

U.S. Department of Labor

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

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



Issue Date: 07 April 2020

In the Matter of:

**AG-MART PRODUCE, INC. d/b/a
SANTA SWEETS, INC.,**
Employer.

**OALJ Case Nos. 2020-TLC-00050
2020-TLC-00051**
ETA Case Nos. H-300-19353-206321
H-300-20035-295700

DECISION AND ORDER REVERSING DENIALS OF LABOR CERTIFICATIONS

Appearances: Stephanie Rosin, Esq.
Signature Staffing, Inc.
Avon Park, Florida
and
Ann Margaret Pointer, Esq.
Fisher & Phillips LLP
Atlanta, Georgia
For the Employer

Matthew Bernt, Esq.
Matthew Gordon, Esq.
Edward Waldman, Esq.
U.S. Department of Labor
Washington, DC
For the Certifying Officer

Before: **THEODORE W. ANNOS**
Administrative Law Judge

These matters arise under the temporary agricultural labor or services provision of the Immigration and Nationality Act¹ (“Act”) and its implementing regulations² (“Regulations”). On March 16, 2020, Ag-Mart Produce, Inc. d/b/a Santa Sweets, Inc. (“Employer”) filed with the Board of Alien Labor Certification Appeals (“BALCA” or “Board”) requests for expedited administrative review of the final determinations issued by the Certifying Officer (“CO”) in the above-captioned H-2A Applications for Temporary Employment Certification.³ On March 25 and 27, 2020, the Administrative Files were submitted in 2020-TLC-00050/H-300-19353-206321 and 2020-TLC-00051/H-300-20035-295700, respectively.⁴

BACKGROUND

Employer filed two H-2A Applications for Temporary Employment Certification (“Application”). On December 21, 2019, Employer filed an Application for its North Florida (“NF”) location in Jennings, Florida, seeking certification for 25 seasonal “Farmworkers and Laborers, Crop” (SOC Occupational Code 45-2092.02) for the period March 2, 2020 to November 9, 2020 (“NF Application”).⁵ On February 11, 2020, Employer filed an Application for its South Florida (“SF”) location in Immokalee, Florida, seeking certification for 55 seasonal “Farmworkers and Laborers, Crop” (SOC Occupational Code 45-2092.02) for the period April 16, 2020 to May 15, 2020 (“SF Application”).⁶ In both the NF Application and SF Application, Employer described the duties and requirements as “[c]ultivat[ing] and harvest[ing] tomatoes, cucumbers, squash and peppers[.]”⁷

¹ 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1188.

² 20 C.F.R. Part 655, Subpart B.

³ See 20 CFR § 655.171(a).

⁴ The Administrative Files will hereinafter be referred to as “AF1” for 2020-TLC-00050/H-300-19353-206321 and “AF2” for 2020-TLC-00051/ H-300-20035-295700. Pursuant 20 CFR § 655.171(a), a decision in these matters was due within five business days after receipt of the Administrative Files. However, on April 3, 2020, Employer filed a *Motion to Stay Decision on Pending Appeals*, requesting that a decision “be held in abeyance until Monday, April 6, to afford the parties ample time to complete settlement discussions and for the DOL to give the additional information submitted by the Employer full and careful consideration.” I granted the motion and stayed these matters through April 6. Since then, Employer has informed me that no resolution has been reached with Counsel for the CO. Employer has also made several additional filings, including an opposed motion for remand. Those additional filings are rendered moot by this Decision and Order.

⁵ AF1 at 9, 64-65, 69-70.

⁶ AF2 at 7, 55-56, 63-64.

⁷ AF1 at 69; AF2 at 63.

On February 11, 2020, the CO issued to Employer a Notice of Required Modifications (“NRM”) because it had not demonstrated how the job opportunity in the NF Application was temporary or seasonal in nature.⁸ On that same date, Employer responded to the NRM.⁹

On February 18, 2020, the CO issued to Employer a Notice of Deficiency (“NOD”) because Employer had not demonstrated how the job opportunity in the SF Application was temporary or seasonal in nature.¹⁰ On February 26, 2020, Employer responded to the NOD.¹¹

On March 9, 2020, the CO denied both the NF Application and the SF Application.¹² Although two separate decisions were issued, the decisions are identical.¹³ Importantly, the decisions cite to *Ag-Mart Produce, 2020-TLC-00018* (Jan. 10, 2020) (“*Ag-Mart I*”), and rely on Employer’s previous applications for both its NF location and its Central Florida (“CF”) locations in Duette, Parrish and River:¹⁴

A review of the employer’s filing history ... revealed that the employer had been previously certified for applications containing the same worksite locations, crops, and duties for a period which did not appear indicative of a seasonal need.

