

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
800 K Street, NW, Suite 400-N  
Washington, DC 20001-8002

(202) 693-7300  
(202) 693-7365 (FAX)



**Issue Date: 28 October 2016**

**BALCA Case No.: 2016-TLN-00067**  
ETA Case No.: H-400-16197-582056

*In the Matter of:*

**LOS ALTOS MEXICAN RESTAURANT,**  
*Employer.*

Appearances: Trisha Floyd Nielsen, Esq.  
The Bernard Firm, P.L.C.  
Ames, Iowa  
*For the Employer*

Jeffrey L. Nesvet, Associate Solicitor  
Cleveland Fairchild, Attorney  
Office of the Solicitor of Labor  
Division of Employment and Training Legal Services  
Washington, D.C.  
*For the Certifying Officer*

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

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

This case arises from the Employer's request for review before the Board of Alien Labor Certification Appeals ("BALCA") of the denial by a Certifying Officer ("CO") for the Employment and Training Administration ("ETA") of its application for H-2B temporary labor certification. *See* 8 U.S.C. §§ 1101(a)(15)(H)(ii)(b), 1103(a), 1184(a)(c); 8 C.F.R. § 214.2(h); 20 C.F.R. Part 655, Subpart A.<sup>1</sup> For the reasons set forth below, the CO's denial of temporary labor certification in this matter is affirmed.

---

<sup>1</sup> On April 29, 2015, the Department of Labor ("DOL") and the Department of Homeland Security jointly published an Interim Final Rule ("2015 IFR") amending the standards and procedures that govern the H-2B temporary labor certification program. *See* 80 Fed. Reg. 24042 (Apr. 29, 2015). This case will be heard under the procedures outlined in the 2015 IFR, and all citations to 20 C.F.R. Part 655, Subpart A refer to the regulations as amended in the 2015 IFR.

## **STATEMENT OF THE CASE**

On July 15, 2016, the Employment and Training Administration (“ETA”) received an application for H-2B temporary labor certification from Los Altos Mexican Restaurant (“Employer”) for employment of five “Cooks” from October 1, 2016 to January 1, 2017. AF at 55.<sup>2</sup> The Employer’s application identified two worksites in Ames, Iowa, and Story City, Iowa, and stated that its need was “seasonal.” AF at 55, 58, 74.

In its Statement of Temporary Need, the Employer explained that while its restaurants are open year round, it experiences an increase in business during the spring through fall. AF at 64. The Employer stated its wages are highest during the warmer months of the year from spring through fall, supporting its seasonal need. AF at 64-65. The Employer explained that during the warmer months, more people eat out, there is more construction and agricultural work leading to more potential customers, more people travel through Iowa on nearby Interstate 80, and “more people crave icy cold drinks to help keep cool during really hot days.” AF at 65.

The Employer submitted several exhibits with its Statement of Temporary Need, including but not limited to, Iowa Department of Revenue Sales Tax Quarterly Return Confirmations identifying quarterly gross sales in 2015 for the Story City location and an accompanying chart, 2015-2016 payroll for the Story City location and accompanying charts, May and June 2016 payroll for the Ames location, and examples of construction projects nearby the Ames and Story City locations. *See generally*, AF at 93-197.

On July 22, 2016, the CO issued a Notice of Deficiency (“NOD”), identifying four specific deficiencies with the Employer’s application. AF at 48-54. One of the deficiencies identified by the CO was that the Employer did not submit sufficient information to support the dates of need requested, citing to 20 C.F.R. § 655.6(a) & (b). AF at 51. Specifically, the CO explained:

The employer’s attached statement of temporary need discusses the seasonal need it experiences as being contingent on construction projects in the surrounding area. The employer explains that warmer weather in the area is conducive to constructive work, and the resulting increase in construction projects creates a customer base for the employer that requires an increased workforce to service.

However, the employer’s requested period of employment is October 1, 2016, through January 1, 2017. This period of the year is outside of the discussed warmer seasonal period in the statement of temporary need.

AF at 51.

To remedy this deficiency, the CO directed the Employer to provide a revised statement of temporary need containing:

---

<sup>2</sup> The appeal file is referenced herein as “AF” followed by the page number.

1. An explanation of why the employer indicates that its season is contingent on construction during the warmer portion of the year but has requested a start date of need of October 1, 2016; and
2. An explanation of how the employer determined its requested dates of need.

