This matter arises under the temporary agricultural labor or services provision of the Immigration and Nationality Act and its implementing regulations. The temporary alien agricultural labor certification (H-2A) program permits employers to hire foreign workers to perform agricultural work within the United States on a temporary basis. The Certifying Officer (“CO”) in this matter denied the application of Mimi Farms, Inc. (“Employer”) for temporary labor certification for 225 Farmworker positions. Pursuant to 20 C.F.R. § 655.141(b)(4), the Employer appealed the denial and requested a de novo hearing before an Administrative Law Judge (“ALJ”).

Procedural History

On June 30, 2021 the Chicago National Processing Center (“CNPC”) received the Employer’s ETA Form 9142A application requesting authorization to hire 225 workers to perform
manual labor to work in a tomato greenhouse facility and complete the following duties:

Monitor plants to prevent diseases, weeds and insects, prune, clip lower, suckering and transferring plants. Maintain eqpt, such as scissors lifts, lift trucks bailer, tarp cleaner, sprayers and disinfecter. Inspect tomatoes for quality. Pack, prepare tomatoes for shipment. Clean and maintain greenhouse & other related Farmworker activities as per SOC/OES 45-2092 (onetonline.org) . . .

The dates of need would be from September 1, 2021 to June 30, 2022. On July 7, 2021, the CO issued a Notice of Deficiency ("NOD") stating that Employer failed to demonstrate a temporary (seasonal) need as required by 20 C.F.R. § 655.103(d) and also failed to provide a detailed explanation as to why the need is seasonal rather than permanent. Further, the NOD states that Employer failed to provide an explanation to distinguish between “Modern Commercial Industrial Structure” versus “Field-Lean-Tos” as required by 20 C.F.R. § 655.141(a).

On July 8, 2021, Employer timely filed its first reply to the NOD. Employer noted that during the prior season, the staff damaged the crop and impacted the production for the season. Therefore, “[Employer’s] seasonal need [is] to tied to the planting and growth season of the tomato plant without taking on the planting duties, [Employer] could reasonably wait for workers until October, but with the planting falling onto [Employer’s] shoulders, the workers are needed to come in September to make sure the plants are planted correctly.” On July 12, 2021, Employer timely filed its second reply, which included Employer’s 914 reports for 2020 broken down by quarter. Employer explained that “[w]ith the planting duties coming back to [Employer], we’d anticipate to see a much higher trend of wages paid out for 2021 in Q3, thus solidifying the temporary need for [Employer] which solely follows the growth cycle of their tomato plants.”

On July 13, 2021, the CO issued a final determination denying the temporary labor certification. The CO noted that “based on the filing history and Employer’s requested dates of need in the current case, the employer has not established how this job opportunity is seasonal, rather than permanent and full-time, in nature.” The CO also noted the Employer’s filing season as reflected below.

<table>
<thead>
<tr>
<th>Case Number</th>
<th>Employer Name</th>
<th>Status</th>
<th>Start Date of Need</th>
<th>End Date of Need</th>
</tr>
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<tr>
<td>H-300-21168-410736</td>
<td>Mimi Farms Inc.</td>
<td>Received</td>
<td>09/01/2021</td>
<td>06/30/2022</td>
</tr>
</tbody>
</table>

3 The following abbreviations are used in this Decision: “AF” refers to Appeals File, “Tr” refers to Transcript. (AF 68-78).
4 Id.
5 AF 49-54.
6 This Decision and Order only addresses the deficiency on appeal regarding 20 C.F.R. § 655.103(d).
7 AF 47-48.
8 Id.
9 AF 20-46.
10 AF 22.
11 AF 12-19.
12 AF 16.
The CO determined that the Employer did not provide any documentation with its application supporting the shift in their requested dates of need. The CO stated that adding a greenhouse and acreage does require more workers, but does not require a change in Employer’s seasonal need. Further, the CO noted that Employer requested the workers to come earlier to complete planting duties, but that the Employer failed to include those duties in its application.

