

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-00073
ETA Case No.: H-400-16197-485893

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.¹ For the reasons set forth below, the CO's denial of temporary labor certification in this matter is affirmed.

¹ 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 four “Cooks,” from October 1, 2016 to January 1, 2017. AF at 62.² The Employer identified two worksite locations in Stuart, Iowa, and Greenfield, Iowa, and stated that its need was “seasonal.” AF at 62, 65, 71.

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 71. The Employer stated its wages are highest during the warmer months of the year, supporting its seasonal need. AF at 71-72. 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 72.

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 both the Stuart and Greenfield locations and accompanying charts, 2015-2016 payroll for both locations and accompanying charts, and examples of construction projects nearby the Stuart and Greenfield locations. *See generally*, AF at 98-204.

On July 22, 2016, the CO issued a Notice of Deficiency (“NOD”), identifying five specific deficiencies with the Employer’s application. AF at 52-61. 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 55. 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 construction 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 55.

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

² 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 55. The CO also requested 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 56 (emphasis in original).

On August 2, 2016, the Employer responded to the NOD and attached its amended application. AF at 26-50. The Employer also provided a revised Statement of Temporary Need. AF at 28. 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 included its 2014-2016 Gross Sales Receipts by Month, separated by each worksite location. AF at 41-44. The Employer asserted the corresponding graphs show a “typical increase in gross sales during the warmer months and then the least food being sold in the coldest parts of the year.” AF at 28. The Employer also submitted its 2014-2016 payroll records by month, with corresponding charts, for both the Stuart and Greenfield locations. AF at 43-50.

On September 14, 2016, the CO issued a Final Determination denying certification. AF at 13-19. The CO found that the Employer corrected three of the five deficiencies identified in the NOD, but two deficiencies remained, including the Employer’s failure to justify the dates of need requested. AF at 6-19. Specifically, the CO stated:

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 construction work, and the resulting increase in construction projects creates a customer base for the employer that requires an increased workforce to service.

AF at 16. The CO again pointed out the Employer’s requested period of need in its application, October 1, 2016 to January 1, 2017, is outside the warmer seasonal period outlined in its statement of temporary need. AF at 17.

Additionally, the CO found the Employer’s gross receipts by month did not demonstrate an increase in gross sales during the Employer’s purported seasonal period. AF at 17. The CO

highlighted particular months' gross sales in 2015 and 2016 within the Employer's alleged seasonal period:

[T]he Stuart location lists year-to-date gross receipts of \$312,466.15, with a monthly gross receipts average of \$52,077.69 [in 2016]. However, gross receipts for the month of April 2016 show a total of \$45,885.79. This is a decrease in gross receipts of \$6,191.90, or roughly 11%, from the year-to-date average for 2016. The gross receipts for the month of April in 2016 are also lower than for the month of January 2016, despite the employer's indication that the colder months are slower for business.

The same holds true for the 2015 year. The Stuart location shows gross receipts of \$504,663.31, with average monthly gross receipts of \$42,055.28. However, the month of June 2015 shows gross receipts of \$39,198.06. This is also a decrease in gross receipts. This time, the discrepancy is \$2,857.22, or roughly 6.8% lower gross receipts for the month of June 2015, compared to the rest of the year. The gross receipts for the Greenfield location also fail to indicate an increase in gross sales during the warmer months.

For the years 2014 and 2015, the Greenfield location shows lower gross receipts during the warmer months. In 2014, the months of April and September both show gross receipts below the monthly average for 2014. In 2015, the months of April, June and August show lower gross receipts in comparison to the monthly averages for 2015.

AF at 17-18. The CO noted the Employer's gross receipts merely show that business activity fluctuates throughout the year, rather than consistently increase during a particular seasonal period. AF at 18.

On September 26, 2016, the Employer requested administrative review of the denial before BALCA. AF at 1-11. In its review request, the Employer argued the CO ignored the evidence establishing an overall trend of an increase in business during the warmer months and overall decrease in the colder months. AF at 1. Specifically, the Employer indicated the CO dismissed the gross receipts erroneously reasoning that the "data shows a fluctuation throughout the year." AF at 1. The Employer further argued the CO spent "an excessive amount of time comparing various months at random." AF at 1.

