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Issue Date: 08 July 2011

In the Matters of:

WESTWARD ORCHARDS,	**OALJ Case No.:** ETA Case No.:	**2011-TLC-00411** C-11118-29167
VOLANTE FARMS,	**OALJ Case No.:** ETA Case No.:	**2011-TLC-00412** C-11126-29255
S.W.A. TOBACCO,	**OALJ Case No.:** ETA Case No.:	**2011-TLC-00413** C-11118-29158
BRUSCOE FARM,	**OALJ Case No.:** ETA Case No.:	**2011-TLC-00414** C-11118-29157
GORDON KIMBALL,	**OALJ Case No.:** ETA Case No.:	**2011-TLC-00415** C-11118-29163
DAVID R. SHEARER **D/B/A** **PINE HILL ORCHARDS,**	**OALJ Case No.:** ETA Case No.:	**2011-TLC-00416** C-11118-29169
MEADOWVIEW FARM, LLC,	**OALJ Case No.:** ETA Case No.:	**2011-TLC-00422** C-11133-29293
MEADOWVIEW FARM, LLC,	**OALJ Case No.:** ETA Case No.:	**2011-TLC-00423** C-11133-29292
KEOWN ORCHARDS,	**OALJ Case No.:** ETA Case No.:	**2011-TLC-00424** C-11126-29254
MEADOWBROOK ORCHARDS, INC.,	**OALJ Case No.:** ETA Case No.:	**2011-TLC-00425** C- 11133-29296
OUTPOST FARM, LLC,	**OALJ Case No.:** ETA Case No.:	**2011-TLC-00426** C-11133-29297
APEX ORCHARDS,	**OALJ Case No.:** ETA Case No.:	**2011-TLC-00427** C-11136-29324

ANDRE & ULRICA GROSZYK FARM, LLC,	**OALJ Case No.:**	**2011-TLC-00428**
	ETA Case No.:	C-11136-29327
PINE HEDGE ORCHARDS D/B/A BIG APPLE,	**OALJ Case No.:**	**2011-TLC-00429**
	ETA Case No.:	C-11136-29320

Employers.

Certifying Officer: William L. Carlson
Chicago National Processing Center

Appearances: Wendel Hall, Esquire
CJ Lake, LLC
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For the Employer

Gary M. Buff, Associate Solicitor
Matthew Bernt, Attorney
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Washington, DC
For the Certifying Officer

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

DECISION AND ORDER AFFIRMING IN PART AND REVERSING IN PART THE CO'S DENIALS OF CERTIFICATION

These matters arise under the temporary agricultural labor provisions of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a) and 1184(c)(1), and the implementing regulations at 20 C.F.R. Part 655, Subpart B. On May 31, 2011, and June 1, 2011, the Employers in these matters filed requests for review of the Certifying Officer's ("CO") denials of their H-2A applications for temporary alien labor certification. *See* 20 C.F.R. § 655.171(b).

On June 6, 2011, counsel for the Employers filed an unopposed motion to consolidate the appeals, and on June 9, 2011, I held a telephone conference call with the parties to schedule the

hearing. During the conference call, the parties agreed that the administrative records for *Westward Orchards*, 2011-TLC-00411, and *Volante Farms*, 2011-TLC-00412, which were transmitted to this Office from the CO on June 8, 2011, would serve as the administrative files for the purposes of the administrative hearing and the decision and order. On June 14, 2011, I issued an *Order Granting Motion to Consolidate*.[1]

On June 17, 2011, I conducted a telephonic hearing. The Employers called Ms. Marie Gonzalez, Mr. Jose Ocasio, Ms. Carol House, Mr. David Volante, Mr. Don Green, and Mr. John Young to testify at the hearing. The CO offered CO Exhibits ("CX") 1-2, which were both admitted into evidence. The Employers offered Employers' Exhibits ("EX") 1-10, and 13, which were admitted into evidence, and withdrew EX 11. Counsel for the Employers indicated that he wished to submit two additional deposition testimonies, and I informed the parties that I would keep the evidentiary record open until June 23, 2011. On June 24, 2011, the Employers submitted the deposition testimony of Professor Wesley Autio, EX 14. During a conference call held on June 24, 2011, the parties agreed to submit post-hearing briefs on June 30, 2011, and the Employers' attorney indicated that he would submit the deposition of Jose Ocasio, EX 12. The Employers filed EX 12 on June 30, 2011, and the parties filed their post-hearing briefs on June 30, 2011.

STATEMENT OF THE CASE

Administrative Files

On April 28, 2011 and May 6, 2011, the United States Department of Labor's Employment and Training Administration ("ETA") received applications from Westward Orchards and Volante Farms ("the Employers"), respectively. AF1 51-59, AF2 52-60.[2] Both Employers are located in Massachusetts and sought two H-2A workers each for the position of "farmworker and laborer crop," O*Net/OES code 45-2092. AF1 51-52, AF2 52-53. Westward Orchards stated the job duties as follows:

> May perform any combination of tasks related to the planting, cultivating, and processing of fruit and vegetable crops including, but not limited to, driving, or

[1] On June 22, 2011, I issued a second consolidation order, joining *Meadowview Orchards*, 2011-TLC-00425.

[2] Citations to the Westward Orchard Administrative File will be abbreviated "AF1" followed by the page number, and citations to the Volante Farm Administrative File will be abbreviated "AF2" followed by the page number.

> operating farm machines, maintain buildings, preparing soil, planting, pruning, weeding, thinning, spraying, irrigating, mowing, harvesting. May use hand tools such as shovel, pruning saw, and hoe.

AF1 53. Volante Farms stated the job duties as follows:

> May perform any combination of the following tasks: planting, cultivating, and harvesting of vegetables and fruits, work as a crew member. Dump seeds into hopper of planter towed by tractor. Rides on planter pushing debris from seed sprouts that discharge seeds into plowed furrow. May operate farm equipment. Plant roots and bulbs using hoes and trowel. Cover plants with plastic to prevent frost damage. Weed and thinning blocks to plants. Transplanting seedlings using hand transplanter. Closes and ties leaves over heads of cauliflower. Picks, cuts, pulls, and lifts crops to harvest them. Ties vegetables in bunches. May be identified with work assigned such as blocking, cutting, stringing, irrigating various crops. Transplanting, moving, spacing of flats. Carts and [drives] plants to and from greenhouse floors and benches. Washing [vegetables], cleaning barns, farmstand, and greenhouse. Setting up and breaking down farmstand. Cutting down trees, pruning trees and bunching brush.

AF2 54. Both Employers stated that one month of experience with the above-mentioned duties was required for the job opportunity. AF1 53-54, AF2 54-55.

On May 5, 2011, and May 13, 2011 the CO issued *Notices of Deficiency* ("NOD") to the Employers, finding that the one-month experience requirement was not 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. AF1 38-40, AF2 33-36. The CO notified the Employers that the Massachusetts State Workforce Agency ("SWA") conducted a prevailing practice survey and determined that one-month experience was not a common and normal practice among non-H-2A employers for general farm workers and laborers.[3] AF1 40, AF2 35.

On May 11, 2011, and May 17, 2011, the Employers responded to the NOD. AF1 21-37, AF2 18-32. Westward Orchards argued that even though the Massachusetts SWA survey found that 25% of apple farms and 15% of vegetable farms that do not hire H-2A workers have an experience requirement, this requirement is still "normal and accepted." AF1 21. Westward Orchards also submitted a copy of a 2009 prevailing practices survey for apples showing that two out of eight apple employers require experience prior to hiring. AF1 32. The survey did not identify the state that was surveyed and did not classify its results by H-2A or non-H-2A employers. *Id.* Based on the Employer's one-month experience requirement, the CO denied

[3] The CO also found one additional deficiency in each case, which are not at issue on appeal.

Westward Orchards' application on May 23, 2011. AF1 10-12. The CO explained that the Massachusetts SWA found that of the six employers who produced fruit and 17 employers who produced vegetables, none of them require work experience prior to hiring, and therefore, the one-month experience requirement was not normal and accepted, as required by 20 C.F.R. § 655.122(b). AF1 12.