AF at 52. The CO also required supporting evidence that justified the dates of need, including but not limited to, “gross sales receipts by month for calendar years 2014 and 2015, separated for each worksite in the application.” AF at 52 (emphasis in original).

On August 2, 2016, the Employer responded to the NOD and attached its amended application. AF at 26-46. The Employer also provided a revised Statement of Temporary Need. AF at 32-39. In its response, the Employer explained that it just recently learned about the H-2B program, and therefore could not file at the beginning of its season. AF at 28. However, the Employer stated the dates listed in the application are within its seasonal period because “concrete construction work continues through October, November, and starts to slow in December. It then stops during the coldest months of the year, January and February and does not resume until April.” AF at 28. The Employer specifically noted the construction work in the area results in an increase in its customers and sales during those particular months. *See* AF at 28.

In support of its position, the Employer provided Gross Sales Receipts by Month, including corresponding graphs, separated for each worksite, but noted the Ames location just opened in April 2016. AF at 28. Therefore, the Employer stated it cannot provide gross sales receipts by month for 2014 and 2015 for that location. AF at 28. However, the Employer asserted that the gross sales from the Story City location show that the requested dates of need “fit into its season from April to January 1<sup>st</sup>.” AF at 28. The Employer also submitted its 2014-2016 payroll records by month for its Story City location, and its May and June 2016 payroll records by month for its Ames location. AF at 44-46.

On September 8, 2016, the CO issued a Final Determination denying certification. AF at 13-19. The CO found that the Employer corrected two of the four deficiencies identified in the NOD, but two deficiencies remained, including the Employer’s failure to justify the dates of need requested. AF at 17-21. The CO found the Employer’s gross receipts showed no appreciable increase during the period of need requested in its application. AF at 17. The CO also noted the Employer’s payroll does not support its purported seasonal period from April through January 1<sup>st</sup>. AF at 17. The CO further stated the Employer did not demonstrate that either weather or construction facilitate a seasonal period in April through January 1<sup>st</sup> in a predictable manner that is not subject to change. AF at 17.

On September 21, 2016, the Employer requested administrative review of the denial before BALCA. AF at 8-10. The Employer argued in its review request that it had “clearly shown that weather and construction directly contribute to [an] increased seasonal period . . . in a very predictable manner.” AF at 8. The Employer stated it provided examples of construction work in the surrounding areas, supporting the effect the construction has on its business. AF at

8. The Employer argued that “little explanation is necessary to show how the weather in Iowa can impact dining at a Mexican restaurant.” AF at 9.

The Employer further argued that it should not be unfairly adjudicated because the Ames location is new, and therefore has limited data available.<sup>3</sup> AF at 8, 9. The Employer cited to *Midwest Poured Foundation, Inc.*, 2013-TLN-53 (June 18, 2013), for the proposition that an employer can apply for an H-2B labor certification even if they are new and have limited data available. AF at 9. The Employer also disputed the CO’s finding that its gross receipts show no appreciable increase during the season of need, stating a properly scaled graph of the data would show an increase in sales during the warmer months. AF at 9.

On October 7, 2016, I issued a Notice of Docketing, allowing the parties to file briefs within seven business days. The parties have since filed appellate briefs in this matter (“Er. Br.” and “CO Br.” respectively). In the Employer’s appellate brief, it highlights the substantial construction work in the area near its restaurant locations during its purported seasonal period and Iowa’s weather patterns explaining, “concrete construction is less likely to be performed during the coldest months of the year from December to late March.” Er. Br. at 6, 7. Furthermore, the Employer asserted the CO unfairly adjudicated its application because its Ames location is new and only has limited data to support its position. Er. Br. at 8-9.

The CO argued the Employer failed to establish that its temporary seasonal need is “tied to a season of the year by an event or pattern” required by 8 C.F.R. § 214.2(h)(6)(ii)(B)(2). CO Br. at 10. Specifically, the CO emphasized that the Employer’s Story City location had higher grossing sales in March 2016 than in July, August, and September of both 2014 and 2015. CO Br. at 11. Moreover, the CO noted Story City in March 2016 had the third-highest grossing sales during the twenty-five months documented. CO Br. at 10-11. The CO ultimately concluded the Employer failed to establish a temporary seasonal need because the Employer’s payroll and gross sales by month “vary throughout the year seemingly at random.” See CO Br. at 11.