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 argues it provided ample data evidencing an overall trend of an increase in business during the warmer months, which encompasses the period of need requested in its application. Er. Br. at 5. The Employer also asserted the CO's method of comparing its gross receipts by month was "not conclusive." *Id.*

Conversely, the CO argued the Employer's requested dates of need, October through January 1st, is "completely at odds with its warm-weather justification." CO Br. at 10.

Moreover, the CO indicated the evidence does not support the Employer's claim that business is "closely linked to demand for construction and agriculture" in the surrounding area. *Id.* The CO emphasized the Employer's gross receipts by month for each worksite location do not support a temporary seasonal need from April through December. *Id.* at 7-8, 9-11. To support this position, the CO noted the Employer's gross sales at its Stuart location in January 2016 "were higher than sales every month for the preceding twenty four months" and in March 2016, the Stuart location exhibited the highest recorded sales. *Id.* at 10.

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 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 2014-2016 gross sales receipts by month submitted with its NOD response show that business activity fluctuates throughout the year, rather than demonstrates an increase during a particular period or season. AF at 17-18.

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, 36-37. 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 36-37.

While the Employer's application sought workers from October through January 1st, I will focus on its entire purported seasonal period, including the warmer months discussed in its appellate brief. *See* Er. Br. at 5-6; AF at 62. I find the Employer's 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 1st. Specifically, the Employer's purported seasonal period does not show a recurring or consistent increase in sales, necessitating the need for temporary workers. *See* AF at 41-44. In its legal brief, Employer concedes its Greenfield and Stuart locations reveal fluctuations in sales throughout the year.³ *See* Er. Br. at 5. However, the Employer argued that the CO erroneously analyzed its gross receipts by month.⁴ Er. Br. at 6. The Employer stated:

The CO spent an excessive amount of time comparing various months, seemingly at random, without looking at the properly scaled graphs of the data. There is indeed an overall increase in business during the warmer weather months of the year and an overall decrease in the colder months of the year; comparing one month of the year with the yearly average is not conclusive. The warm month data should only be compared with the average of the cold weather months to see if there is an increase or not. The CO did not do this and instead used faulty math to come to the conclusion that there is not an increase in business during the warm weather months. However, the CO's excess mathematics were unnecessary based on the data submitted showing higher gross sales during the warmer weather months as well as the graphs which depict the data.

Id. However, the CO did not merely compare the monthly average for a given year with a particular month. *See* AF at 17-18. The CO correctly recognized the Employer's gross sales

³ The Employer originally attached its Iowa Department of Revenue Sales Tax Quarterly Return Confirmations identifying quarterly gross sales in 2015 for both the Stuart and Greenfield locations to its application. AF at 98-105, 110-117. The Employer argued this documentation proves its seasonal need. AF at 71-72. Specifically, the Employer asserted that quarter one, or January 1, 2015-March 31, 2015, for both locations, had the lowest gross sales of the year. AF at 72. The Employer further argued that quarters two through four, accounting for the months of April 1, 2015 through December 31, 2015, or the warmest months of the year, have higher gross sales than quarter one. AF at 72. Thus, the Employer concluded its requested period of need in its application falls within its busy season. AF at 72.

Review of the Employer's 2015 Quarterly Gross Sales for both the Stuart and Greenfield locations demonstrate the lowest gross sales during quarter one, or January 1, 2015 through March 31, 2015. AF at 98-105, 110-117. 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.

⁴ The Employer's suggested approach for comparing the warm months with the "average of the cold weather months to see if there is an increase or not" does not help its position. *See* Er. Br. at 6. For instance, in 2014, the Greenfield location had average grossing sales of \$26,151.24 for the months between January and March, which was still higher than December, which reflected grossing sales of \$25,726.35. *See* AF at 41. In 2015, December also had lower grossing sales than the average sales in the alleged off-season at the Greenfield location. *See id.* Furthermore, in 2015, the Employer's average grossing sales in its off-season at its Stuart location were higher than sales in June and November. AF at 43.

fluctuate throughout the year. AF at 18. The CO's determination also indicated that gross sales in April 2016 were lower than January 2016, "despite the employer's indication that the colder months are slower for business." AF at 17.