In its NOD response, Volante Farms contended that while only 20% of vegetable farmers require experience, the requirement is "normal and accepted." AF2 18. With its NOD response, Volante Farms also submitted a copy of a 2009 survey of vegetable growers and greenhouses, showing that three out of 17 vegetable growers require experience prior to hiring and two out of eight greenhouse employers require experience prior to hiring. AF2 at 27-28. These surveys did not identify the state that was surveyed and did not classify the results by H-2A or non-H-2A employers. *Id*. The CO denied Volante Farms' application on May 24, 2011 based on the Employer's one-month experience requirement. AF2 10-12. In denying Volante Farms' application, the CO explained that the Massachusetts SWA found that only three of 19 non-H-2A vegetable employers require experience prior to hiring workers. AF2 12. The CO found that the Employer's survey was inadequate to show that the one-month experience requirement was normal and accepted, because while it showed that seven out of 20 employers required experience, it did not differentiate between employers that use the H-2A program and employers that do not. *Id*.

Testimonial Evidence

A de novo hearing was held on June 17, 2011.[4] At the hearing, I admitted into evidence the Administrative Files (AF1 and AF2) and Employers' Exhibits 1-9. Tr. 14, 17, 97. Additionally, I informed the parties that I would admit Employers' Exhibit 12, to be submitted after the hearing. Tr. 21. The witness' testimonies at the hearing are summarized below.

Ms. Marie Christine Gonzalez

Ms. Gonzalez is a Certifying Officer at the Chicago National Processing Center who denied the Volante Farms application because the Employer did not prove that the one-month experience requirement was normal and accepted. Tr. 29-30. Ms. Gonzalez has been working at

[4] Citations to the hearing transcript will be abbreviated "Tr." followed by the page number.

the CNPC since January 2005 and is one of two Certifying Officers responsible for administering the H-2A program. Tr. 40, 42.

Ms. Gonzalez testified that the "normal and accepted" standard is distinct from the "prevailing practice" standard, because a practice is "prevailing" if 50 percent or more of employers engage in the practice. Tr. 30-31. Ms. Gonzalez explained that "normal and accepted" is not defined in the regulations and that there is not any sort of specific definition of normal and accepted. Tr. 44-45. Ms. Gonzalez stated that the H-2A regulations do not define normal and accepted, and that a practice that is engaged in by less than 50, 40, 30, or 20 percent of employers might be still be considered normal and accepted, based on the information before the CO. Tr. 31-33. Likewise, Ms. Gonzalez explained that even if a practice was performed by over 40 percent of non-H-2A employers, it would not necessarily be considered a practice that is "normal and accepted." Tr. 45. Ms. Gonzalez stated that a determination that a practice is normal and accepted is made on a case-by-case basis based on evidence submitted to the CO. Tr. 45.

Ms. Gonzalez testified that she contacted the New England Apple Council ("NEAC") in connection with the determination of whether or not the one-month requirement was normal and accepted among non-H-2A employers. Tr. 36. Ms. Gonzalez testified that she was provided with a prevailing practice survey for 2009 and then followed up with an additional request for clarification on the survey. Tr. 36-37. Ms. Gonzalez did not contact NEAC after the Massachusetts SWA provided her with a revised prevailing practice survey on May 20, 2011, and she did not contact the Farm Bureau or any other agricultural association in Massachusetts about the one-month experience requirement. Tr. 37.

Ms. Gonzalez testified that Volante Farms' response to the NOD was insufficient because it was not clear whether the survey submitted in response to the NOD was conducted in Massachusetts and because the survey combined the practices of H-2A and non-H-2A employers. Tr. 46-47. Ms. Gonzalez testified that she relied upon the revised prevailing practices survey from the Massachusetts SWA (EX 1 and CX 1) to make her determination about whether the one-month experience requirement was normal and accepted. Tr. 47. She noted that the SWA survey found that four out of four non-H-2A apple employers do not require experience prior to hiring, and therefore, it is not normal and accepted. Tr. 47-48. Regarding the non-H-2A vegetable employers, three employers required experience prior to hiring and 16 did

not require any experience prior to hiring. Tr. 48. Based on those results, Ms. Gonzalez determined that one-month experience was not a normal and accepted requirement for vegetable farmers in Massachusetts. Tr. 48.

Ms. Gonzalez explained that when the Chicago National Processing Center ("CNPC") receives the results of prevailing practice surveys from SWAs, it places this information in a working folder so the analysts will have the information available to them when they are reviewing the applications. Tr. 50-51. Ms. Gonzalez testified that the CNPC does not perform any type of statistical analysis on the results of the SWA surveys to determine the statistical validity, and that such analysis is not required by the regulations or internal procedures. Tr. 51. Ms. Gonzalez also noted that the specific standards that apply to establishing a prevailing wage or piece rate do not apply to prevailing practice surveys. Tr. 52-53.

Ms. Gonzalez testified that prior to March 2011, procedures changed at the CNPC, and it now makes contact with the SWA to request additional information or clarification if the CNPC has a concern about a job order, even if the SWA accepted the job order. Tr. 53.

Ms. Gonzalez testified that she was not aware of the results of a 2007 census of agriculture by the U.S. Department of Agriculture that found that there were approximately 1,207 apple growers and approximately 1,010 vegetable growers in Massachusetts. Tr. 57-58. Ms. Gonzalez testified that if this information had been provided to her by the SWA or the Employers, she would have considered it, but since she did not have this information, her determination was based on the information provided by the Massachusetts SWA. Tr. 59.

Mr. Jose Ocasio

Mr. Jose Ocasio is the foreign labor certification supervisor at the Massachusetts Department of Career Services. Tr. 65-66. Mr. Ocasio has been working with the H-2A program and agriculture for 21 years. Tr. 86. Mr. Ocasio's office processes ETA Form 790s, conducts housing inspections, conducts the prevailing wage and practice survey, and handles the referral process of job orders. Tr. 73-74. Mr. Ocasio explained that his office only works with employers that are covered under the H-2A program. Tr. 74.

Mr. Ocasio supervised the 2009 Massachusetts SWA survey regarding the prevailing practices of agricultural employers. Tr. 66. The surveys are conducted every two years. Tr. 80. In setting the parameters of the survey, Mr. Ocasio explained that the SWA started with a list of

approximately 2,000 employers and sent out approximately 796 surveys to agricultural employers. Tr. 67. Mr. Ocasio stated that the SWA did not send out a survey to any of the 2,000 agricultural employers that had an "invalid code," pursuant to Attachment C of the 2009 Agricultural Prevailing Wage Survey, EX and CX 2. Tr. 76-77. Mr. Ocasio explained that while employers that only use H-2A workers are excluded from the prevailing wage survey, they are included for the prevailing practice survey. Tr. 78-79.

Mr. Ocasio stated that he did not do any statistical analysis before mailing out the 796 surveys, but that he compiled information from the Massachusetts Department of Agriculture to come up with the list of employers. Tr. 67-68. Mr. Ocasio explained that the SWA ensures that the survey results are representative because it uses a database from the Department of Agriculture and that the information comes from the Bureau Market of the Department of Agriculture and is kept current. Tr. 79. Mr. Ocasio stated that the SWA did not conduct any in-person surveys because the SWA does not have the staff and resources needed to conduct them. Tr. 68, 80. Mr. Ocasio stated that the SWA received approximately 129 of the surveys back from the employers. Tr. 67. In Mr. Ocasio's opinion, many employers did not respond because the survey is voluntary and employers are not compelled to respond. Tr. 80.

Mr. Ocasio testified that of the 150-160 surveys mailed to apple orchards, 33 responded, and only 19 responses had valid data. Tr. 71-72. Mr. Ocasio explained that a data response is valid if the Employer meets the survey requirements under Attachment C. Tr. 84. Four non-H-2A apple employers responded to the question about an experience requirement, and all four indicated that they do not require experience prior to hiring. Tr. 84-85. Between 25-30 vegetable employers responded to the surveys, 25 of which were valid responses. Tr. 72. Three non-H-2A vegetable employers indicated that experience was required, while 16 non-H-2A vegetable employers responded that experience was not required prior to hiring. Tr. 85. The SWA received two valid responses from non-H-2A tobacco employers, both of which stated that experience was not required prior to hiring. *Id*.