Specifically, each of the applications contains the same crops: tomatoes, cucumbers, squash, and peppers, purports to be tied to a distinct seasonal need, and yet taken together they span the entire calendar year.

The chart below was presented to illustrate the employer’s previous applications:

⁸ AF1 at 41-47.

⁹ *Id.* at 18-40.

¹⁰ AF2 at 43-48.

¹¹ *Id.* at 18-40.

¹² AF1 at 6-12; AF2 at 4-10.

¹³ *Id.*

¹⁴ *Id.*

Case Number	Employer Name	Status	Beginning Date of Need	Ending Date of Need	Crops
H-300-18304-283117	Ag-Mart Produce, Inc.	Determination Issued - Certification	1/1/2019	6/10/2019	tomatoes, cucumbers, squash and peppers
H-300-18311-337358	Ag-Mart Produce, Inc.	Determination Issued - Certification	1/7/2019	6/17/2019	tomatoes, cucumbers, squash and peppers
H-300-19312-136199	Ag-Mart Produce, Inc.	Determination Issued - Denied	1/20/2020	4/12/2020	tomatoes, cucumbers, squash and peppers
H-300-18334-625171	Ag-Mart Produce, Inc.	Determination Issued - Certification	2/11/2019	11/15/2019	tomatoes, cucumbers, squash and peppers
H-300-18346-272172	Ag-Mart Produce, Inc.	Determination Issued - Certification	2/25/2019	11/15/2019	tomatoes, cucumbers, squash and peppers
H-300-19043-730662	Ag-Mart Produce, Inc.	Determination Issued - Certification	4/16/2019	5/20/2019	tomatoes, cucumbers, squash and peppers
H-300-19072-584623	Ag-Mart Produce, Inc.	Determination Issued - Certification (Expired)	4/16/2019	5/20/2019	tomatoes, cucumbers, squash and peppers
H-300-19130-833692	Ag-Mart Produce, Inc.	Determination Issued - Certification	7/15/2019	12/16/2019	tomatoes, cucumbers, squash and peppers
H-300-19144-568266	Ag-Mart Produce, Inc.	Determination Issued - Certification	8/5/2019	12/16/2019	tomatoes, cucumbers, squash and peppers
H-300-19184-283158	Ag-Mart Produce, Inc.	Determination Issued - Certification	9/17/2019	10/14/2019	tomatoes, cucumbers, squash and peppers
H-300-19214-668990	Ag-Mart Produce, Inc.	Determination Issued - Certification	10/14/2019	12/16/2019	tomatoes, cucumbers, squash and peppers
H-300-19333-172841	Ag-Mart Produce, Inc.	Determination Issued - Certification	2/10/2020	11/9/2020	tomatoes, cucumbers, squash and peppers
***	***	***	***	***	***
***	***	***	***	***	***

15

The employer's filing history demonstrates the capability to grow the same crops throughout the entirety of the calendar year. By contrast, a seasonal need is, by definition limited in scope and tied to a certain time of year.

Moreover, a recent filing from the employer, H-300-19312-136199, was issued a Notice of Deficiency (NOD) for failure to establish either a temporary or a seasonal need. The employer appealed to BALCA, and the NOD was affirmed, [*Ag-Mart I*], with the ALJ finding that the employer had failed to demonstrate either a seasonal or a temporary need. The employer then filed a motion for reconsideration with BALCA which was denied as well.

In this filing, the employer again listed its job opportunity as 'seasonal,' but provided no new information in support of that contention. Instead, the job opportunity contained in this filing is consistent with application H-300-

¹⁵ The applications involving the NF location are: H-300-18334-625171, H-300-18346-272172, H-300-19072-584623, H-300-19184-283158, and H-300-19333-172841. The applications involving the CF locations are: H-300-18304-283117, H-300-18311-337358, H-300-19312-136199, H-300-19043-730662, H-300-19144-568266, H-300-19214-668990, and H-300-19130-833692. The CO did not cite to any prior applications for the SF location.

19353-206321, and therefore is not demonstrative of a seasonal nor a temporary need. The burden to demonstrate a 'temporary' or 'seasonal' need for agricultural services rests with the employer.

