more than a single person can handle, and with the contract being awarded effective on December 1, 2017, it has become necessary to establish an employee base. Due to the lack of a legal qualified workforce, we must implement the use of H-2B foreign workers. . . .

(AF 476, 482).

On July 11, 2018, the CO issued a Notice of Deficiency (“NOD”). (AF 467). Among other deficiencies, the CO found the Employer failed to establish temporary need for the number of workers requested pursuant to 20 C.F.R. § 656.11(e)(3) & (4). (AF 472). The CO found the Employer “did not adequately establish how it determined that it needs two additional workers during the requested period of need” and stated “[f]urther explanation and documentation is required in order to establish the employer’s need for a total of two additional fulltime, temporary workers.” (AF 473). The CO in the NOD directed the Employer to provide specific, outlined documentation to cure the deficiency. (AF 472-73).<sup>4</sup>

On July 20, 2018, the Employer provided a Response to the NOD. (AF 121-466). The Employer provided a background on the company, explaining the company was established as a Limited Liability Corporation on May 2, 2018, but had previously operated as a sole proprietorship since 2015. (AF 123). The Employer indicated that in addition to the owner, the

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<sup>3</sup> The appeal file is referenced herein as “AF” followed by the page number.

<sup>4</sup> The CO identified three additional deficiencies in the NOD. Two of the deficiencies the CO no longer relied upon in the Final Determination letter. The remaining deficiency will not be discussed herein as we uphold the CO’s denial on the basis that the Employer failed to establish the need for two Assistant Braiders.

Employer had to “utilize 2.5 subcontractors per week to meet the needs of the client for the 2017/2018 season, and therefore it is seeking to hire workers directly under [the Employer] for the Florida/Winter season.” (AF 125). The Employer referred the CO to documentation submitted with its Response, which the Employer asserted substantiated its need for two fulltime Assistant Braiders.

On August 3, 2018, the CO issued a Final Determination denying certification, upholding his finding that the Employer did not establish the need for the number of workers requested. (AF 100-120). The CO stated the Employer failed to provide much of the documentation requested in the NOD. (AF 106, 110). The CO acknowledged that based on the explanation of the Employer’s business history, monthly invoices and payroll technically could not be provided by the Employer because the company did not legally exist before May 2018, but stated the Employer was informed it could submit other evidence to justify the number of workers requested. (AF 106, 110). The CO stated the documentation provided by the Employer does not establish the number of workers specified, because much of the documentation predates the formation of the company, large portions of the documents are illegible, the documentation was not presented in a format reasonable for the CO to evaluate, and some documentation reference States outside the area of intended employment. (AF 106-07, 110-11).

On August 20, 2018, the Employer requested administrative review of the denial before BALCA and provided additional documentation. (AF 1-99). (AF 2). The Employer stated since its corporate establishment in 2018, it exclusively services the horse show circuit in Palm Beach County, Florida for the winter season, which runs from October 1 through May 30, and it does not operate from June to September. (AF 3, 4). The Employer stated: “Due to the high volume of clients requiring braiding services at the horse show locations, the company requires Assistant Braiders during this season.” (AF 4). The Employer in its request for review did not present any legal arguments supporting its request for two full-time Assistant Braiders.

On August 28, 2018, I issued a Notice of Docketing, allowing the parties to file briefs within seven business days.

On September 7, 2018, Employer filed an appellate brief (“Er. Br.”). The Employer provided with its brief its contract with Wellington Training Stables. The Employer stated the work required on this contract alone requires two full time braiders. Er. Br. 2. The Employer stated “this would traditionally have been performed by the owner . . . and one other individual. However, as [the owner’s] business has expanded, she can no longer be the individual performing the actual braiding services and needs to take on more management and business development duties in order to grow the business.” Er. Br. at 2. The Employer stated additionally, “the work at Welling Training Stables’ Inc.’s additional farm location at Gem Twist Court, requires an additional full-time braider at that location.” Er. Br. 2. The Employer stated:

To put the employer’s need in perspective: the employer must consider both the number of horses that are competing, as well as the number of times that each horse needs to be braided. Each horse can complete [sic] in multiple shows. Typically, each horse will compete either 2 or 3 days, and sometimes even 4 days. They get braided each day they compete, and sometimes multiple braiding is required depending on the particular show. Therefore, 10 horses competing can

result in well over 30 Braid jobs, which alone is 60 hours of labor for the week for a single show. It takes 2 hours to braid the average size horses. Top Notch has anywhere from 10 to up to 40 horses competing each week – this depends on the specific competition.

Er. Br. 2. The Employer acknowledged “given the infancy of [its] operations in Florida, [it] does not have all of the usual payroll documentation to provide to demonstrate seasonal need.” Er. Br. 2.

The CO did not file an appellate brief.

## **STANDARD OF REVIEW**

The standard of review in H-2B temporary labor certification appeals is limited. A reviewing judge may consider only “the Appeal File, the request for review, and any legal briefs submitted.” 20 C.F.R. § 655.61(e). The request for review may contain only legal arguments and evidence which was actually submitted to the CO prior to issuance of the final determination. 20 C.F.R. § 655.61(a)(5). In Employer’s request for review, and in its appellate brief, the Employer submitted new evidence not previously provided to the CO. Pursuant to the regulations, this information is barred from evidence, and cannot be considered by BALCA.<sup>5</sup>

Evidence is reviewed *de novo*, and a reviewing judge must affirm, reverse, or modify the CO’s determination, or remand the case to the CO for further action. 20 C.F.R. § 655.61(e). An employer seeking to hire employees under the H-2B program bears the burden of proving that it is entitled to a temporary labor certification. 8 U.S.C. § 1361.