Mr. Ocasio testified that a prevailing practice is anything that is performed by 50 percent of employers, and that normal and common is anything that is not rare. Tr. 81. Mr. Ocasio stated that the 2009 prevailing practice survey did not inquire about different occupations within each crop activity. Tr. 82. Mr. Ocasio determined that based on the survey results and his

experience, he found the work experience requirements were not normal and accepted in Massachusetts. Tr. 86.

Mr. Ocasio's deposition testimony was also admitted into evidence as EX 12. Mr. Ocasio explained that the Massachusetts SWA used information from the ETA Handbooks 385 and 398 to get information to conduct the prevailing practice survey. EX 12 at 13-14. Mr. Ocasio stated that while the ETA Handbook 385 prescribes how the prevailing wage survey should be conducted, the methodology used for the prevailing practice survey is similar to the methodology for the prevailing wage survey. EX 12 at 14. Mr. Ocasio explained that the SWA compiled a database of approximately 6,400 employers from a 2007 Department of Agriculture survey. EX 12 at 18-19. Mr. Ocasio stated that not all of these businesses were viable farm operations, and the SWA was able to identify 2,000 valid operations. EX 12 at 18-19. From the list of 2,000 operations, the SWA mailed out 800 surveys to the agricultural employers that did not have any invalid codes and were determined to be in business. EX 12 at 16, 19, 72.

Mr. Ocasio testified that usually, the SWA calls about 10 percent of employers that respond to the survey to verify the information, but that because of the low response rate to the 2009 survey, every single responding employer that provided valid data was contacted. EX 12 at 22-23. Mr. Ocasio testified that the survey results are a report of the data, and not a determination of whether or not the data are representative. EX 12 at 31. Mr. Ocasio stated that because these are the only responses the SWA received, as far as the SWA is concerned, the results represent the industry. EX 12 at 32. Mr. Ocasio testified that the SWA has not made any statistical reports regarding the survey results because it has not been one of the requirements of the H-2A program. EX 12 at 33.

Mr. Ocasio stated that the normal and accepted standard is not as stringent as the prevailing practice standard, and that another way of describing it would be that it is a practice that is not unusual or rare. EX 36-37. Mr. Ocasio stated that in 2006, the Department of Labor provided guidance to the SWA that if a practice is "not really unusual and not rare, it may be considered normal or common." EX 12 at 38-39. Mr. Ocasio does not have any personal knowledge whether the DOL has changed its guidance since 2006. EX. 12 at 39.

The SWA did not conduct a prevailing practice survey in 2010 because the SWA does not have the resources. EX 12 at 60. Mr. Ocasio testified that for the past decade or so, the survey responses have been consistent and the SWA has received similar responses for the past

decade. EX 12 at 61. Mr. Ocasio also stated that it is not required that the prevailing practice survey be conducted on a yearly basis. *Id*.

Ms. Carol House

Ms. Carol House is a consultant and a statistician focusing on serving methodology and agricultural statistics. Tr. 91. Ms. House is currently employed part-time by the National Academies of Science and is a consultant particularly on agricultural statistics. Tr. 91-92. Ms. House assessed the Massachusetts SWA survey for its reasonableness in making a statistical determination whether the one-month experience requirement was normal and accepted among non-H-2A employers for the production of apples, vegetables, and tobacco. Tr. 92.

In connection with her review of the Massachusetts SWA survey, Ms. House reviewed Handbook 385,[5] the 2009 agricultural prevailing wage survey plan, the tabulated results for apples, tobacco, and vegetables, and reviewed results from the census of agriculture, and all of the Employers' exhibits. Tr. 99. Ms. House testified that she believes that Handbook 385 provides a sound statistical methodology for conducting these surveys, because it calls for a survey plan and discusses the necessity of ensuring that the survey sample is representative of the larger population. Tr. 100-101. Ms. House stated that the Handbook guidelines recommend a sampling rate of 15-100% of the overall population. Tr. 102-103.

Ms. House explained that her review of the Massachusetts SWA survey was to assess whether the survey process was reasonable in terms of statistical inference to the larger population of agricultural growers in Massachusetts. Tr. 99-100. Ms. House testified that the Massachusetts SWA sampled 15% of the population for some commodities, but not for others. Tr. 103. Ms. House explained that in her opinion, the Massachusetts SWA survey was inadequate based on the low response rate. Tr. 105. The response rate was five percent for apples, three percent for tobacco, and 10 percent for vegetables. Tr. 105. Ms. House stated that when she was a federal statistician, the Office of Management and Budget (OMB) gave guidelines that response rates could not fall below 80 percent for the questionnaire, or below 70 percent for an individual question on the questionnaire. Tr. 106.

[5] Ms. House stated that Handbook 385 is a handbook of guidelines for conducting the prevailing wage survey, and she also understood it to be the guidelines for conducting prevailing practice surveys. Tr. 100.

Ms. House stated that in 2007, there were 1,200 fruit producers in Massachusetts, but she did not know how many of these were apple employers. Tr. 107-108. The SWA mailed out 153 surveys to apple employers and received eight responses from non-H-2A employers. Tr. 108. Of these eight, only four answered the question regarding experience. Tr. 108. Ms. House stated that this number only represents .3 percent of all fruit growers. Tr. 108. Ms. House testified that in her expert opinion, one cannot make a reliable statistical inference about whether the one-month experience requirement is a normal and accepted requirement among non-H-2A apple employers in Massachusetts based on the four responses to the question.[6] Tr. 112, 116. Ms. House opined that the SWA failed to exercise due diligence by not following up with employers that did not respond to the survey. *Id*.

The SWA sent out 63 surveys to tobacco producers, and the census of agriculture found that there were 59 tobacco producers in Massachusetts. Tr. 113. Of the 63 surveys mailed out, the SWA received two survey responses, from which Ms. House opined that a statistical inference could not be made. Tr. 113. Ms. House stated that she believes that the Massachusetts SWA did not perform due diligence because it did not conduct a telephone follow-up of tobacco employers that did not respond to the survey. Tr. 114.

The SWA sent out 243 surveys to vegetable producers, of which it received 25 responses. Tr. 114. Of the 25 responses, 19 employers answered the question of experience. Tr. 114-115. Ms. House testified that based on this response rate, one could not make a valid statistical determination about the experience requirement with respect to vegetable employers. Tr. 115. In Ms. House's opinion, the SWA did not perform due diligence because it did not follow up with the vegetable employers that did not respond to the survey. *Id*.

Mr. David Volante

Mr. David Volante has been the owner of Volante Farms since 2003. Tr. 130-131. Volante Farms is located in Needham, Massachusetts and grows corn, beans, tomatoes, and radishes. *Id*. Mr. Volante explained that one month of experience is required because of the need to do things quickly and efficiently on the farm. Tr. 133. Mr. Volante testified that it is not unusual or rare for other farmers to ask for experience prior to hiring. Tr. 134. Mr. Volante

[6] Ms. House stated that she understands the normal and accepted standard to mean something that is practiced by less than 50 percent of the population, but something that is not a rare practice. Tr. 109.

testified that while he does not know specifically which farms do and do not use the H-2A program, he knows that there are non-H-2A vegetable farms that ask for one month of work experience. Tr. 135-36. Mr. Volante stated that based on his experience, it is not normal and accepted among non-H-2A farms to ask for two months of experience. Tr. 136-37. Mr. Volante said that he knows approximately six non-H-2A employers, but he is not sure if a lot of farmers that he knows are H-2A or non-H-2A. Tr. 137.