In its NOD response, the employer submitted a letter. The letter, in part, stated,

[Employer] has multiple farm location within the United States and Mexico. This application is for labor that is needed in the [SF] location. The [SF] location operates independent of the [CF] locations which were the locations at issue in the decisions cited in the recent NRM issued in this case[.] [*Ag-Mart I*] was solely decided based on the period of need set forth in that filing (H-300-19312-136 I 99/ January 20, 2020-April 12, 2020) and the [CF] locations listed in that case. In fact, the judge acknowledged in his decision that the employer does have a seasonal need, but that it included a period after the one listed in the TLC application.

The employer's seasonal need in this filing is inherently different from its need in [its CF locations], and the TLC applications filed for the [CF] locations are not relevant when evaluating the need at the [SF] location. Importantly, the regulations prohibit the employer from including worksite locations in its applications that are outside of a single area of intended employment. Thus, if the employer is prohibited from including the locations in its filings, it is inherent that the CO is prohibited from using work performed outside of the area of intended employment in its evaluation of the employer's application.

The employer also submitted Google Maps showing that its worksite locations are located in different areas in central and southern Florida. The employer argued its applications' seasonal needs differs in its central and southern areas due to being in separate areas of intended employment and notes that the sites are separated by two to five hours of driving time. However, for purposes of the Regulations, area of intended employment are identified for recruitment and identifying normal commute

times, see 20 CFR 655.103(b). Different areas of intended employment, if present, do not automatically connote different seasonal needs.

The employer did not explain how these geographic differences would alter its seasonal need for same duties and crops in neighboring central and southern Florida. Since 2018, the employer has requested workers in each month of the year ... As the employer is performing the same crop activities in the state of Florida in every month of the year, it is unclear how the activity is tied to a certain time of year by an event or pattern.

In its response, the employer declined to explain how different parts of Florida would produce different seasons for the same crops.

The employer further stated that its,

Need at the [SF location] includes activities that are recurrent on an annual basis. However, all activities cease in May, and normally no labor is needed until August to fill the required positions. As evidenced by the employer's prior TLC applications that include the [SF] location, the activities are not year-round and do not exceed one year in length. The demand for labor is dictated by the activities performed; therefore, the need for additional labor coincides with the seasonal production and activities being performed.

While any given application filed by the employer may be limited in a way which appears seasonal in isolation, the employer's need stretches across more than a dozen applications which, when considered in the aggregate, show a need for labor in the job opportunity sought which is not seasonal.¹⁶

On March 16, 2020, Employer filed with BALCA its requests for expedited administrative review of the CO's denials of the NF Application and SF Application.¹⁷ On April 1, 2020, both Employer and the CO filed briefs in support of their respective positions.

¹⁶ AF1 at 9-12; AF2 at 7-10.

¹⁷ AF1 at 1-4; AF2 at 1-2.

PARTIES CONTENTIONS

Employer argues that the CO incorrectly determined that: (1) Employer failed to demonstrate a seasonal or temporary need, and (2) Employer's locations in separate areas of intended employment do not create an independent basis to evaluate Employer's need as separate and distinct. Specifically, Employer states, in part:

The Employer farms at multiple locations within the United States and Mexico, including multiple locations throughout the State of Florida. The current cases are evaluating the Employer's seasonal need at its [NF] and [SF] farming locations. These locations maintain their own distinctly different farming operations and have distinctly different and independent seasonal needs. The [CF] locations that were at issue in [*Ag-Mart I*] are wholly irrelevant to the determination whether the Employer's [NF] and [SF] needs are seasonal. Moreover, the CO should not be permitted to arbitrarily aggregate all three locations where the applicable regulations explicitly prohibit the Employer from including more than one area of intended employment in its Applications, nor should the CO be permitted to include in its determination worksites that were not included in either of the Employer's Applications before the CO in the present cases.

The DOL's repeated certification of the Employer's more than eight prior TLC applications that included the [SF] and [NF] locations should be dispositive evidence that the activities at these locations are not year-round, do not exceed one year in length, and are, as a matter of law, seasonal and temporary. Importantly, the Employer's period of need at its [SF] and [NF] locations are far below the ten (10) month threshold in which to question the seasonality or temporary nature of the job opportunity.¹⁸

Counsel for the CO contends that Employer failed to carry its burden of proving that its need for agricultural workers is seasonal or temporary, and relies upon the decision in *Ag-Mart I*:

¹⁸ Employer Brief at 14-15. Employer also cites to, and included with its filing, a deposition transcript and an article from the Wall Street Journal. Neither will be considered nor become part of the record. See 20 CFR § 655.171(a) (ALJ's decision will be "on the *basis of the written record* and after due consideration of any written submissions (*which may not include new evidence*)") (emphasis supplied).

