

**U.S. Department of Labor**

Office of Administrative Law Judges  
11870 Merchants Walk - Suite 204  
Newport News, VA 23606

(757) 591-5140  
(757) 591-5150 (FAX)



**Issue Date: 19 February 2014**

**OALJ Case No.: 2014-TLC-00028**

**ETA Case No.: H-300-13350-518607**

*In the Matter of*

**WARD OYSTER CO.,**

*Employer*

Certifying Officer: William L. Carlson  
Chicago Processing Center

Appearances: Wendal Hall, Esq.  
CJ Lake, LLC  
525 Ninth, Street Northwest  
Suite 800  
Washington, D.C. 20004  
*For the Employer*

Gary M. Buff , Associate Solicitor  
Vincent Costantino, Attorney  
Office of the Solicitor  
Division of Employment and Training  
Legal Services  
Washington, D.C.  
*For the Certifying Officer*

Before: Kenneth A. Krantz  
Administrative Law Judge

**DECISION AND ORDER**

On January 23, 2014, Employer filed a request for a de novo hearing reviewing the Certifying Officer's determination in the above captioned temporary agricultural labor certification matter. *See* 8 USC §§ 1101(a)(15)(H)(ii)(a), 1184 (c)(1); 20 C.F.R. § 655.115(a)(2)(2009). On January 27, 2014, the Office of Administrative Law Judges received the file. When a party requests a de novo hearing, the administrative law judge has five calendar days to schedule a hearing after receipt of the appeal file and ten calendar days after the hearing to render a decision. 20 C.F.R. § 655.115(a). The telephonic hearing was held on February 5, 2014 in Newport News, Virginia. At the hearing, Exhibits One through Four were admitted into

evidence without objection. (TR 4). The parties requested a briefing deadline of February 13, 2014 to submit briefs. On February 12, 2014, both attorneys requested an extension until February 14, 2014. Employer's counsel communicated to the court that he was waiving the ten day decision deadline. The parties submitted their briefs on February 14, 2014.

### **Statement of the Case**

On December 17, 2013, Employer submitted ETA Form 9142, an H-2A application for Temporary Employment Certification. (AF 64-70). The application was for four "First-Line Supervisors of Farming, Fishing, and Forestry Workers" with an SOC code of 45-1011. (AF 64). Employer listed the period of intended employment as February 15, 2014 to December 15, 2014. (AF 64). Employer stated that the position required ten months experience. (AF 66). Employer noted that the workers would be "responsible for overseeing crews handling both manual as well as mechanized activities with accuracy and efficiency." (AF 66).

On December 24, 2013, the Certifying Officer ("CO") issued a Notice of Deficiency. (AF 46-50). The CO identified problems in the following areas; fixed-site employer, temporary need, and FLC certificate. (AF 48-49). Regarding temporary need, the CO noted that Employer's description of the job duties did not properly differentiate between the current first-line supervisor positions and the previously requested aquacultural worker positions. (AF 49).

Employer responded to the Notice of Deficiency on December 31, 2013. (AF 19-40). Employer acknowledged the CO's request that it submit information addressing how changes in its business operations led to a filing for first line supervisors. (AF 32). To address this issue, Employer explained its 2013 workforce. Employer explained that it had fifteen employees in 2013. Four of the employees performed hatchery or administrative tasks and did not share duties with the H-2A workers. (AF 32). The remaining eleven employees performed H-2A duties, although only four were H-2A workers. (AF 32). Employer explained that none of the locally hired workers remained in the position past September. Specifically, Employer noted that two local workers quit unexpectedly, several local workers returned to college, and another left to serve a jail sentence. (AF 32-33). Employer explained that it experienced these issues despite opening the position to those without the "requested and required experience." (AF 32). Employer explained that securing experienced H-2A workers would enable it to hire "domestic workers with no experience who are more readily available." (AF 32).

The CO denied the application on January 24, 2014. (AF 10-14). The CO noted that under 20 C.F.R. § 655.122(b) "[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. . ." (AF 13). The CO asserted that Employer does not have a bona fide need for four first-line supervisors with ten months of experience. The CO noted that the need for supervisors is contingent upon the difficult task of identifying local workers willing to perform the difficult work. Based on previous labor levels, the CO predicted that Employer's workforce will contain only two to three additional domestic workers. In addition, the CO noted that Employer's ETA Form 9142 stated that the H-2A workers would only supervise three workers. The CO asserted that "[i]t defies credulity that four supervisors would be needed for an entry level staff of three people." (AF 14). The CO also noted that

Employer expected the supervisors to perform all of the duties required of an entry level worker. Based on these factors, the CO asserted that Employer does not have a bona fide need for four workers with ten months experience in aquaculture.