Mr. Don Green

Mr. Donald Green is a retired manager from Westward Orchards, but is still very active and works every day. Tr. 139. Westward Orchards is located in Harvard, Massachusetts and grows apples, peaches, plums, blueberries, and cherries. Tr. 139-40. In his capacity as manager, Mr. Green managed all of the help, took care of refrigeration, and managed the growing, raising, and harvesting of the crops. Tr. 140. Mr. Green testified that the job at issue requires one month of experience because it is a skilled job and a job that requires general knowledge of the farm, safety hazards, and the type of equipment used on a farm. Tr. 142.

Mr. Green stated that he has met three or four times with other H-2A growers to discuss labor problems. Tr. 143-44. In Mr. Green's opinion, the difference between H-2A and non-H-2A apple growers is that non-H-2A growers are usually smaller growers. Tr. 144. Mr. Green explained that because of this, H-2A and non-H-2A growers may not come into contact with each other very often, but he noted that it is a small world of apple growers in New England. *Id.* Mr. Green stated that he thought that non-H-2A employers would also ask for one month of experience prior to hiring. Tr. 144-45. He did not think that two months of work experience was necessary. Tr. 145. Mr. Green stated that he probably knows four growers that are not H-2A and that it was normal and accepted for these employers to require one month of experience. Tr. 147.

Mr. Green testified that he trains his employees after they have been hired, and that it takes about two weeks of training and practice to pick apples, and by the third week, the farm worker is usually a qualified farm worker. Tr. 148-49. Mr. Green stated that the first day of training is paperwork and going to the field, that the second day consists of putting on the bucket used to pick the apples and setting up the ladder and receiving instructions on how to pick the fruit. Tr. 149. Mr. Green said that the second day is mostly going very slowly and learning the

process of what the fruit is and how to harvest it. *Id.* Mr. Green also said that the first week is hands-on training, the second week the workers are on their own, and by the third week, the Employer hopes that the worker meets the production standards, but noted that sometimes it takes four weeks. Tr. 149-50.

Mr. John Young

Mr. John Young is a consultant for the New England Apple Council ("NEAC"), a non-profit organization of approximately 200 apple and other agricultural growers located in the six New England states. Tr. 151. In his capacity as a consultant, Mr. Young works on labor issues, helps with lobbying, and helps process the paperwork that is involved in the H-2A program. Tr. 152. Additionally, Mr. Young was a member of the National Council of Agriculture Employers for more than 25 years, and was the president of the organization from 1995 to 1997. Tr. 152-53. Mr. Young testified that the majority, possibly as much as 90 percent, of the members of the National Council of Agriculture Employers are not H-2A employers. Tr. 153. Mr. Young stated that he comes into contact with non-H-2A employers through his work with the NEAC because when a non-H-2A employer wishes to participate in the H-2A program, they often contact the NEAC because it represents the predominant number of employers. Tr. 154. Mr. Young testified that the majority of the members of the Farm Bureau are non-H-2A employers. *Id.*

Mr. Young testified that the NEAC has instituted a survey in Massachusetts, New Hampshire, and Connecticut in cooperation with the Farm Bureau to try to gain some insight into the prevailing practices. Tr. 155. Mr. Young stated that the Massachusetts Farm Bureau has mailed out surveys to over 2,000 operations in Massachusetts that are on the Farm Bureau list. Tr. 162. Mr. Young is unaware of how many of these operations are employers, but that information is part of the data to be collected by the surveys. *Id*. Mr. Young stated that through June 8, 2011, the NEAC had received a total of 114 surveys back. Tr. 163, 178. Of these, 41 were not valid, and 73 were valid. *Id*. Twenty of the 73 valid surveys were from H-2A employers, and 26 from employers that do not hire long-term seasonal workers. *Id*. Mr. Young said that there were 27 responses from non-H-2A employers that hire long term seasonal workers, and that of these 27, ten do not require experience and 17 do require experience. Tr. 163. In other words, 63 percent of non-H-2A employers that returned their surveys and provided

valid responses require experience. Tr. 164. Mr. Young stated that he would not consider it rare or unusual for a non-H-2A employer to require one month of experience. Tr. 167.

Mr. Young testified that beginning in 1998 many, but not all, employers had experience requirements in their SWA job orders. Tr. 157.

Professor Wesley Autio

Professor Wesley Autio's deposition testimony was submitted June 24, 2011.[7] Professor Autio is a professor of pomology, the study of fruit crops, at the University of Massachusetts, Amherst. EX 14 at 6. In this capacity, Professor Autio is the leader of the fruit extension program, which works directly with farmers in Massachusetts. *Id.* Professor Autio has been involved in the fruit extension program for 26 years, and through this program, Professor Autio conducts educational programs with farmers on new technologies, and assists farmers solve problems with insects, disease, and nutrient deficiencies. EX 14 at 7, 9. Professor Autio testified that he does very little work involving the business side of farming. EX 14 at 8. Professor Autio stated that he interacts with farmers and discusses labor needs with them, but he does not discuss it from a management point of view. *Id.*

Professor Autio stated that he believes he is familiar, in general, with what are normal and accepted practices in Massachusetts. EX 14 at 9. Professor Autio testified that it is normal and acceptable for employers to require 30 days or more of agricultural work experience for any worker involved in fruit, vegetable, nursery, or greenhouse operations. EX 14 at 11. In Professor Autio's opinion, 30 days of experience is normal and acceptable because the activities require an understanding of the normal growth responses, physiology, and pest management, and because a tremendous amount of material and understanding is necessary for the horticultural operations. *Id.* For example, Professor Autio stated that if fruit trees are incorrectly pruned, they may be unproductive and either produce low-quality fruit or no fruit. EX 14 at 12. Professor Autio's understanding of the 30-day experience requirement comes from casual conversations with growers over a 26-year period. *Id.*

In Professor Autio's opinion, operating farm equipment, thinning, mowing, and harvesting all require experience to do well. EX 14 at 14. Professor Autio stated that probably most of the farms that he works with utilize H-2A employees, but not all of them. EX 14 at 15.

[7] Professor Autio's deposition testimony will be referred to as "EX 14."

Professor Autio testified that of the non-H-2A employers that he recalls working with, all of them require some form of work experience. EX 14 at 15-16. Professor Autio noted that he could not recall recently speaking to any non-H-2A employers about whether or not they require work experience. EX 14 at 16.

Other Evidence

EX 1 and CX 1 is a 2009 prevailing practices survey by the Massachusetts SWA, revised in May 2011, of apple, vegetable, and tobacco employers. The survey does not identify which occupations were surveyed. The 2009 Massachusetts SWA survey of apple employers shows that the SWA received valid data responses from eight non-H-2A employers and 19 valid data responses from all apple producers. Of the employers that responded to the question regarding experience requirements, zero non-H-2A apple employers require experience prior to hiring, and four non-H-2A employers do not require experience prior to hiring.

The 2009 prevailing practices survey of vegetable employers shows that the SWA received valid data responses from 25 non-H-2A vegetable employers, and 30 valid data responses from all vegetable employers. The SWA found that three non-H-2A vegetable employers require experience prior to hiring, and 16 non-H-2A employers do not require any experience. The SWA prevailing practices survey shows that the SWA received valid data responses two non-H-2A tobacco employers, both of which do not require any experience prior to hiring.

EX 2 is a 2005[8] survey by the Massachusetts SWA of the prevailing practices of agricultural producers of apples and tobacco. Of the three tobacco employers surveyed, none require experience prior to hiring. Of the 19 apple employers surveyed, two required experience prior to hiring. This survey does not differentiate between H-2A employers and non-H-2A employers or identify the occupations surveyed.