## **DISCUSSION**

For an employer to participate in the H-2B program, it must establish a need for temporary nonagricultural services or labor. 20 C.F.R. § 655.6(a). An employer’s need is considered temporary if the employer can establish that the need is either: (1) a one-time occurrence; (2) a seasonal need; (3) a peakload need; or (4) an intermittent need, as defined by the Department of Homeland Security at 8 C.F.R. § 214.2(h)(6)(ii)(B). 20 C.F.R. § 655.6(b). The following is required to establish seasonal need:

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

---

<sup>3</sup> The Employer acknowledged that the CO “does not openly analyze their application unfairly because of the limited data,” but claimed “it seems that the CO has placed their application at a disadvantage anyways.” AF at 9.

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).

The CO reviews H-2B applications and makes a determination based on factors including whether the number of worker positions and period of need are justified, and whether the request represents a bona fide job opportunity. 20 C.F.R. § 655.11(e)(3),(4). 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 denying certification in the instant case, the CO found that the Employer's evidence submitted with its NOD did not demonstrate an increase in sales during a specific seasonal period. AF at 16-17. The CO specifically noted the Employer's gross receipts "show no appreciable increase during the period of need requested." AF at 17. Moreover, the CO stated the Employer failed to show any correlation between the warmer weather or construction projects in the area and an increase in sales between the months of April through January 1<sup>st</sup>. See AF at 17.

In its NOD response, the Employer explained the discrepancy between its requested dates of need, and the warm seasonal period discussed in its statement of temporary need. AF at 28. First, the Employer explained that it was unable to file at the beginning of its season as it just recently learned of the H-2B program. AF at 28. The Employer also asserted that October through December is part of its seasonal period because there are several construction company projects in the area during that time, which begin to "slow in December." AF at 28, 35-36. The Employer stated the construction work in the area creates a more substantial customer base, leading to the need for more help at its restaurant locations during this time period. AF at 28, 35-36.

#### *The Employer's Story City Location*

While the Employer's application sought workers from October through January 1<sup>st</sup>, I will focus on its entire purported seasonal period, including the warmer months discussed in its appellate brief. See Er. Br. at 5-6, 9; AF at 55. I find the Employer's Story City 2014-2016 gross sales receipts by month fail to establish a consistent pattern of increasing business in the Employer's stated period of need, April through January 1<sup>st</sup>.<sup>4</sup> Specifically, the Employer's purported seasonal period does not show a recurring or consistent increase in sales, necessitating the need for temporary workers.<sup>5</sup> AF at 41-42. The Employer's gross receipts by month in 2015

---

<sup>4</sup> The Employer's 2014 Story City Gross Receipts only provide data for June through December. AF at 41. Thus, there is no data for the purported off-season months to compare.

<sup>5</sup> The Employer originally attached its Iowa Department of Revenue Sales Tax Quarterly Return Confirmations identifying quarterly gross sales in 2015 for its Story City location. AF at 117-124. The Employer argued this documentation proves its seasonal need. AF at 64-65. Specifically, the Employer stated its wages are highest during quarters two through four (April-December), which are the warmer months of the year, and "drastically" decrease in quarter one, the coldest months of the year (January-March). AF at 64-65. Thus, the Employer

for its Story City location do not demonstrate an appreciable or consistent increase in sales from April through December:

<b>Month</b>	<b>Gross Receipts</b>
January	\$24,794.33
February	\$22,607.29
March	\$28,246.70
April	\$28,564.75
May	\$36,657.83
June	\$33,837.62
July	\$33,019.75
August	\$30,449.17
September	\$28,618.79
October	\$31,262.22
November	\$28,773.49
December	\$29,380.17

See AF at 41. The Employer’s purported seasonal period, April through December, show higher sales than January and February, but also demonstrate comparable sales to the alleged off-season month of March. See *id.*

In its appellate brief, the Employer argues the CO “completely ignores” the gross sales figures. Er. Br. at 9. The Employer noted, “there was a decrease in business when the weather started to get colder in 2014 to the lowest point in February 2015 and then an increase in business when the weather started to get warm to the highest point for 2015 in May.” Er. Br. at 9. However, sales in March were similar to sales April, September, and November. AF at 41. The Employer ultimately ignores the inconsistencies in its purported period of seasonal need and emphasizes select high grossing warmer months to support its assertion. See Er. Br. at 9. Thus, I do not find a distinct increase in sales during the Employer’s alleged seasonal period from April to December.