I find comparison of the Employer's purported off-season months with the alleged seasonal period an appropriate method by which to analyze whether the stated temporary seasonal need meets the definition under § 214.2(h)(6)(ii)(B)(2). *See Chippewa Retreat Spa, LLC*, 2016-TLN-63, slip op. at 5 (Sept. 12, 2016) (affirming denial of certification where an employer's gross receipts by month demonstrated the lowest sales during the purported seasonal period).

In this case, the Employer's gross receipts by month demonstrate lower sales in the alleged seasonal period than its off-season at both locations. *See* AF at 41-44. The Employer attempts to mask these inconsistencies or fluctuations by highlighting its "overall trend of an increase in business activity" in the warmer months of the year. *See* Er. Br. at 5 (emphasis in original). For example, Greenfield shows lower gross sales in purported seasonal period than in its alleged off-season month. AF at 41. Specifically, March 2014 demonstrated higher grossing sales than April, September, November, and December. AF at 41.

In 2015, the Employer stated Greenfield's sales were "very low" from January to April, but increased "dramatically from April to May." Er. Br. at 5. However, the 2015 Greenfield sales also reveal that the alleged off-season months of January, February, and March had higher grossing sales than both August and December. AF at 41. In fact, August 2015 was the lowest grossing month of the year. 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 5-6.

The Employer's Stuart gross receipts also show an unpredictable fluctuation between sales throughout the year. *See* AF at 43. The Employer admitted to "some fluctuation in business in 2015" at its Stuart location. Er. Br. at 5. Nevertheless, the Employer maintains its Stuart location, between April and December, had an "overall increase above the sales during January through March." Er. Br. at 5. The Employer ignores the fact that in 2014, Stuart had lower sales in both November and December than in March. *See* AF at 43. Furthermore, in 2015, Stuart had lower grossing sales in June than in March. AF at 43. The Employer argued that June 2015 was simply an "outlier" as it was the only month below the gross sales between January and March. *See* Er. Br. at 5-6.

Gross receipts for the Employer's Stuart location in 2016 further illustrate unpredictable sales each month. *See* AF at 43. For instance, in 2016, Stuart had the lowest grossing sales in the month of April and the highest grossing sales in March. AF at 43. Moreover, the Employer's grossing sales in April 2016 were lower than January, February and March at the Stuart location. AF at 43.

In its legal brief, the Employer acknowledged its alleged seasonal period sporadically demonstrates lower sales than the months in its purported off-season. For instance, in 2016, the Employer admitted the Stuart location's gross sales "*unexpectedly* increased in March and

decreased in April, but there was still an overall increase in business during May and June.” Er. Br. at 6 (emphasis added). Yet the regulation specifically states that employment is not seasonal “if the period during which the services or labor is not needed is unpredictable or subject to change.” § 214.2(h)(6)(ii)(B)(2). Thus, the period between April and December cannot be considered a temporary seasonal need when the Employer’s alleged off-season from January through March is evidently “unpredictable” and “subject to change.” See § 214.2(h)(6)(ii)(B)(2).

Thus, the Employer’s assertion it experiences an increase in sales during the warmer months due to more customers traveling through Iowa, eating out, and buying “icy cold drinks” is not supported by evidence. See Er. Br. at 5; AF at 28, 35, 72. The Employer’s claim that it has substantial construction near its restaurants, which contributes to a larger customer base in the fall months, is also not corroborated by the gross sales for each month. See AF at 28, 36-37, 72-73. 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). 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, 36-37.

I find the Employer’s argument unconvincing. The Employer’s gross receipts by month for each location do not show a consistent connection between its purported seasonal period and an increase in sales. See AF at 41-44. The Employer argues it established a seasonal need for April through December because its gross receipts evidence an “overall increase” in sales during that period. Er. Br. at 5-6. The Employer mistakes the definition for temporary seasonal need. The regulation does not merely require an employer to show that additional temporary employment is generally or intermittently needed during a specific season.

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 also 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 for each location display an unpredictable fluctuation throughout the year. Based on this documentation, I am unable to find that the period between April through January 1st constitutes a distinct time of the year requiring employment of additional cooks at the Employer’s locations. Thus, the Employer’s general or “overall” increase in sales between the months of April through December is insufficient to establish a temporary seasonal need under the regulation. See Er. Br. at 5-6.

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.⁵

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

⁵ 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).