EX 3 is a Department of Labor document titled, "Information on Surveys for Prevailing Practices." This information is not dated. Under the heading, "Normal, Common, or 'Not Unusual' Practices, an explanation is given that "normal or common" is used for tools, productivity standards, positive recruitment practices, crewleader override, and job

[8] The CO and Mr. Ocasio contend that this was a typographical error, and that EX 2 is actually a copy of the 2009 prevailing practices SWA survey before it was revised in May 2011. Tr. 10; EX 12 at 35-36.

qualifications, and that it is a lower standard than the "50%-50%" standard used for determining whether a practice is "prevailing." EX 3 at 4. The same page states: "Remember – 'If it is not really unusual, and not rare, it may be considered normal or common." *Id.* An example is given that 33% of employers use a productivity standard, apparently to show that a practice can be done by less than 50% of employers and still be normal or common. *Id.* EX 3 also contains an excerpt from ETA Handbook No. 398. This excerpt states:

> In order to arrive at determinations as to whether certain factors are "prevailing," SESAs are encouraged to conduct formal surveys of employers, as time and resources permit, utilizing the sample size and data collection/analysis principles required for prevailing wage surveys in ETA Handbook no. 385, with survey findings and determinations verified by the Regional Office. If a formal survey is not possible in view of time or budgetary constraints, SESAs must, to the extent that they are available: (1) utilize expert staff knowledge and experience available in the State agency; (2) informally survey local employers; (3) contact organizations such as the Cooperative Extension Service and the Farm Bureau; and (4) consult with farmworker advocates and other informed sources in order to arrive at a reasonable determination of prevailing, common or normal practice.

EX 3 at II-5, II-6.

EX 4 is a November 8, 2004 Memorandum from William Carlson, Chief, Division of Foreign Labor Certification regarding H-2A Prevailing Wage and Practice Surveys. The Memorandum states that Certifying Officers and Center Directors should ensure that each state's prevailing wage and practice surveys are conducted in accordance with ETA Handbook No. 385.

EX 5 is a slideshow titled Foreign Labor Certification Training for SWAs, and is dated November 28-29, 2006. One slide, titled "Normal, Common or Not Unusual Practices" states that "normal or common criteria is used to establish the offer of tools, productivity standards, positive recruitment practices, crewleader override, and job qualifications." The slide also reminds that this standard is less than the 50-50 standard of prevailing, and states, "Remember – If it is not really unusual, and not rare, it may be considered normal or common." EX 5 at 30.

EX 6 is an excerpt from ET Handbook No. 385, issued August 1981, explaining the wage finding process.

EX 7 is a 2008 survey by the Massachusetts SWA of the prevailing practices of apple, vegetable, and tobacco producers, as well as greenhouses, nurseries, and poultry producers. Although this survey identifies how many employers require experience prior to hiring, it does not differentiate between H-2A and non-H-2A employers or identify the occupations surveyed.

EX 8 and CX 2 is a 2009 Agricultural Prevailing Wage Survey Plan. The Plan states:

> The Prevailing Wage survey only involves U.S. domestic seasonal farm workers who perform particular functions in agriculture. Specifically, the traditional survey encompasses only the "planters, prunes and pickers," in other words, field workers. Due to changes in the agricultural industry and the H-2A Program activities several non-traditional activities are now surveyed.
>
> This year the SWA transitioned from using the Dictionary of Occupational Titles (DOT) codes to the Occupational Employment Statistics (OES) codes for identifying and selecting the crop activities that are to be surveyed. As in past years the SWA plans to provide the employers with a limited number of job description based on the previous year job orders.

EX 8 at 3. The 2009 Agricultural Prevailing Wage Survey Plan shows that the occupations surveyed for apple, vegetable, and tobacco growers will be agricultural equipment operators, 45-2091.00, and farm workers and laborers, crop, 45-2092.00. EX 8 at 6. The Survey Plan also includes a copy of the prevailing wage survey and the prevailing practices survey. While the prevailing agricultural wage survey requires the employer to specify whether the employer's response pertains to agricultural equipment operators, 45-2091.00, or farm workers and laborers, crop, 45-2092.00, the prevailing practices survey does not. EX 8, Attachments A and B. Nowhere on the 2009 prevailing practice survey does the SWA request the job title or occupation to which the employer is referencing in the survey. EX 8, Attachment B.

The Agricultural Prevailing Wage Survey Plan also explains how the survey sample is created. The Plan states that an employer will be excluded from the SWA survey if it receives an invalid code for any of the following circumstances: the employer only has H-2A workers; the employer is a family operated farm; the employer only employs part-time or youth workers; the employer did not employ workers during the week in question; the employer does not grow a survey crop; the employer does not have a crop this year; the employer does not grow a crop and only has a farm stand; the employer is a pick-your-own farm and does not have any employees; the employer is not a Massachusetts employer; the employer went out of business; the SWA was unable to contact the employer; the employer is not willing to participate in the survey; the employer is not a farm or a nursery; the employer obtains workers through a labor association; or the employer only employs year-round employees. EX 8, Attachment C.

EX 9 is Ms. Carol House's curriculum vitae. Currently, Ms. House is the Senior Program Officer at the National Academies of Science and the Committee on National Statistics.

EX 10 is a letter from Wesley R. Autio, Professor of Pomology at the University of Massachusetts to the Certifying Officer, dated June 13, 2011. Professor Autio's letter states, in relevant part:

> I would rather you consider 30 days as an absolute minimum and give the potential for increasing that number. It is normal and acceptable for employers to require 30 days or more of agricultural work experience for any worker involved in fruit, vegetable, nursery, or greenhouse operations. This includes both farms that use and farms that do not use the H2A Program.
>
> Orcharding, particularly, is one of the most sophisticated horticultural endeavors. Much knowledge is required in all aspects of day-to-day operation. Very few activities need no skill or training. Examples of duties that are required of nearly all orchard workers are pruning, tree training, and harvesting. Pruning, first of all, allows for the development of appropriate tree structure, the minimization of disease and insect problems, the insurance of adequate yields of fruit, and the guarantee of good quality. Therefore, inappropriate pruning can damage the tree's ability to physically support a crop, its longevity, and its yield potential. Only a day of poor pruning can cause significant damage to trees and resultant loss of profitability. Tree training requires further knowledge than pruning, and requires incorporation of knowledge of plant growth and development. Horticultural/agricultural experience, particularly with tree fruit, greatly improves the quality of pruning and training.

EX 12 is a deposition of Mr. Jose Ocasio, summarized in the *Testimonial Evidence* section above.

EX 13 is a partially completed survey conducted by the New England Apple Council and the Massachusetts Farm Bureau. The accompanying letter from Joseph Young states that the survey was mailed to over 2,000 farm operations, and that as of June 9, 2011, 114 surveys have been returned. The letter states that of these, "41 have been discarded for various reasons, mostly, that they do not hire seasonal workers. The remaining surveys that have been tabulated are 73 in total, of those, 20 are from employers who use H2A workers, and 26 are from employers who don't hire long-term seasonal workers. The results which are attached are only for the 27 employers who do not use H-2A workers and do hire long term seasonal workers." The survey shows that of non-H-2A employers that hire long-term seasonal workers, 17 require experience and 10 do not. Of the 17 that require experience, one employer requires 30 days of experience, three employers require 60 days of experience, and 13 employers require more than

60 days of experience. The survey does not identify the crops or occupations at issue in the survey.

EX 14 is a deposition of Professor Wesley Autio, summarized in the *Testimonial Evidence* section above.

CONTENTIONS OF THE PARTIES

The Employers argue that the SWA survey was so poorly conducted that it cannot provide any probative evidence regarding the normal and accepted practices of agricultural employers in Massachusetts. The Employers assert that the SWA did not follow ETA Handbook 385's procedures because too few employers were sampled, the SWA did not perform any type of statistical analysis, and it did not follow up with any employers. Additionally, the Employers argue that the survey is deficient because it does not provide any specific details about the job duties of the occupations and because the survey was altered in May 2011. Therefore, the Employers contend that the SWA prevailing practice survey is not statistically sound, is not representative of the overall population of employers, and does not provide a rational basis for denying the applications.

The Employers argue that because the SWA survey is not probative, the DOL should have considered the amount of experience generally needed for the occupation, as stated by the Dictionary of Occupational Titles. The Employers add that the evidence from H-2A growers Mr. Volante of Volante Farms and Mr. Green of Westward Orchards is probative of the amount of experience that is normal and accepted among non-H-2A growers. In addition, the Employers point to the ongoing prevailing practice survey that is being conducted by the New England Apple Council as evidence that it is normal and accepted among non-H-2A growers to require experience prior to hiring.