Furthermore, as the CO pointed out in its final determination, the months between April and December do not show an increase in sales in a “predictable manner that is not subject to change.” For instance, in 2016, Story City’s data showed that March had the second highest

---

concluded its requested period of need, or October through January 1st, in its application falls within the busy season with the highest sales. See AF at 64-65.

Review of the Employer’s 2015 Quarterly Gross Sales for its Story City location demonstrate the lowest gross sales during quarter one, or January 1, 2015 through March 31, 2015. AF at 117-124. Although this documentation supports the Employer’s position, it cannot be wholly relied upon to establish a seasonal need. The Employer merely submitted its 2015 quarterly gross sales. A single year of increasing sales during the Employer’s asserted seasonal period is not enough to show a predictable pattern, nor is it sufficient to show that the seasonal period is “recurring in nature” as required by the regulation. See 8 C.F.R. § 214.2(h)(6)(ii)(B)(2). Moreover, the Employer’s quarterly sales do not identify gross sales for each month evidencing a consistent increase in business for the months between April and December.

grossing sales and April had the lowest grossing sales thus far. AF at 41. Additionally, both January and February had comparable sales to May.<sup>6</sup> AF at 41. Similarly, the Employer's 2014-2016 payroll records do not show an appreciable increase in workers during the purported seasonal period that would suggest a definite temporary need. See AF at 44.

The Employer also defends its position by arguing the weather and construction in the surrounding area clearly affects sales at its restaurant locations during its alleged seasonal period. Er. Br. at 5-6. Specifically, the Employer argued the weather data it originally provided with its application "shows the extreme cold weather Iowa experiences during the months of January, February and March." Er. Br. at 6; see also AF at 183-194. Further, the Employer stated its multiple exhibits showing the various construction projects near its restaurants support its temporary seasonal need from April to January 1<sup>st</sup>. See Er. Br. at 6-7; AF at 149-152.

However, the Employer's gross sales receipts for its Story City location do not evidence a distinct increase in sales between April and January 1<sup>st</sup>. An employer's lack of evidence supporting its assertion that it requires more workers in specific months out of the year warrants denial of certification. See *Lodoen Cattle Company*, 2011-TLC-109, slip. op at 5 (Jan. 7, 2011) (citing *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (*en banc*) (finding an employer's bare assertion without supporting documentation insufficient to meet its burden of proof). Documentation merely showing cold weather patterns and construction projects in the Employer's area between April and January 1<sup>st</sup> neither proves an increase in gross sales at its restaurant locations nor does it establish a temporary seasonal need. Furthermore, it is difficult to understand the Employer's position that its seasonal need extends from April to December when it admitted business "starts to slow in December." See AF at 28, 35-36.

Pursuant to the regulation at 8 C.F.R. § 214.2(h)(6)(ii)(B)(2), an employer must demonstrate its services or labor are "traditionally tied to a season of the year by an event or pattern and is of a recurring nature." The regulation requires an employer to "establish when the . . . season occurs and how the need for labor or services during this time of the year differs from the other times of the year." *Stadium Club, LLC d/b/a Stadium Club D.C.*, 2012-TLN-2, slip op. at 9 (Nov. 21, 2011). The Employer's gross receipts by month do not demonstrate increased sales are clearly linked to its purported seasonal period. Based on the documentation submitted by the Employer, I am unable to find that the period between April through January 1<sup>st</sup> constitutes a distinct time of the year requiring employment of additional cooks at the Employer's locations.

#### *The Employer's Ames Location*

In its NOD response, the Employer also explained its Ames location has only been open since April 2016, and therefore it could not submit gross sales receipts by month for 2014 and 2015. (AF 28). In the Employer's appellate brief, it noted it "sufficiently explained" its inability to provide additional data for its Ames location. Er. Br. at 7. Specifically, the Employer argued the CO failed to consider its other data besides the payroll records submitted with its NOD response. See Er. Br. at 6.

---

<sup>6</sup> January 2016 had grossing sales of \$28,664.78, February 2016 had grossing sales of \$28,605.31 and May had grossing sales of \$28,664.79. AF at 41.

The Employer cited to a portion of the Department of Labor’s preamble to the 2008 Final Rule concerning types of evidence appropriate to demonstrate a seasonal need:

[F]or most employers participating in the H–2B program, demonstrating a seasonal or peakload temporary need can best be evidenced by summarized monthly payroll records for a minimum of one previous calendar year that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation, the total number of workers employed, the total hours worked. Such records, however, are not the only means by which employers can choose to document their temporary need. The proposed regulation accordingly leaves it to the employer to retain other types of documentation, including but not limited to work contracts, invoices, client letters of intent, and other evidence that demonstrates that the job opportunity that is the subject of the application exists and is temporary in nature.