In addition, the CO also stated that Employer tied its need to the growing cycle of tomatoes. However, the CO concluded that Employer’s filing history provides that these duties can be performed every month of the year. Thus, the Employer failed to show how the need is seasonal or “tied to a certain time of year by an event or pattern.” Although Employer provided its 941 quarterly tax return for 2020, “it does not indicate the employment status of the workers, permanent versus seasonal, or the number of hours worked,” therefore the Employer provided an incomplete picture of its labor needs. Ultimately, the CO concluded that based on the Employer’s history and the shift in requested dates of need, the Employer had not established a seasonal need as required by 20 C.F.R. § 655.103 (d) and denied the certification.

On July 16, 2021, Employer requested an expedited de novo hearing of the CO’s Denial of Certification. On July 21, 2021, the undersigned issued a Notice of Docketing and Preliminary Order, setting a teleconference for July 23, 2021, and directing the CO to submit the AF. As Employer requested a de novo hearing, the undersigned must independently examine the evidence and testimony contained in the record to determine the employer’s eligibility for temporary labor certification. The regulations further provide that after a de novo hearing “the ALJ must affirm, reverse, or modify the CO’s determination, or remand to the CO for further action. The decision of the ALJ must specify the reasons for the action taken. The burden remains with Employer throughout the process.

Pursuant to the deadlines set forth at 20 C.F.R. §655.171(b)(1), a hearing in this matter was scheduled and held on July 27, 2021. Thereafter, on August 3, 2021, the CO and Employer submitted post hearing briefs, and the record is now closed.

Proffered Relevant Evidence

In de novo hearings, employers are permitted to submit evidence even if that evidence could have been submitted to the CO in response to a NOD. Other than the documentary evidence contained in the AF Administrative File, Employer filed three exhibits (EX 1, EX 2, and

<table>
<thead>
<tr>
<th>H-300-20208-735640</th>
<th>Mimi Farms Inc.</th>
<th>Certified</th>
<th>10/01/2020</th>
<th>07/31/2021</th>
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<td>H-300-19226-383310</td>
<td>Mimi Farms Inc.</td>
<td>Certified</td>
<td>10/15/2019</td>
<td>08/15/2020</td>
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\[13\] AF 8.
\[14\] AF 9.
\[15\] AF 10.
\[16\] Id.
\[17\] Id.
\[18\] Id.
\[19\] In re Westward Orchards, 2011-TLC-00411 (July 8, 2011).
EX 3), and the CO submitted one exhibit into evidence (CX 1), which were admitted during the hearing. I have fully considered the entire record, including testimony of the witness. The testimony, in pertinent part, is as follows.

**Hearing Testimony of Dave Loewen**

Mr. Loewen is the General Manager of Employer’s Huron, Ohio operation since March 2018 and has worked in the greenhouse industry for nine years. The first H-2A season was approved for October 15, 2019 to August 15, 2020 and the second season was approved for October 1, 2020 to July 31, 2021. The current request is for September 1, 2021 to June 30, 2022.

During the hearing, Mr. Loewen testified that Employer grows on a counter-cyclical market, and regardless of when Employer plants tomatoes, the tomato plants produce fruit for ten months. Mr. Loewen stated that planting occurs in early September because new plants do not need as much sunlight initially, and the plant will produce tomatoes during the winter. Additionally, Mr. Loewen explained that the greenhouse was constructed and completed in late 2017 after being delayed several months. Due to the delay, Employer could not plant a full crop in September like it originally planned and planted a “short crop” in March 2018. Since the tomatoes were planted after the “lighting season” in March, Employer harvested the tomatoes in May 2018. Further, he noted that Employer was relatively new, and the past three years were a learning process. Therefore, although the past applications for H-2A workers required a different period and duties, Employer has now developed a season and duties that will remain the same for years to come.

Mr. Loewen also testified Employer previously applied for H-2A workers to being work in October because outside contractors used to conduct the planting. However, when Employer hired an outside contractor to plant the tomatoes during the previous season, they received poor results. To ensure better results, Employer now requests the H-2A workers to conduct the planting, which was always completed in September, noting no change in its season. He stated that the tomato plants fruit production season is complete by the end of June and H-2A workers are not necessary as the greenhouse begins preparation for the next season during July and August.