On January 23, 2014, Employer submitted a request for a de novo hearing under 20 C.F.R. § 655.17(b). Employer further explained its request for first-line supervisors. It noted that it “could safely attempt to relax its experience requirement for Acquacultural Workers IF it was able to hire four experienced supervisors to make up for the lack of experience.” Employer asserted that it could not hire entry-level local workers if it did not have supervisory employees to train them.

**DISCUSSION OF RELEVANT EVIDENCE**

O\*Net Online Help Documents

Employer submitted the O\*Net online help document addressing the Specific Vocational Preparation (“SVP”) levels. (EX 2). The document describes SVP as “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.” (EX 2 at 1). The document notes that the vocational training includes “vocational education, apprenticeship training, in-plant training, on-the-job training, and essential experience in other jobs.” (EX 2 at 1).

The document contained the following explanation of the SVP levels:

SVP 1	Short demonstration only
SVP 2	Anything beyond short demonstration up to and including one month
SVP 3	Over 1 month up to and including 3 months
SVP 4	Over 3 months up to and including 6 months
SVP 5	Over 6 months up to and including 1 year
SVP 6	Over 1 year up to and including 2 years
SVP 7	Over 2 years up to and including 4 years
SVP 8	Over 4 years up to and including 10 years
SVP 9	Over 10 years

Employer also submitted the O\*Net summary report for first-line supervisors of aquacultural workers. (EX 3). The summary of duties contained the following tasks; observe fish beds to detect disease, monitor fish growth, record numbers and type of fish or shellfish, assign duties to workers, direct and monitor worker activities, plan work schedules, and engage in the same fishery work as workers supervised. (EX 3 at 1). The document listed Biology, Administration, English, Chemistry, and Human Resources as necessary knowledge areas. (EX 3 at 2). The document placed the first-line supervisor of aquacultural workers in the SVP 7 to less than SVP 8 range. (EX 3 at 4). It also placed the position in “Job Zone Four: Considerable Preparation Needed.” (EX 3 at 4).

## Mr. John Rotterman's Testimony

Mr. Rotterman, an officer at the Chicago National Processing Center, testified at the hearing. He confirmed that he is the officer who denied Employer's application. (TR 10). Mr. Rotterman testified that the additional issues mentioned in the denial have been resolved, and that the only remaining issues are temporary need and bona fide nature of the job opportunity. (TR 30). Collaterally, Mr. Rotterman questioned the need for the ten month experience requirement.

Employer's attorney questioned Mr. Rotterman about the qualifications for the position. Mr. Rotterman agreed that an employer is allowed to ask for any position qualifications, so long as the qualifications are "[b]ona fide normal and accepted." (TR 12). Mr. Rotterman testified that the Virginia Employment Commission confirmed that a ten month experience requirement is acceptable for the first line supervisor position. (TR 12). Mr. Rotterman testified that, although there is nothing inherently wrong with requesting supervisors under the H-2A program, the employer must have a workforce to supervise. (TR 31).

Mr. Rotterman noted that state workforce agencies review applications and present instructive, but not determinative, opinions. (TR 13). He acknowledged that state workforce agencies possess special expertise in local labor market conditions. (TR 13). Regarding this specific case, Mr. Rotterman testified that it did not appear that the Virginia Employment Commission had any information about the workforce that was going to be supervised by the H-2A workers. (TR 28).

Regarding the O\*Net description for the position, Mr. Rotterman agreed that a front line supervisor of aquacultural workers is within SVP Level 7. (TR 18). He testified that this translates to between two and four years of experience. (TR 18). Mr. Rotterman testified regarding the negative impact on domestic hiring of listing qualifications which are not bona fide. He testified that an employer must place newspaper advertisements and a job order to attract domestic workers. (TR 26). He further explained that nonexempt employers must displace the H-2A worker with a willing, able, and qualified domestic worker during the first fifty percent of the contract period. (TR 26-7). Mr. Rotterman noted that if a domestic worker did not meet the stated qualifications an employer could reject the domestic worker. (TR 27). Thus, Mr. Rotterman explained that the inclusion of non-bona fide qualifications has a negative impact on domestic workers.

Mr. Rotterman explained that ten months of experience is an acceptable requirement for a supervisory position. However, Mr. Rotterman expressed concern that the H-2A workers would not be performing supervisory work. He testified that Employer's business need letter referenced "how difficult it is to find workers at all" and how "the entry level workers don't stay." (TR 16). Mr. Rotterman emphasized that Employer did not file an application for entry-level workers and did not explain how it would recruit workers in the difficult labor market. (TR 17). Mr. Rotterman testified that the change between last year's and this year's filing raised questions. As the H-2A workers performed some supervisory tasks last year, Mr. Rotterman expressed concern that the only reason to change the application would be to make it more difficult for domestic workers to qualify. (TR 23). In addition, Mr. Rotterman expressed concern

that Employer offered the same wage for the supervisory and the entry level positions. (TR 24). Mr. Rotterman testified that Employer satisfied the regulatory requirements of paying the Adverse Effect Wage Rate wage floor but failed to offer a wage that indicated true recruitment of supervisors. (TR 24).