In [*Ag-Mart I*], following a *de novo* hearing, the ALJ found that [Employer] failed to establish that its application for 50 farmworkers at its [CF] locations from January 20, 2020, through April 12, 2020, was seasonal or temporary in nature. Citing that decision, the CO asked Employer to show how its applications for H-2A workers here, at its [NF and SF] locations, were seasonal or temporary in nature. Instead of providing responsive information to the CO, Employer provided only assertions from its attorney and Google Maps with the locations of its Florida worksites. But counsel's assertions are not evidence.

In light of the foregoing, the CO properly determined that, consistent with the ALJ's finding in [*Ag-Mart I*], Employer failed to establish how the proposed job opportunities differed from the [CF] location and were, in fact, seasonal or temporary. To the contrary, Employer's application history for its Florida locations demonstrate a year-round need for labor. In light of Employer's failure to provide sufficient evidence and information to establish that the job opportunities are temporary or seasonal in nature, the CO's decision easily passes muster under the 'arbitrary and capricious' standard of review applicable here.¹⁹

LEGAL STANDARD

The scope of review in H-2A cases is limited. I may only consider the written record and any written submissions from the parties, which may not include new evidence.²⁰ The standard of review is *de novo*. That is, I may affirm the denial of certification only if the basis stated by the CO for the denial is legally and factually sufficient in light of the written record provided.²¹

To qualify for the H-2A program, an employer has the burden to establish that it has a need for agricultural services or labor on a temporary or seasonal basis.²² According to the regulations:

¹⁹ CO Brief at 4-5 (citations omitted).

²⁰ 20 C.F.R. § 655.171(a).

²¹ The Act and Regulations are silent as to the appropriate standard of review to be applied on administrative review of a CO's decision. I find persuasive the rationale articulated in *Crop Transport*, 2018-TLC-00027, slip op. at 3 n.4 (Oct. 19, 2018), concluding that *de novo* review, as opposed to an arbitrary and capricious standard, is appropriate on administrative review under 20 C.F.R. § 655.171(a). See also *Mejia Produce*, 2020-TLC-00030 (applying *de novo* review); *Family Fresh Harvest*, 2019-TLC-00077 (same); *E&A Farming*, 2019-TLC-00053 (same).

²² 20 C.F.R. § 655.161(a).

[E]mployment is of a seasonal nature where it is tied to a certain time of year by an event or pattern, such as a short annual growing cycle or a specific aspect of a longer cycle, and requires labor levels far above those necessary for ongoing operations. Employment is of a temporary nature where the employer's need to fill the position with a temporary worker will, except in extraordinary circumstances, last no longer than 1 year.²³

In determining whether an employer's need 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."²⁴ The inquiry is whether the employer's needs are seasonal, not whether the particular job at issue is seasonal.²⁵ "Denial of certification is thus appropriate where the employer fails to provide any evidence that it needs more workers in certain months than other months of the year."²⁶ Similarly, "[i]t is the nature of the need for the duties to be performed which determines the temporariness of the position."²⁷ If "[t]he consecutive nature of...current and previous application periods in conjunction with the similarity in job requirements and duties demonstrate that the employer's need does not differ from its need for such labor during other times of the year; the need is year round."²⁸ Further, an employer may not continually shift its periods of need in order to utilize the H-2A program,²⁹ and therefore is required to justify a change in its dates of need in order to ensure it is not manipulating its "season" when it really has a year-round need for labor.³⁰

²³ 20 C.F.R. § 655.103(d).

²⁴ *Fegley Grain Cleaning*, 2015-TLC-00067, slip op. at 3 (Oct. 5, 2015).

²⁵ *Pleasantville Farms*, 2015-TLC-00053, slip op. at 3 (June 8, 2015).

²⁶ *Farm-Op*, 2017-TLC-00021, slip op. at 7 (July 7, 2017).

²⁷ *Id.*

²⁸ *Larry Ulmer*, 2015-TLC-00003, slip op. at 4 (Nov. 4, 2014).