Mr. Loewen testified that another company comes to sanitize the greenhouse during the

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20 Tr. at 16-17.
21 AF 87-326.
22 AF 60-84.
23 Tr. at 95.
24 Tr. at 27-28, 64.
25 Tr. at 51.
26 Id.
27 Id.
28 Tr. at 77-78.
29 Tr. at 34, 47-48.
30 Tr. at 76-77.
31 Id
32 Id
33 Tr. at 34-35.
clean-out period, cutting down the vines, and shredding the plants to prevent plant disease during the following season.\textsuperscript{34} Due to the poor planting conducted by an outside contract, Employer sent the most recent group of H-2A workers home at the end of June instead of the end of July.\textsuperscript{35}

**Parties’ Positions**

**Certifying Officer’s Closing Brief**

In her Closing Brief (“CO’s Brief”), the CO argues that Employer has not shown a seasonal need. First, the CO asserts that Employer’s filing history provides a need for workers during every month of the year.\textsuperscript{36} Beginning in 2019, Employer applied for and received H-2A workers from October 15, 2019 to August 2020. In 2020, Employer applied and received workers from October 1, 2020 to July 31, 2021.\textsuperscript{37} Employer’s current application for H-2A workers is from September 1, 2021 to June 30, 2022.\textsuperscript{38} Therefore, the CO asserts that from 2019 until present, Employer has applied for the same type of H-2A workers covering every month of the year.\textsuperscript{39}

Secondly, the CO argues that Employer can manipulate its season because of its use of a greenhouse citing *Nature Fresh Farms USA, Inc.*\textsuperscript{40} The CO asserts that Mr. Loewen testified that Employer’s growing season is not required to “begin in September and could begin during any month using the two different greenhouses.”\textsuperscript{41} Further, Mr. Loewen testified that due to the “greenhouse’s assimilation lighting,” the tomatoes can “grow in the winter months and create a situation where “summer conditions [can occur] year-round.”\textsuperscript{42} Therefore, the CO concluded that Employer can manipulate its season.

Thirdly, the CO asserts that Employer failed to show a seasonal need.\textsuperscript{43} The CO states that Employer failed to provide evidence of its monthly labor utilization or production levels.\textsuperscript{44} In support of its argument, the CO cites *Maroa Farms, Inc.*,\textsuperscript{45} which denied its request because the employer failed to “explain its refusal to supply the requested records, which would have addressed its need for labor throughout the year or to explain how their labor needs changed to affect the alleged seasonal need as required by the H-2A program.”\textsuperscript{46} The CO argues that Employer has “failed to provide records that show information on a monthly basis and failed to provide alternate relevant documentation.”\textsuperscript{47}

Furthermore, during the hearing, Mr. Loewen stated that Employer does maintain such

\textsuperscript{34} Id.
\textsuperscript{35} Tr. at 77-78.
\textsuperscript{36} CO’s Brief at 5-6.
\textsuperscript{37} CO’s Brief at 6; Employer released the H-2A workers early at the end of June.
\textsuperscript{38} Id.
\textsuperscript{39} Id.
\textsuperscript{40} 2020-TLC-00079, slip op. at 9 (June 19, 2020); CO’s Brief at 7.
\textsuperscript{41} Id.
\textsuperscript{42} Id.
\textsuperscript{43} CO’s Brief at 7.
\textsuperscript{44} CO’s Brief at 8.
\textsuperscript{45} 2020-TLC-00110, slip op. at 14-15 (September 4, 2020).
\textsuperscript{46} Id.
\textsuperscript{47} CO’s Brief at 9.
records but failed to provide the records. However, Employer did file its quarterly IRS 2020 tax reports of wages paid but failed to differentiate between permanent and seasonal/contract workers. The CO states that Employer failed to provide these records because it is unlikely they show an increase in need from September to June and a decrease in need from July to August, therefore, proving its need is not seasonal. Further, Employer hires seasonal local workers in July and August to conduct cleaning but failed to provide documentation of the need during this time. Therefore, the CO concluded that Employer has not met its burden to show seasonal need because it failed to provide documentation regarding its labor needs.