...

The Department also recognizes that conventional evidence such as payroll information may not be sufficient to demonstrate a one-time or intermittent need, or seasonal or peakload need in cases in which the employer’s need has changed significantly from the previous year. In such cases, the employer should retain other kinds of documentation with the application that demonstrates the temporary need.

73 Fed. Reg. 78020, 78035 (Dec. 19, 2008). Moreover, the Employer argued its case is similar to the facts of *Midwest Poured Foundations, Inc.*, 2013-TLN-53 (June 18, 2013), where “a new company had just been started and was asked to provide evidence that it did not have yet.” See Er. Br. at 8. The Employer noted in that case the administrative law judge used evidence other than what the CO requested in order to determine whether there was a temporary need. Er. Br. at 8.

*Midwest Poured Foundations* held that the regulations are “flexible enough to permit an employer to present other types of evidence, [other than payroll records], to establish that the job opportunity that is the subject of the application exists and is temporary in nature.” *Midwest Poured Foundations, Inc.*, 2013-TLN-53, slip op. at 7. In that case, the administrative law judge instructed the CO to grant certification where the employer presented sufficient evidence, including invoices, corroborating the Employer’s need for 50 temporary construction laborers. *Id.* The decision noted the CO’s final determination was erroneously hinged on the employer’s failure to provide all documentation required pursuant to the information request. *Id.* at 8. The administrative law judge subsequently found the employer’s other evidence submitted with its response to the CO’s request for information sufficient to establish its temporary need. *Id.*

The facts in *Midwest Poured Foundations* are distinguishable from the present case. Here, the Employer argues that case law and regulatory history allows the CO to consider additional evidence that would support a temporary seasonal need. Er. Br. at 7-9. Yet the Employer provided no additional documentation with its NOD response other than the Ames May and June 2016 payroll data and April-June 2016 gross receipts and the Story City 2014-

2016 payroll and gross receipts by month. *See* AF at 41-46. Thus, the CO had no other evidence to help assess whether the Employer's requested dates of need constitute a temporary seasonal need for its Ames location.

The Employer suggests the CO unfairly used Story City's data to adjudicate the application for its main location in Ames. *See* Er. Br. at 8. The Employer argued, "[t]aking only Story City's data into consideration while ignoring the explanation regarding how the Appellant decided on the amount of workers and the data of Ames, even though the data is limited due to the recent opening of the restaurant, is clear error on the CO's part." Er. Br. at 8. However, the data for the Employer's Ames location only shows gross receipts for three months, April 2016 to June 2016 and payroll records for May and June 2016. AF at 42. There is no data available from the alleged off-season, making it impossible to analyze a seasonal need based on the Ames data provided. Thus, in the absence of any other evidence from the Employer, I do not find that the CO unfairly relied on Story City data.

Further, the Employer's mere "explanation" is not supporting evidence the CO must use to determine whether to grant or deny certification. In the final determination, the CO correctly found the Employer's data insufficient to show a temporary seasonal need as the Employer failed to submit any additional supporting documentation for its Ames location. *See* AF at 16-17. The Employer ultimately misinterprets the holding in *Midwest Poured Foundations*. An employer is not excused from providing adequate evidence to support its assertions merely because it seeks certification for a new worksite location that may only have limited data.

In addition, the Employer's bare assertions about weather conditions and construction in the area contributing to increased sales during the alleged seasonal period are not adequate to establish a temporary seasonal need at its Ames location. *See Alter and Son General Engineering*, 2013-TLN-3 (Nov. 9, 2012) (affirming denial of certification where the employer failed to produce any documentation proving weather conditions and contract patterns contribute to a temporary seasonal need).

Based on the foregoing, I find the Employer failed to meet its burden of establishing a need for temporary workers on a seasonal need basis. 8 C.F.R. § 214.2(h)(6)(ii)(B); 20 C.F.R. § 655.6(b); 8 U.S.C. § 1361. Accordingly, I hereby affirm the CO's denial of the Employer's application.<sup>7</sup>

---

<sup>7</sup> Because I affirm denial of certification based on the Employer's failure to justify a temporary seasonal need for its dates requested, it is not necessary to reach the issue regarding the Employer's failure to establish a need for the number of workers requested under 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