Mr. Rotterman testified that Employer's letter did not satisfy his concerns regarding its need for supervisors. (TR 33). He testified that Employer did not explain what change in the business necessitated filing for supervisors. (TR 34). Mr. Rotterman testified that Employer provided aspirational, but not concrete, information about acquiring an entry-level workforce. (TR 35). Mr. Rotterman testified that he was not aware of any ongoing recruitment process. (TR 37). In addition, Mr. Rotterman addressed the payroll records from 2013. He testified that the payroll records demonstrated that "a smattering of folks. . . stick around for a short period of time, but the lion share of the work is done by the H-2A workers." (TR 38). Furthermore, Mr. Rotterman testified that the leasing documents did not demonstrate any change in the cultivation area. (TR 42). Throughout his testimony, Mr. Rotterman expressed concern over whether the H-2A workers would perform higher level duties and whether they would have a workforce to supervise.

#### Mr. Vigliotta's Testimony

Mr. Vigliotta testified that he owns and manages Ward Oyster Company. (TR 54). He testified that Ward Oyster began as a shucking house but transitioned into an aquacultural production. (TR 55). At the outset of his testimony, Mr. Vigliotta explained the four step aquacultural process. According to Mr. Vigliotta, the first step involves placing one millimeter oyster seeds in indoor tanks. (TR 56). He testified that workers involved in the first step must understand oyster grading. (TR 56). Mr. Vigliotta noted that placing small oysters in with larger oysters stunts their growth. (TR 56). Regarding step two, Mr. Vigliotta testified that workers suspend thirty-two large tanks in the water. (TR 59). He testified that the workers have to place screens on the bottom of the tanks. (TR 59). In addition, he testified that the oysters leak out of the tanks if the workers do not fit the screens properly. (TR 61). He also testified that improper water flow or cleaning can lead to oyster death. (TR 61). After the second step, the workers move the oysters to cages in the river. (TR 63). Mr. Vigliotta testified that during this third step the workers must tie the ropes correctly or the buoys will drift, and Employer will lose the oysters. (TR 63). In the fourth step, the workers move the oysters to larger cages. (TR 64).

Regarding worker qualifications, Mr. Vigliotta testified that he required three months of experience for last year's entry level workers. (TR 57). Mr. Vigliotta testified that he did not find any domestic workers with the requisite experience, and therefore will not impose an experience requirement for entry level workers this year. (TR 57). However, Mr. Vigliotta explained that the entry-level workers must be supervised by experienced workers. He testified that workers without experience cannot perform the necessary duties. (TR 62). Specifically, he testified that "they just don't know which ones have to be done and how to handle the product or how to make sure we don't lose the oysters. . ." (TR 62). In addition, Mr. Vigliotta testified regarding aquaculture's inherent dangers. Mr. Vigliotta testified that the pressure washer can cause serious injury. He also recounted an occasion when one of the inexperienced workers

refilled a gas tank while smoking a cigarette. (TR 62). Therefore, Mr. Vigliotta emphasized that the workers must be trained before they can perform any part of the job adequately. (TR 66).

Regarding the first line supervisors, Mr. Vigliotta testified that they will perform “exactly the same task only making sure that it’s being done correctly because they would know how it was done.” (TR 58). Later, Mr. Vigliotta testified that it was not completely accurate that the H-2A first line supervisors would perform exactly the same duties. (TR 58).

Mr. Vigliotta testified that he worked with Màs Labor to file an application for H-2A workers. (TR 67-8). Employer’s attorney asked Mr. Vigliotta why he filed an application for first line supervisors rather than the aquacultural workers as he had in the past. Mr. Vigliotta testified that he was hoping to hire domestic workers with no experience and “use the H-2A workers to train them in the hopes that some of them might stay with us and reduce our need for H-2A workers going forward.” (TR 69). He testified that he did not file for supervisor positions to ensure that only the previously hired H-2A workers would qualify. On the contrary, he testified that he would be delighted to hire qualified domestic supervisors over H-2A workers. (TR 69). Mr. Vigliotta testified that having a fully domestic workforce would be cheaper. He testified that he would not have to pay additional costs for filing applications and providing housing. (TR 80).

In addition, Mr. Vigliotta explained that he filed for supervisors to ensure consistency with business reality and Department of Labor guidance. He argued that the Virginia Employment Commission’s correspondence demonstrates that the workers have been performing supervisory tasks. Furthermore he argued that Employer wanted the application to match actual worker duties. He explained that Mr. Will Jacobs, a Virginia Employment Commission representative, visited Employer during the previous summer. (TR 70). Mr. Vigliotta testified that Mr. Jacobs observed the H-2A workers training and supervising the unskilled domestic workers.