²⁹ *Farm-Op*, 2017-TLC-00021, slip op. at 10.

³⁰ *Pleasantville Farms*, 2015-TLC-00053, slip op. at 3.

DISCUSSION

In determining whether Employer has met its burden in these cases of establishing that it has a need for agricultural labor on a temporary or seasonal basis, it is necessary to consider the extent to which a CO may rely upon an employer's prior applications to make a finding that its needs are not temporary or seasonal, but rather year round. The Board has "consistently found that the CO can review the situation as a whole ... and need not confine the analysis to the existing application."³¹ And the record here is clear that the consolidation of Employer's current and previous applications involving its Florida locations shows a year round need for workers, as the applications are nearly identical in terms of both job requirements and job duties.³² However, a question remains as to whether the CO's consideration of the prior Florida applications was proper in light of the geographic differences among Employer's NF, CF and SF locations. That is, the issue is whether there any geographic limitations that confine a CO's review of an employer's prior applications when determining if an employer's need is temporary or seasonal.

While BALCA has expressly sanctioned a CO's ability to reference prior applications when considering whether an employer in its current application has met its burden, neither the Regulations nor prior BALCA decisions provide any boundaries on the geographic "reach" that a CO can use when engaging in such a review. The Regulations do, however, address "areas of intended employment,"³³ and require employers to submit a "job order ... to the SWA [State Workforce Agency] serving the area of intended employment" prior to filing an Application for Temporary Employment Certification.³⁴ An "area of intended employment" is defined in the regulations as:

The geographic area within normal commuting distance of the place of the job opportunity for which the certification is sought. There is no rigid

³¹ See *Ag-Mart Produce*, 2020-TLC-00018, slip op. at 7 (Jan. 10, 2020) (citing *Haag Farms*, 2000-TLC-00015 (Oct. 12, 2000); *Bracey's Nursery*, 2000-TLC-00011(Apr. 14, 2000); *Stan Sweeney*, 2013-TLC-00039 (June 25, 2013); *Rainbrook Farms*, 2017-TLC-00013 (Mar. 21, 2017)).

³² AF 1 at 69, 161, 163, 294, 296, 442, 522, 524, 650, 652, 799, 801, 917, 919, 1090, 1092, 1196, 1198, 1280, 1282, 1525, 1527, 1612, 1632; AF2 at 63, 291, 311, 424, 426, 515, 518, 759, 762, 862, 864, 949, 951, 1122, 1124, 1240, 1242, 1370, 1372, 1524, 1604, 1606, 1735, 1737. See *Larry Ulmer*, 2015-TLC-00003, slip op. at 4 (If "[t]he consecutive nature of...current and previous application periods in conjunction with the similarity in job requirements and duties demonstrate that the employer's need does not differ from its need for such labor during other times of the year; the need is year round.").

³³ 20 C.F.R. § 655.103(b).

³⁴ 20 C.F.R. § 655.121(a)(1).

measure of distance that constitutes a normal commuting distance or normal commuting area, because there may be widely varying factual circumstances among different areas (e.g., average commuting times, barriers to reaching the worksite, or quality of the regional transportation network). If the place of intended employment is within a Metropolitan Statistical Area (MSA), including a multistate MSA, any place within the MSA is deemed to be within normal commuting distance of the place of intended employment. The borders of MSAs are not controlling in the identification of the normal commuting area; a location outside of an MSA may be within normal commuting distance of a location that is inside (e.g., near the border of) the MSA.³⁵

Here, Employer's Florida locations are not in the same "areas of intended employment." As stated above, the NF location is in Jennings, the SF location is in Immokalee, and the CF locations are in Duette, Parrish and River. These locations are not in the same MSA.³⁶ The NF location is approximately 230-262 miles from the CF locations,³⁷ and the SF location is approximately 363 miles from the NF location³⁸ and 123-155 miles from the CF locations.³⁹ While there is "no rigid measure of distance," the significant distances between Employer's Florida locations cannot be considered "normal commuting distance."⁴⁰ For reference, the distance between Employer's NF and CF locations is greater than the distance from Washington, D.C. to New York City, and the distance between Employer's SF and CF locations is approximately the same as from Washington, DC to Philadelphia.⁴¹ The fact that all of Employer's locations are

³⁵ 20 C.F.R. § 655.103(b).