The CO notes that “need based on economics cannot properly be classified as ‘seasonal.’” The CO argues that Employer ties its needs to its profits rather than weather or annual patterns, pointing to Mr. Loewen’s testimony that Employer grows on a “counter-cyclical” season “based on the market value of tomatoes and the price per pound of tomatoes.” Further, Employer invested $33 million in lights to grow tomatoes during the winter months for a higher revenue. Therefore, Employer is able “to change production levels based on sales and market demands which further show[s] that Employer’s need is not seasonal since it is not based on ‘a short annual growing cycle or a specific aspect of a longer cycle’.” The CO asserts that because Employer can obtain the plants at any time from the propagator and its need may change due to the market, Employer has failed to establish a seasonal need.

The CO notes that Employer’s citation to Pope’s Plant Farm, Inc., during the hearing supports the CO’s denial rather than the Employer’s position. Unlike Pope where the employer tied its need to the impact of frost, Employer has failed to provide any information or documentation that connects its need to weather concerns. Therefore, the CO asserts that “Employer has only provide[ed] bare assertions that have not been independently verified and are not relevant to the seasonal need analysis.”

Finally, the CO argues that “[e]ven if the Employer hires a U.S. Contractor for cleaning duties in July and August, the Employer has year-round need for seasonal labor.” The CO asserts that Mr. Loewen’s testimony provides that the H-2A workers could complete the cleaning and sanitizing duties conducted in July and August because it requires no experience. Further, the CO notes that although Employer completes the cleaning performed in July and August, “these

48 Id.
49 Id.
50 CO’s Brief at 10.
51 Id.
52 Id.
53 Id.
54 Id.
55 Id.
56 Id.
57 Id.
59 CO’s Brief at 12.
60 Id.
61 Id.
62 CO’s Brief at 13.
63 Id.
are duties that fall within the duties and responsibilities related to farmworkers activities, do not require any experience and continue to show year-round need. Therefore, the CO argues Employer has established a year-round need as opposed to a seasonal need. The CO concluded that Employer failed to meet its burden based on the above reasons, and the CO’s denial should be affirmed.

**Employer’s Closing Brief**

Employer asserts that it has been certified for H-2A workers since 2019. The only difference in its current application is that it has “concrete knowledge of their actual growing season.” Employer notes that from planting to harvesting, tomato plants last for only ten-months, a schedule that Employer cannot alter. Further, Employer states that “[t]heir season is ‘counter cyclical’ as compared to outdoor tomato production, but still just as much tied to two natural cycles: (1) 10-month tomato production life cycle; and (2) the amount of sunlight based at given times of the year.” Employer argues that the CO failed to offer evidence to contradict its season, and reasons for the denial are flawed. Therefore, since Employer can “demonstrate a seasonal need that is tied to natural conditions and their need to perform that work is not year-round, the law is clear, that employer qualifies for H-2A certification.”

Employer noted that it has a standing agreement with the City of Huron for a “lighting season” running from October through April, which sets the growing season in advance, and any change would violate the agreement and go against Employer’s operational structure. Further, Employer invested $33 million in lights and pays $750,000 per month in electrical bills so it can “sell tomatoes during specific times of the year based on factors beyond Employer’s control as far as sunlight, weather, and market conditions for conventionally produced tomatoes.” Employer states that its current season of September to June is dependent upon varying levels of sunlight and the Earth’s angle towards the sun. Additionally, Employer argues that the CO has provided no evidence to rebut Employer’s current season.

Employer asserts that the CO incorrectly referenced the Matter of South Side Nursery to support her denial of its application. Employer notes that the CO failed to acknowledge the section of the decision which states “that the Court has previously acknowledged that “naturally recurring seasonal reasons (“weather concerns”) can co-exist with economic concerns and, thus would support a seasonal need.” Employer urges that because the timing of its season is tied to

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64 CO’s Brief at 14.
65 Id.
66 Employer’s Closing Brief is abbreviated as “Employer’s Brief.” Employer’s Brief at 1.
67 Id.
68 Id. at 1-2.
69 Id. at 2.
70 Id.
71 Id. at 3.
72 Id.
73 Id. at 4.
74 Id.
75 2010-TLC-00157 (Oct. 15, 2010).
76 Employer’s Brief at 5.
77 Id.
natural and seasonal factors, this case differs from South Side where the season had no relation to weather concerns. South Side is further inapplicable because Employer always plants its tomatoes in early September and therefore, there is no drastic shift in its planting season like the employer in South Side.