## **DISCUSSION**

An employer seeking H-2B temporary labor certification must demonstrate the number of workers and period of need requested are justified, and that the request represents a bona fide job opportunity. 20 C.F.R. § 655.11(e)(3), (4); *North Country Wreaths*, 2012-TLN-00043 (Aug. 9, 2012) (affirming partial certification where the employer failed to provide any evidence, other than its own sworn declaration, that it had a greater need for workers this year than it did in 2012); *Roadrunner Drywall*, 2017-TLN-00035 (May 4, 2017) (affirming denial where the employer’s temporary and permanent employee payroll data did not support its claimed number of workers or period of need); *Sur-Loc Flooring Systems, LLC*, 2013-TLN-00046 (Apr. 23, 2013) (reversing denial where the employer sufficiently justified the number of workers requested in its application).

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<sup>5</sup> I note that I held a conference call with the parties on September 4, 2018, to inquire whether the parties could potentially resolve this matter. During this discussion, counsel for the CO indicated that additional documentation, including a copy of the contract with Wellington Training Stables, was required before any successful settlement negotiations could take place. I therefore encouraged the Employer to provide the CO with the contract, along with any other documents requested by the CO, for the purposes of facilitating any settlement discussions. Ultimately, the parties did not resolve the matter, and I cannot consider the contract provided with the Employer’s appellate brief, as part of my decision on the merits of the case.

Applications are properly denied where the employer did not supply requested information in response to a Notice of Deficiency. 20 C.F.R. § 655.32(a) (“The employer’s failure to comply with a Notice of Deficiency, including not responding in a timely manner or not providing all required documentation, will result in a denial of the Application for Temporary Employment Certification.”); *Munoz Enterprises*, 2017-TLN-00016, slip op. at 6 (Jan. 19, 2017); *Saigon Restaurant*, 2016-TLN-00053, slip op. at 5-6 (July 8, 2016).

In its initial application, the Employer stated due to a large growth in business in 2017, it became necessary to hire subcontractors to complete nightly orders and at the end of 2017, it entered into a new client contract commencing in December 1, 2017, and the volume of work for the contract was “more than a single person could handle.” (AF 476). The Employer did not explain in the application how it determined it needed two Assistant Braiders to handle the volume of work, and the CO in the NOD required further explanation and documentation to establish the need for a total of two additional full-time temporary workers. (AF 473). Specifically, the CO required the following documentation:

1. A statement indicating the total number of workers the employer is requesting for this occupation and worksite;
2. An explanation with supporting documentation of why the employer is requesting two Assistant Braiders during the dates of need requested;
3. Summarized monthly payroll reports for a minimum of two previous calendar years (2016 and 2017) that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation (*Assistant Braiders*), the total number of workers or staff employed, total hours worked, and total earnings received. Such documentation must be signed by the employer attesting that the information being presented was compiled from the employer’s actual accounting records or system; and
4. The employer may also submit other evidence and documentation that similarly serves to justify the number of workers requested, if any.

(AF 473).

In its Response to the NOD, the Employer did not provide an additional statement as requested by the CO explaining its need for two full-time temporary Assistant Braiders during the dates of need requested. (AF 122-26). Instead, the Employer referred to evidence attached to its Response. (AF 126). The Employer did not provide any reasoning or clarification of how the large volume of documentation attached to its Response supported its need for two Assistant Braiders.

While the Employer provided some payroll data as requested by the CO, which listed various subcontractors paid in conjunction with specific invoices, the payroll data was from prior to the company’s formation in May 2018, and is therefore of minimal value in assessing the Employer’s need for two Assistant Braiders in this case. (AF 263, 274-85, 296). To the extent the Employer argues these payroll documents are still relevant because the need for

subcontractors prior to the new company's formation supports the need for full-time employees with the new company, this argument is not convincing. (AF 3, 123, 125). First, based on the Employer's filings and documentation, it appears the nature of the Employer's services changed after the company was formed, from providing braiding services in both the Northeast and Florida, to working exclusively for the winter horse show season in Florida. (AF 3, 4, 123-24). In fact, several of the payroll documents provided appear to be based on invoices for work performed in the Northeast. (See AF 274-76). Second, the payroll documentation did not indicate the number of hours each subcontractor worked, or the consistency/regularity of the work performed, to justify the need for two full-time employees. Thus, the payroll documentation provided does not justify the need for two full-time Assistant Braiders.

While the Employer does not yet have any payroll documentation following its creation in May of 2018, the Employer has provided no other evidence that would justify the number of workers requested.

In his appellate brief, counsel for the Employer stated the contract with Wellington Training Stables, Inc. requires two full time braiders. Er. Br. 2. Counsel asserted, for the first time, that one Assistant Braider was needed because the owner of the company was no longer performing braiding duties but instead was focused on management and business development duties, and one Assistant Braider was needed to work at the Wellington Training Stables' additional farm location at Gem Twist Court. Er. Br. 2. These blanket statements from counsel, without any supporting documentation, are insufficient for the Employer to establish the need for two full-time temporary Assistant Braiders.

Based on the foregoing, I find the Employer has failed to meet its burden of establishing its need for two Assistant Braiders as required by 20 C.F.R. § 655.11(e)(3), (4).

### **ORDER**

It is hereby **ORDERED** that the Certifying Officer's denial of the Employer's Application for Temporary Employment Certification is **AFFIRMED**.

**SO ORDERED.**

For the Board:

**COLLEEN A. GERAGHTY**  
Administrative Law Judge

Boston, Massachusetts