The CO argues that the prevailing practices survey submitted by the Employers, EX 13, is insufficient to demonstrate that the one-month experience requirement is normal and accepted among non-H-2A employers because it is incomplete. Additionally, the CO asserts that the testimonies of Mr. Volante, Mr. Green, and Professor Autio are insufficient to establish that the one-month experience requirement is normal and accepted, because Professor Autio has little experience dealing with farm labor issues, and Mr. Volante's and Mr. Green's opinions regarding non-H-2A employers' experience requirements are too generalized.

The CO also argues that *Tougas Farm*, 1998-TLC-10, USDOL/OALJ Reporter (May 8, 1998) does not control the outcomes of these cases before me. The CO notes that *Tougas Farm* relied in part on the Dictionary of Occupational Titles ("DOT") codes, but that the DOT codes have been replaced by the Occupational Employment Statistics ("OES") codes, which the CO argues are more generalized that the DOT codes. The CO also contends that no inferences can be drawn from the OES code, because the Employers did not proffer any evidence regarding the relevant SVP range for the occupation involved in these appeals.

DISCUSSION

Evidentiary Rulings

During the hearing, counsel for the CO made a general objection that the evidence offered during the hearing should have been presented to the CO with the Employers' responses to the Notices of Deficiency. Tr. 10, 12. The process for appealing the CO's decision regarding an H-2A application is established at 20 C.F.R. § 655.171. Section 655.171(b) provides that where an employer seeks a de novo hearing, the employer may submit additional evidence before the ALJ. As the H-2A regulations do not limit the scope of an ALJ's de novo review, I find no basis in the regulations for excluding any of this evidence on the ground that it is somehow beyond my scope of review.[9]

Counsel for the CO objected to the admission of Mr. Jose Ocasio's deposition testimony under 20 C.F.R. § 18.23. Tr. 19-20. At the hearing, I admitted Mr. Jose Ocasio's deposition testimony as EX 12. Tr. 21. The CO also objected to the admission of Professor Autio's letter and deposition testimony (EX 10 and 14) on the grounds of relevance and lack of foundation.

The H-2A regulations provide that the procedures at 20 C.F.R. Part 18 govern the conduct of the hearing. 20 C.F.R. § 655.171(b). Under 20 C.F.R. § 18.402, all relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, pursuant to executive order, by these rules, or by other rules or regulations prescribed by the administrative agency pursuant to statutory authority. Relevant evidence is defined as

[9] Moreover, I reject the assertion that the CO is somehow prejudiced by permitting the Employers to submit new evidence on review, particularly in light of the fact that the CO received a revised 2009 prevailing practices survey from the Massachusetts SWA on May 20, 2011, *after* the Employers had already responded to the Notices of Deficiency. Tr. 37; AF1 21-37; AF2 18-32. Therefore, the de novo hearing was the first opportunity that the Employers had to present evidence in response to the revised 2009 prevailing practices survey, upon which the CO based its denials.

"evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." 20 C.F.R. § 18.401.

Professor Autio's letter and deposition testimony centers on whether he believes that 30 days of experience is a normal job requirement for farmers in Massachusetts, and why he believes one month of experience is necessary. This evidence is central to the sole issue on appeal, and therefore, is relevant and admissible. Additionally, I find that the Employers have sufficiently laid a foundation for Professor Autio's letter and deposition testimony, and therefore, EX 10 and EX 14 are admitted into evidence.

30-Day Experience Requirement

The issue in this case is whether the Employers' one-month experience requirement is consistent with the normal and accepted qualifications required by non-H-2A employers in the same or comparable occupations and crops. The H-2A regulations provide, in relevant part, that in order to bring nonimmigrant workers to the U.S. to perform agricultural work, an employer must demonstrate that there are not sufficient U.S. workers able, willing, and qualified to perform the work in the area of intended employment at the time needed and that the employment of foreign workers will not adversely affect the wages and working conditions of U.S. workers similarly employed. 20 C.F.R. § 655.103(a). The Immigration and Nationality Act ("INA") provides that "[i]n considering whether a specific qualification is appropriate in a job offer, the Secretary shall apply the normal and accepted qualifications required by non-H-2A-employers in the same or comparable occupations and crops." 8 U.S.C. § 1188(c)(3)(A). The implementing regulation at 20 C.F.R. § 655.122(b) provides:

> Each 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 offer.

The regulations do not define "normal and accepted." Nevertheless, based on guidance provided to the SWAs, it appears that the CO has interpreted this standard as one in which the qualification must be not unusual and not rare. EX 3, EX 5. Mr. Ocasio testified that he understood the "normal and accepted" standard to be one requiring that the practice not be rare

or unusual. Tr. 81, EX 12 at 38-39. In quoting the DOL's H-2A handbook, one federal district court judge defined the "normal and common" standard:

> The terms "normal" and "common," although difficult to quantify for H-2A certification purposes, mean situations which may be less than prevailing, but which clearly are not unusual or rare. The degree to which a practice is engaged in (or a benefit is provided) should be measured to be close to what is viewed (and measured) as "prevailing," but the degree of proof needed to establish its acceptability for H-2A purposes is not as formal or stringent as "prevailing" calls for.

Snake River Farmers' Ass'n, Inc. v. U.S. Dept. of Labor, 1991 WL 539566, *9 (D. Idaho, Oct. 1, 1991).

Ms. Gonzalez testified that a practice that is engaged in by less than 50, 40, 30, or even 20 percent of employers might still be considered normal and accepted, based on information before the CO. Tr. 31-33. Conversely, Ms. Gonzalez also testified that a requirement used by more than 40 percent of non-H-2A employers is not necessarily a normal and accepted requirement. Tr. 45. Ms. Gonzalez emphasized that the normal and accepted determination is made on a case-by-case basis. Tr. 45.

The CO's argument that a practice could be engaged in by more than 40 percent of non-H-2A employers and not be normal and accepted by non-H-2A employers, while another practice could be engaged in by less than 20 percent of non-H-2A employers but still be normal and accepted, is unpersuasive, given that the CO has not provided any additional information that is relevant in making this determination. Ms. Gonzalez implied that the determination of whether a requirement is normal and accepted is not simply a matter of the percentage of non-H-2A employers that engage in the practice. However, the CO never articulated the other factors that may be relevant to this determination. Indeed, in the cases before me, it appears that the percentage of non-H-2A employers that require one month of experience was the <u>only</u> relevant factor used in determining whether the requirement was normal and accepted. Tr. 47-48.

While the parties agree that a normal and accepted requirement is one that is not rare or unusual, the parties do not agree on a threshold proportion of employers that must engage in the practice so as to render it normal and accepted. The only guidance provided by the agency regarding the definition of this standard is an example that is provided in ETA Handbook 398, which references a practice engaged in by 33 percent of employers, which, although not explicitly stated, apparently meets the normal and accepted standard.

Prevailing Practices Surveys

The Massachusetts SWA survey results show that no non-H-2A apple employers require any experience prior to hiring. CX 1; EX 1. Of the 19 non-H-2A vegetable employers that responded to the Massachusetts SWA survey and answered the question about the amount of experience, if any, required prior hiring, only three, or approximately 16%, answered affirmatively. The SWA survey found that no non-H-2A tobacco employers require any experience prior to hiring.

The Employers argue that because of the sample size and response rate to the Massachusetts SWA survey, the survey is invalid. I disagree that that the SWA survey is invalid because of a small sample size. Mr. Ocasio, the foreign labor certification supervisor at the Massachusetts SWA, testified that the SWA identified 2,000 agricultural operations in Massachusetts, and that from this list, the SWA identified 800 agricultural employers that did not have any invalid codes, *see* EX 8 and CX 2, and were determined to be in business. Tr. 76-77; EX 12 at 16, 19-20, 72. All 800 of these agricultural employers were mailed surveys. Tr. 67; EX 12 at 19-20; 72. Therefore, the sample size was 100% of the agricultural employers determined to be relevant for the purposes of the prevailing practices survey.