Furthermore, the only change in Employer’s current request for H-2A workers is that the workers will now be responsible for planting the tomatoes whereas in previous years Employer hired outside contractors. Employer argues that similar to Pope’s Plants, its season is tied to a tomatoes life cycle, “the one-month ‘shift’ by both is entirely permissible and ‘markedly different’ from South Side’s change in [the] period of need.”

Employer further differentiates its case from Matter of Maroa Farms. Employer argues that unlike the employer in Maroa which applied for a drastic shift in its season, Mimi has not left its “core season” of September through June. Employer also notes that the CO in Maroa, stated that the ten months of growing and two months of clear-out and sanitization is enough to establish seasonal need, the issue was the “combination of two different 10-month periods.” As to Employer’s failure to provide itemized payroll records, similar to the employer Maroa, Employer argues that the DOL H-2A rules do not require submission of that information. Additionally, the “discussion of payroll records in Maroa Farms was only because, as the Judge Ramaley noted, ‘the Employer’s requested dates of need have shifts on multiple occasions over approximately the last eight years.’” Employer further asserts that its itemized payroll records are unnecessary because it has shown a “rock-steady growing season” and has provided additional testimony explaining its seasonal need due to the case being reviewed under 20 C.F.R. §655.171(b).

Additionally, Employer requests the Court to reject the CO’s position “that agricultural employers cease to have a seasonal need if they could plant at bizarre times of the year, contrary to natural conditions and profitability concerns.” Employer states that this reasoning “could dismantle the H-2A program completely.” Employer asserts that “where a growing cycle is specifically tied to the amount of sunlight available at different times of year – as is the case here – the work is quintessentially ‘seasonal’ and should be certified.” Therefore, because Employer’s growing season does not match up with outdoor tomato growers, its season should be considered seasonal since it produces tomatoes when outdoor growers cannot.

Lastly, Employer notes that the duties conducted by the H-2A workers are different from

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78 Id. at 6.
79 Id.
80 Id. at 7.
81 Id. at 8.
82 2020-TLC-00110 (Sept. 4, 2020); Employer’s Brief at 9.
83 Id.
84 Id.
85 Id.
86 Id. at 10.
87 Id.
88 Id. at 11 (emphasis added).
89 Id.
90 Id.
91 Id. at 12.
the duties performed during the sterilization process. The sterilization process requires only 50-60 workers as opposed to the 225 workers needed for growing. The two processes require different skills for the sterilization process “no experience requirement and use of power washers and scrub brushes” and for the growing process the workers need “experience growing, training, and harvesting from tomato plants.” Employer argues that the fact that H-2A workers could do the job is irrelevant because the job is different, “a computer engineer could learn to plant tomatoes, but that does not make them a farmworker.” In conclusion Employer urges the Court to reverse the CO’s denial and remand it for certification.

Discussion and Applicable Law

The issue here is whether the Employer meets the burden of proving that they have a “seasonal need,” as defined by the applicable regulation at 20 C.F.R. § 655.103(d). The H-2A program exists to fill only temporary or seasonal labor needs; therefore, the need for a particular position cannot be a year-round need, except in extraordinary circumstances.

A “seasonal need” occurs if employment 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. In order to receive labor certification, an employer must demonstrate that it has a “temporary” or “seasonal” need for agricultural services. Employment is “temporary” where the employer’s need to fill the position with a temporary worker lasts no longer than one year, except in extraordinary circumstances.

To meet their burden showing a need for seasonal work, the employer must identify their growing season and how the need for labor or services during that growing season differs from other times of the year. The employer’s needs must be for a fixed season not whether the duties are seasonal. A need is not seasonal if the employer can manipulate the season to fit the criteria of the temporary labor certification program. Further, an employer is required to justify a change in its dates of need to ensure it is not manipulating its “season” when it really has a year-round need. Ten months has been viewed as an acceptable threshold when ascertaining whether an employer’s need is temporary.

