

**U.S. Department of Labor**

Office of Administrative Law Judges  
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**Issue Date: 06 January 2011**

**OALJ Case No.: 2011-TLC-00104**

**ETA Case No.: C-10328-25597**

*In the Matter of*

**TAYLOR ORCHARDS,**  
*Employer*

Certifying Officer: William L. Carlson  
Chicago Processing Center

Before: **WILLIAM S. COLWELL**  
Associate Chief Administrative Law Judge

**DECISION AND ORDER**  
**VACATING DENIAL OF CERTIFICATION**

On December 22, 2010, Taylor Orchards (“the Employer”) filed a request for review of the Certifying Officer’s determination in the above-captioned temporary agricultural labor certification matter. *See* 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184(c)(1); 20 C.F.R. § 655.171. On December 29, 2010, the Office of Administrative Law Judges received the Administrative File from the Certifying Officer (“the CO”). In administrative review cases, the administrative law judge has five business days after receiving the file to issue a decision on the basis of the written record. § 655.171(a).

**Statement of the Case**

On November 24, 2010, the United States Department of Labor’s Employment and Training Administration (“ETA”) received an application from the Employer for temporary labor certification for one hundred and thirty-five (135) “Farmworkers & Laborers, Crop, Nursery and

Greenhouse.” AF 33-43.<sup>1</sup> The Employer stated that it required one month fruit orchard experience for the position. AF 42.

On December 1, 2010, the CO issued a Notice of Deficiency (“NOD”), finding that the Employer’s previous application did not require one month experience of fruit orchard experience, and therefore, the requirement was not consistent with the normal and accepted qualifications for the position in violation of 20 C.F.R. § 655.122(b).<sup>2</sup> AF 12-15. The CO indicated that in order for the Employer’s application to be acceptable, it was required to amend its application to be consistent with its previous application. AF 15. The Employer responded to the NOD on December 3, 2010, arguing that this year it will do a more intense pruning in a shorter amount of time, and therefore required workers with at least one month of experience. AF 5-11.

On December 15, 2010, the CO denied temporary labor certification. AF 2-4. The CO rejected the Employer’s reasoning for the experience requirement, finding that the Employer’s argument was inconsistent with the Employer’s request for workers to plant, cultivate, and harvest peaches, strawberries, green beans, and squash. AF 4. The CO found that the pruning duties are minor and do not substantiate an increase in the job qualifications. AF 4. Therefore, the CO found that the one month requirement was not consistent with the normal and accepted qualifications for the position, in violation of 20 C.F.R. § 655.122(b). The Employer’s appeal followed the CO’s denial.

### **Discussion**

The H-2A regulations provide that “[e]ach job qualification and requirement listed in the job offer must be bona fide and consistent with the normal and accepted qualifications required by employers that do not use H-2A workers in the same or comparable occupations and crops. Either the CO or the SWA may require the employer to submit documentation to substantiate the appropriateness of any job qualification specified in the job order.” 20 C.F.R. § 655.122(b). Here, the Employer’s previous applications did not require any experience. Now, the Employer

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<sup>1</sup> Citations to the 64-page Administrative File will be abbreviated “AF” followed by the page number.

<sup>2</sup> Additionally, the CO found one other deficiency, not at issue on appeal. AF 14.

seeks to establish a shorter pruning season, and in order to achieve that goal, would like to require one month fruit orchard experience.

That the Employer has not required one month of experience in the past does not resolve the issue of whether the one month experience requirement is “normal and accepted.” Instead of requiring the Employer to submit documentation to substantiate the appropriateness of the one month experience requirement, the CO’s NOD instructed the Employer to amend its application to be consistent with the Employer’s previous application. The CO then denied when the Employer did not do so.

While the Employer has included evidence in its request for review and its appellate brief to demonstrate that its one month requirement is consistent with the normal and accepted qualifications required by other employers, the regulations provide that administrative review must be made on the basis of the written record and cannot include new evidence submitted on appeal. 20 C.F.R. § 655.171(a). Therefore, I am unable to consider this new evidence. Nevertheless, I find that the CO’s denial of certification was improper because the Employer was never provided the opportunity to submit evidence to demonstrate its one month experience requirement is consistent with the normal and accepted qualifications required by employers that do not use H-2A workers in the same or comparable occupations and crops. As such, I find that this case must be remanded to the Certifying Officer in order to permit the Employer the opportunity to submit documentation to substantiate the appropriateness of the one month experience requirement.

### **Order**

In light of the foregoing, it is hereby **ORDERED** that the Certifying Officer’s decision is **VACATED** and **REMANDED** for further processing consistent with this decision.

For the Board:

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**WILLIAM S. COLWELL**  
Associate Chief Administrative Law Judge

Washington, D.C.