I also disagree that the SWA survey is invalid because of the low response rate. The Employers erroneously rely on *Strathmeyer Forests, Inc.*, 1999-TLC-6 (Aug. 30, 1999) to support the proposition that a low response rate diminishes the probative value of a SWA prevailing practices survey. In *Strathmeyer Forests*, the survey was not deemed invalid because of the low response rate; rather, the survey was determined to be invalid and of no probative weight because the SWA reported the results of the survey in a conflicting manner. Slip op. at 4. In *Strathmeyer Forests*, the ALJ rejected the SWA's prevailing practices survey because it was internally inconsistent inasmuch it stated both that zero out of two non-H-2A employers required experience and that zero out of two non-H-2A employers did not require experience. *Id*.

Likewise, while Ms. House's testimony that a response rate as low as that of the Massachusetts SWA survey does not provide a statistically sound basis for making a determination about the population as a whole, the fact that the survey is not statistically valid does not render the SWA survey wholly invalid. Neither the INA nor the H-2A regulations

require a prevailing practices survey to be statistically valid in order for the survey results to have any probative value whatsoever, nor does any caselaw impose such a condition.[10]

The Employers contend that the prevailing practice survey is invalid because it does not provide specific details about the occupations surveyed. I agree that the SWA survey does not identify whether the results apply to agricultural equipment operators or farm workers and laborers, crop, the two occupations that the SWA surveyed. *See* EX 8 at 6, Attachments A and B; Tr. 82. Moreover, the record before me contains no evidence that the SWA survey results pertain only to farm workers and laborers. Where a SWA survey does not indicate the occupation title or job description for the workers in question, the survey is too general to be of any probative value on the issue of normal and accepted practices among non-H-2A employers of the same or comparable occupation and crop. *See Jay R. Debadts & Sons Fruit Farm*, 2008-TLC-38, slip op. at 4-5 (July 3, 2008); *Tougas Farm*, 1998-TLC-10, USDOL/OALJ Reporter at 6-7 (May 8, 1998). Accordingly, I find that the SWA survey is not probative of the normal and accepted requirements of apple, tobacco, or vegetable employers for the occupation of farm workers and laborers, crop.

Therefore, I must look to other evidence in the record to determine whether the one-month experience requirement is normal and accepted among non-H-2A apple, vegetable, and tobacco employers for the occupation of farm workers and laborers.

The Employers have presented evidence of their own survey, which is as of yet, incomplete. The preliminary survey results determined that of the 27 valid responses from non-H-2A employers, 17 require experience and 10 do not. EX 13. Of the 17 that require experience, one employer requires 30 days of experience, three employers require 60 days of experience, and 13 employers require more than 60 days of experience. *Id*. The survey does not separate the employer responses by crop or occupation. *Id*. The regulations require that the qualifications for a job must be normal and accepted among non-H-2A employers in the same or comparable occupation <u>and</u> crops. As the survey results are not separated by occupation or crop, it is impossible to determine to which occupations or crops the results apply, and I find that the

[10] While the Employers argue that the SWA survey should not be considered because it was altered in May 2011, Mr. Ocasio testified that he reviewed the underlying survey data and revised the survey to match the data. I find Mr. Ocasio's testimony to be credible, and therefore do not find that the probative value of the Massachusetts SWA survey is entitled to any less weight in light of the May 2011 revision. Additionally, I am not willing to completely reject the SWA's survey because the SWA did not follow up with employers.

NEAC survey does not establish that the 30 days of work experience is normal and accepted for non-H-2A apple employers.[11]

*OES/O*Net Code*

The Employers argue that the DOT code establishes that one month of experience is normal and accepted requirement for the occupation. The CO correctly points out that the DOT codes have been replaced by the Occupational Employment Statistics (OES) codes and O*Net descriptions.[12] Official notice is taken of the O*Net occupation descriptions for the occupation at issue in the cases on appeal. 29 C.F.R. § 18.201; *The Cherokee Group*, 1991-INA-280 (Nov. 4, 1992). In the cases before me, the job opportunity is classified under the OES Code 45-2092. AF1 at 51, AF2 at 52. The most specific O*Net Code for these job opportunities is 45-2092.02 – Farmworkers and Laborers, Crop. The occupation summary found on the O*Net website identifies the occupation as a Job Zone 1, meaning that little or no previous work-related skill, knowledge, or experience is needed for occupations falling in this zone, and provides a specific vocational preparation ("SVP") of "Below 4.0."[13] An SVP of below Level 4 corresponds to an amount of lapsed time ranging from Level 1, which is "short demonstration only," Level 2, which is "anything beyond short demonstration up to and including 1 month," to Level 3, which is "over 1 month up to and including 3 months."[14]

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[11] I note that the survey currently being conducted by NEAC may be sufficient for the Employers to meet their burden; however, I reiterate that in order to have any relevance, the survey must be divided by occupation and crop, so as to permit the CO and, possibly, the ALJ, to determine whether the requirement is normal and accepted by employers that do not use H-2A workers in the same or comparable occupations and crops.

[12] The O*Net is a database containing information on hundreds of standardized and occupation-specific descriptors. O*Net job descriptions contain several standard elements, one of which is a "Job Zone." An O*Net Job Zone "is a group of occupations that are similar in: how much education people need to do the work, how much related experience people need to do the work, and how much on-the-job training people need to do the work." The Job Zones are split into five levels, from occupations that need little or no preparation, to occupations that need extensive preparation. Each Job Zone level specifies the applicable SVP. http://www.onetonline.org/help/online/zones.

[13] http://www.onetonline.org/link/details/45-2092.02#JobZone.

[14] SVP, as defined in Appendix C of the *Dictionary of Occupational Titles*, is the amount of lapsed time required by a typical worker to learn the techniques, acquire the information, and develop the facility needed for average performance in a specific job-worker situation. http://www.onetonline.org/help/online/svp (*citing* U.S. Department of Labor. (1991). *Dictionary of Occupational Titles* (Rev. 4th ed.). Washington, DC: U.S. Government Printing Office).

When an ALJ has found the SWA survey to be invalid and not probative on the issue of normal and accepted practices, the ALJ has considered alternative evidence from the DOT in order to determine whether the job requirement at issue is normal and accepted among non-H-2A employers the same or comparable occupations and crops. *See Jay R. Debadts & Sons Fruit Farm*, 2008-TLC-38 (July 3, 2008); *Strathmeyer Forests, Inc.*, 1999-TLC-6 (Aug. 30, 1999); *Tougas Farm*, 1998-TLC-10, USDOL/OALJ Reporter (May 8, 1998); *Hoyt Adair*, 1996-TLC-1, USDOL/OALJ Reporter (April 19, 1996). The caselaw establishes that the DOT listing for an occupation is probative evidence regarding whether an occupational requirement is a normal and accepted qualification. *See Strathmeyer Forests, Inc*., slip op., at 4; *Tougas Farm*, USDOL/OALJ Reporter at 6. While reliance solely on the OES/O*Net job classification is disfavored because it does not account for variation by state or by crop, given that neither of the surveys in the record provide any probative evidence, I will consider the OES/O*Net occupation and all conflicting or corroborating evidence in order to determine whether the experience requirement is normal and accepted.

In *Strathmeyer Forests*, the ALJ determined that the employer's one-month experience requirement was normal and accepted because the SWA survey was invalid, the employer's experience requirement was within the DOT's SVP rating,[15] and because there was no credible countervailing evidence. Slip op. at 4-6. In *Jay R. Debadts & Sons Fruit Farm*, 2008-TLC-38 (July 3, 2008), the ALJ found a SWA prevailing practice survey invalid because it did not provide the titles or job descriptions for the workers in question. The ALJ credited the employer's argument that the job duties described are potentially dangerous, thereby making it necessary to hire people with experience. Slip op. at 5. In *Hoyt Adair*, the ALJ found that the experience requirement was normal and accepted based on the DOT listing and the additional evidence that the employer submitted that corroborated the DOT listing. USDOL/OALJ Reporter at 7. Specifically, the ALJ relied on the employer's letters of support from credible sources that clearly stated the need for experience, the DOT job listing, and the fact that the SVP recognizes that some training is necessary for the particular category of fruit farmworker. *Id*.