In administering the H-2A program, the Board of Alien Labor Certification Appeals (“BALCA”) has resisted efforts to use temporary labor certification to fill particular positions of permanent or year-round employment need. BALCA has also “consistently found that the CO can review the situation as a whole . . . and need not confine the analysis to the existing application.”

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92 Id.
93 Id.
94 Id.
95 20 C.F.R. § 655.103(d).
96 20 C.F.R. § 655.103(d).
98 20 C.F.R. § 655.103(d).
100 See also William Staley, 2009-TLC-9, slip op. at 4 (Aug. 28, 2009).
101 See Grand View Dairy Farm, 2009-TLC-2 (Nov. 3, 2008)( finding that applying ten months as a threshold is not arbitrary where employer is given the opportunity to submit proof to establish the temporary nature of its employment).
102 See Larry Ulmer, 2015-TLC00003, slip op. at 4 (Nov. 4, 2014)(If “[t]he consecutive nature of . . . current and
Employers who seek to bring foreign agricultural workers into the United States under the H-2A program must apply to the Secretary of Labor for a labor certification that:

(A) there are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services involved in the petition, and

(B) the employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed.103

For purposes of the H-2A temporary alien labor certification program, when determining a temporary need, it is well settled that it is "not the nature of the duties of the position which must be examined to determine the temporary need. It is the nature of the need for the duties to be performed which determines the temporariness of the position."104

The CO notes that based on Employer’s past filing history the Employer’s growing season for the tomatoes was from roughly October until August in 2019-2020.105 Now Employer requests employees for a growing season that runs from September until June for the 2021-2022 growing season. The change in growing seasons raises the issue of whether the seasonal need is tied to a particular event or situation.

A seasonal need is tied to weather or a particular event, and Employer must justify a change in the dates for a seasonal need.106 Employer provides that its requested season changed because H-2A workers will now be responsible for planting tomatoes which always is completed in September. Employer also explained that greenhouses equipped with assimilation lighting begin their season in early September and end in the middle to end of June.107 The September to June season allows Employer to grow tomatoes on a counter-cyclical season to outdoor tomato farmers to produce tomatoes when outdoor farmers cannot produce tomatoes. Further, Employer explained that tomatoes can only grow for ten months, and that afterward the greenhouse requires a sanitization process to prepare for the following season; the sanitation takes two months.

Employer has demonstrated a ten-month planting and harvesting season that is supported by the facts and the law. Employer’s explanation of their “counter cyclical” growing season, testimony of their General Manager, Mr. Loewen, and explanation of their need to shift the upcoming 2021 to 2022 growing season establishes a seasonal need for H-2A laborers to fill these

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[103] 8 U.S.C. §1188(a)(1); see also 20 C.F.R. §655.100; Form ETA-9142A, H-2A Application for Temporary Employment Certification, U.S. DEPT. OF LABOR("ETA Form 9142A").
[105] CO’s Brief at 6.
[107] EX 1.
job duties in Employer’s operations from September 1, 2021 to June 30, 2022.108

Furthermore, Employer adequately explained the difference in need during the ten-month growing period that requires 225 workers instead of the two-month sanitization process, which only requires 50-60 workers. Additionally, since the CO previously confirmed a ten-month planting and harvesting season with two months of sanitization in the mentioned Maroa Farms case, the Employer’s request is consistent with past requests.

Based on the entirety of the evidence in the record, Employer has met its burden of proving a “seasonal need” for H-2A workers as defined by 20 C.F.R. § 655.103(d). Accordingly, the decision of the Certifying Officer denying Employer’s Application for Temporary Labor Certification under the H-2A Agricultural Program is reversed.

**ORDER**

It is hereby ORDERED that:

1. The Certifying Officer’s denial of Employer’s application for temporary labor certification is REVERSED.

2. The matter is REMANDED to the Certifying Officer for further consideration in accordance with this decision.

**SO ORDERED.**

For the Board:

WILLIAM P. FARLEY

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108 Inasmuch as the finding is that the Employer established a seasonal need for H-2A employment, the issue of whether the Employer established, in the alternative, a temporary need is not addressed. It is noted that the Employer’s request is for a ten month period, which has been held to be the threshold for a temporary need.