³⁶ See U.S. Census Bureau, Metropolitan and Micropolitan Statistical Area Reference Files and Maps, available at <https://www.census.gov/programs-surveys/metro-micro/geographies.html> (last visited Apr. 3, 2020).

³⁷ AF1 at 32, 35, 38.

³⁸ AF2 at 23.

³⁹ AF2 at 25, 28, 30.

⁴⁰ See *Phillip Maxwell*, 93-INA-522 (Sept. 23, 1994) (CO's "survey seems to be of 'the State of California,' which, one cannot help but remark, is certainly a Texas-size interpretation of the 'area of intended employment' for a job in Bakersfield.").

⁴¹ See *Stonehenge Framing*, 2010-TLN-00032, slip op. at 5 n.2 (Feb. 26, 2010) ("[I]t is within [an ALJ's] parameters to take judicial notice of ... driving distance[.]"); *Chippewa County War Memorial Hospital*, 2010-PER-00901 (Apr. 28, 2011) (panel took judicial notice of mileage between two cities); *Pacific Sea Products*, 89-INA-46 (May 2, 1990) (same).

in Florida is not determinative of a seasonal need, and does not necessarily make them within the same area of intended employment.

The CO's reliance upon *Ag-Mart I* is misplaced. *Ag-Mart I* involved an application for Employer's CF locations, and the CO relied solely on Employer's prior applications for its CF locations to show that its need was year round.⁴² In this case, however, the CO did not limit his review of prior applications to the locations of the respective current applications. As stated, the CO relied on prior CF applications to deny Employer's NF Application,⁴³ and relied on prior CF and NF applications to deny Employer's SF Application.⁴⁴

In all, I find that the CO's consideration of some of Employer's prior applications was too far-reaching, and therefore inaccurately reflects Employer's period of need. Specifically, the CO should not have considered the prior CF applications for the current NF Application, and he should not have considered the prior CF and NF applications for the current SF Application. Permitting a CO to rely on prior applications involving locations that are not in reasonable proximity to the location identified in a current application creates a substantial risk of producing unreliable data that conflates an employer's period of need, which implicitly impedes an employer's ability to meet its burden of showing that its need is only temporary or seasonal.⁴⁵

In removing from consideration the irrelevant prior applications, the current applications establish a seasonal need. In fact, the prior certified NF applications that the CO relied on in his decision actually support Employer's current NF Application.⁴⁶ Those past NF applications consistently show that Employer has a seasonal need from February to November for the purpose of cultivating and harvesting tomatoes, cucumbers, squashes and peppers.⁴⁷ The current NF Application falls squarely into that period.⁴⁸

⁴² AF1 at 419-515; AF2 at 1492-1500.

⁴³ AF1 at 10-11.

⁴⁴ AF2 at 8-9.

⁴⁵ See *Catnip Ridge Manure Application, Inc.*, 2014-TLC-00078, slip op. at 3 (May 28, 2014) (CO's decision will not be upheld if the "determination was based on facts that are materially inaccurate, inconsistent, unreliable, or invalid, or based on conclusions that are inconsistent with the underlying established facts and/or legally impermissible.").

⁴⁶ AF1 at 10-11, 516-773, 911-1064, 1274-1498, 1610-1718.

⁴⁷ *Id.* at 522, 524, 650, 652, 917, 919, 1280, 1282, 1612, 1632.

⁴⁸ *Id.* at 69.

As for Employer's SF Application, the CO relied only upon Employer's past CF and NF applications,⁴⁹ despite there being prior SF applications that he could have referenced and considered.⁵⁰ Prior certified SF applications show a seasonal need from August to May.⁵¹ Employer's current SF Application fits within that period.⁵²

Employer has proffered the same evidence in the current applications that it produced in prior certified applications for the NF and SF locations. The periods of need identified in the NF Application and SF Application also fall within the same period as the prior certified applications for those locations. Therefore, I find that Employer has met its burden of establishing that it has a need for agricultural labor on a seasonal basis. The Certifying Officer's denials were in error.

ORDER

For the reasons stated above, it is hereby ORDERED that the denials of Employer's H-2A Applications are REVERSED, and these matters are REMANDED to the Certifying Office for further processing in accordance with this Decision and Order.

For the Board:

THEODORE W. ANNOS
Administrative Law Judge

Washington, DC

⁴⁹ AF2 at 8-9.

⁵⁰ AF2 at 21-22.

⁵¹ *Id.*

⁵² *Id.* at 63.