[15] In this case, the Regional Administrator argued that the positions were properly classified as "Horticultural Worker II," with an SVP rating of 1, which corresponded to "up to an including 1 month of experience," while the employer argued that the positions were properly classified as "Horticultural Worker I," with an SVP rating of 3, which corresponded to "up to and including 3 months of experience and education."

The OES/O*Net listing for farmworker and laborer, crop shows that anywhere from a short demonstration up to and including three months of experience is required by a typical worker to learn the techniques, acquire the information, and develop the facility needed for average performance. Although this is probative evidence regarding whether the one-month experience requirement is a normal and accepted qualification, it is necessary to evaluate whether sufficient corroborating evidence exists in the record to support the one-month experience requirement in each crop. It is the Employers' burden to establish that the 30-day requirement is normal and accepted. 20 C.F.R. §§ 655.103(a); 655.122(b).

Apple Farms

Mr. Green testified that one month of experience is necessary for farmworkers on apple farms because it is a skilled job and a job that requires general farm knowledge, knowledge of the equipment used to harvest, and knowledge of the safety hazards. Tr. 142. Mr. Green added that picking fruit is difficult task because the fruit must be handled very carefully. Tr. 143. Mr. Green stated that he thinks a non-H-2A apple farm would ask for one month of experience and he does not think that this requirement is rare. Tr. 145. Mr. Green explained that while it takes about two weeks of training and practice to pick apples, and by the third or fourth week, the worker usually meets production standards. Tr. 148-50.

Professor Autio explained that one month of experience is normal and accepted because many of the activities require an understanding of the normal growth responses, physiology, and pest management. EX 14 at 11. Additionally, Professor Autio stated that orcharding is one of the most sophisticated horticultural endeavors, and explained that inappropriate pruning can damage a tree's ability to physically support a crop, its longevity, and its yield potential. EX 10. Professor Autio added that horticultural or agricultural experience, particularly with tree fruit, greatly improves the quality of pruning. *Id.* Professor Autio testified that he has worked with non-H-2A employers, and all required some form of work experience prior to hiring. EX 14 at 16. Professor Autio could not recall recently speaking to any non-H-2A employers about whether or not they require work experience, and he did not specifically identify any non-H-2A apple growers that require experience. *Id.*

The fact that the one month of experience that the Employers are requiring falls within the OES/O*Net listing is strong evidence that the requirement is consistent with the normal and

accepted qualifications requirements of non-H-2A employers in the same or comparable occupations and crops. *See Tougas Farm*, 1998-TLC-10, USDOL/OALJ Reporter at 6 (May 8, 1998). Where the SWA survey was found to be invalid, ALJs have considered whether the employer demonstrated the need for the experience requirement in determining whether the employer established that the experience requirement was normal and accepted. *See Jay R. Debadts & Sons Fruit Farm*, 2008-TLC-38 (July 3, 2008); *Hoyt Adair*, 1996-TLC-1, USDOL/OALJ Reporter (April 19, 1996).

I find that Mr. Green's testimony supports the O*Net listing because he testified that the farmworker position is a difficult and skilled job that requires training and knowledge of safety issues. Although Mr. Green testified that workers are sometimes qualified after two weeks of training, I find that this testimony supports an SVP Level of 2 (which is inclusive of a one-month experience requirement) and illustrates why it can take up to a month to train a worker. Additionally, I find that Professor Autio's letter and deposition testimony regarding the sophisticated nature of orcharding and the damage to a fruit tree if is improperly pruned supports the O*Net listing. Although neither Professor Autio nor Mr. Green specifically identified non-H-2A apple employers that required one month of experience prior to hiring, I find their testimony regarding the need for farmworkers to have one month of experience credible and consistent with the SVP range.

Based on my de novo review of the evidence, I find that the one-month experience requirement is a normal and accepted requirement for non-H-2A apple employers.

Vegetable Farms

Although I found that Professor Autio's letter and deposition testimony provided credible support for the need for apple farmworkers to have one month of experience, the probative value of Professor Autio's letter and deposition testimony is limited to apple farms. While Professor Autio's letter states that one month of experience is necessary for any worker involved in fruit, vegetable, nursery, or greenhouse operations, Professor Autio stated that he works mostly with tree fruit, and his testimony centered on fruit. EX 14 at 11.

Mr. Volante testified that vegetable farms need farmworkers with one month of experience because they have a need to do things quickly and efficiently. Tr. 133. Although Mr. Volante testified that he knows that there are non-H-2A vegetable growers that ask for one

month of work experience, he did not know specifically which farms do and do not use the H-2A program. Tr. 135-36.

I find that the Employers have not met their burden to establish that one month of experience is normal and accepted among non-H-2A vegetable employers hiring farmworkers. The only reason provided for requiring one month of experience for vegetable farmworkers was the need to do things quickly and efficiently. Whereas Mr. Green's and Professor Autio's testimonies discussed the level of difficulty associated with apple orcharding and safety hazards that necessitates that apple farmworkers have one month of experience, Mr. Volante's testimony is related to increased efficiency, *i.e.*, increased profitability. Absent specific evidence that non-H-2A vegetable employers also require one month of experience, a desire for increased efficiency is insufficient to meet the employer's burden to establish that the experience requirement is normal and accepted among non-H-2A employers. *See Tougas Farm*, 1998-TLC-10, USDOL/OALJ Reporter at 6, n.10 (noting that "to permit employers to hire aliens with experience for reasons of increased profitability or efficiency is contrary to the Act…").

Vague and generalized statements about non-H-2A employers requiring experience are insufficient to carry the employer's burden. *See e.g., Lodoen Cattle Company*, 2011-TLC-109 (Jan. 7, 2011) (*citing Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (en banc) (a bare assertion without either supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof)). Mr. Volante's testimony reveals that he does not have any direct, personal knowledge of any non-H-2A vegetable employers requiring experience, and therefore, I find that his testimony supports an SVP Level of 1, rather than 2. Likewise, although Mr. Young testified that he knows of several non-H-2A employers that require experience, Mr. Young does not have any specific knowledge of any non-H-2A vegetable employers requiring experience of their farmworkers prior to hiring. Tr. 167. Accordingly, I find that the record does not contain any evidence to corroborate the O*Net listing, and find that the Employers have not demonstrated that one month of experience is a normal and accepted requirement among vegetable growers hiring non-H-2A farmworkers.

Tobacco Farms

The record is devoid of any testimony or other evidence to corroborate the O*Net listing, and therefore, I find that the Employers have not demonstrated that one month of experience is a normal and accepted requirement among tobacco growers hiring non-H-2A farmworkers.

CONCLUSION

In reviewing the evidence de novo, I find that the Employers have established that one month of experience is a normal and accepted requirement among non-H-2A apple employers hiring farmworkers based on the OES/O*Net code and applicable SVP range, and I find that the record contains corroborating evidence demonstrating the need and normalcy of the experience requirement. Accordingly, I find that the CO's denials with respect to apple farms in Massachusetts should be reversed, and these applications should be remanded to the CO for acceptance and further processing. However, I find that the Employers have not provided sufficient probative evidence to corroborate the OES/O*Net code and SVP range of experience for vegetable employers or tobacco employers, and therefore, I find that the CO's denials for vegetable and tobacco employers were not improper.

ORDER

In light of the foregoing, it is hereby **ORDERED** that the Certifying Officer's decisions as to vegetable farms and tobacco farms are **AFFIRMED**. The Certifying Officer's determinations as to apple farms are **REVERSED** and **REMANDED**, and the Certifying Officer is instructed to accept these applications for further processing.

A

WILLIAM S. COLWELL
Associate Chief Administrative Law Judge