Mr. Vigliotta further explained:

At the time when Will was here or during the summer months, we were also audited by the Department of Labor Wage and Hour and I assume it’s a routine audit. I haven’t heard anything back from the audit, but when they were auditing us, they were very particular as to make sure that H-2A workers stayed within the job description. So, we wanted to make sure and I say we, I mean, Ward Oyster Company, we wanted to make sure that what we applied for this year was as close to the job description--- our H-2A workers were already doing some supervision and training. So, we figured, well, this will fit it even more accurately and that’s why we put it down as that.

(TR 70).

Mr. Vigliotta also testified regarding the possibility of hiring a domestic workforce. He conceded that he struggles to retain domestic workers. (TR 73). He testified that he hired a high

school student and a fifty-year old gentlemen within the past week. In addition, he testified that “a fair amount of college students” apply. (TR 73). Mr. Vigliotta did not directly testify as to whether he would be able to hire the base domestic workforce. He acknowledged that “when we get people to come in here, sometimes they’ll see what we do and they want nothing to do with it.” (TR 77). He did testify that he will need at least twelve workers at a time to handle the quantity of product he is preparing for this season. (TR 75).

Mr. Vigliotta envisions four supervisors overseeing twelve inexperienced workers during the 2014 season. (TR 81). He conceded that he had seven part-time workers in May of the previous year. When the CO’s attorney suggested that this would equate to two or three full-time workers, Mr. Vigliotta objected and stated that some of the part-time workers were working full-time hours. (TR 90). He agreed that during part of 2013 he had four supervisors overseeing a total of five inexperienced workers. (TR 90). He further conceded that “[a]t times, I don’t have any full-time workers you’d need, no.” (TR 90). Mr. Vigliotta testified that he currently only has two workers. (TR 82). He noted that his need peaks in the middle of the summer. (TR 82). He testified that he is reluctant to hire workers before getting approval for supervisors under the H-2A program. Specifically, he explained that business operations may suffer if he devotes time to supervising the new workers. (TR 84). He testified that if he received approval for the supervisors, he would like to start with four to six entry-level workers. (TR 85). Mr. Vigliotta testified that he plans to expand the business. (TR 55). He plans to begin cultivation with ten to fifteen million spat, up from five million last season. (TR 55). He noted that Employer is currently using only twenty to twenty-five of the 150 acres that are suitable for the placement of oyster cages. (TR 64). Mr. Vigliotta testified that he is concerned about how to handle the increased product if he does not get authorization for H-2A workers.

### Position of the Parties

Employer submitted a brief on February 14, 2014. Employer requested a reversal of the CO’s denial. Employer asserted that, as it has made a *prima facie* case, the CO must come forward with evidence supporting its denial of the application. (Employer’s Brief at 7, *Greenwich Collieries*, 512 U.S. at 267, 278-79 (1994)). Specifically, Employer argued that the CO must “come forward with some factual basis for disbelieving the employer.” (Employer’s Brief at 7-8). Employer further argued that the CO is under a mistaken assumption that employers have a “strong and inflexible distinction between line work and supervision/training.” (Employer’s Brief at 8). Employer argued that a working foreman performs many of the same tasks as those he supervises. Emphasizing the characteristics of a working foreman, Employer stated that the CO should not suspect unlawful motivation. In its conclusion, Employer stated that it has a bona fide need for four working foreman.

The Certifying Officer filed a brief on February 14, 2014. The CO urged that the application was properly denied. (CO’s Brief at 3). The brief emphasized that Employer failed to demonstrate a temporary or seasonal need for the workers under 20 C.F.R. § 655.103(d). The CO referenced cases under the labor certification process for permanent employment of aliens that required employers to demonstrate the existence of a bona fide job opportunity. (CO’s Brief at 4). According to the CO, Mr. Vigliotta’s testimony demonstrated that he “has no need for any supervisors at this time and that his future plans are uncertain.” (CO’s Brief at 5). Specifically,

the CO noted that, despite a start date of February 15, 2014, Employer currently has only two domestic workers in the entry level position. Furthermore, the CO highlighted Employer's acknowledgement that there have been times during the season when he has had no full-time domestic workers. The CO noted that Employer has not described any extensive recruitment efforts. (CO's Brief at 6). In its conclusion, the CO emphasized that the burden is on the employer to prove entitlement to labor certification. (CO's Brief at 7).

## DISCUSSION

In their briefs, both parties set forth arguments regarding the bona fide nature of the job opportunity. Neither party directly cited a regulation mandating that the job opportunity be bona fide. The CO cited three permanent employment certification decisions to demonstrate that an "employer carries the burden of showing that it has a bona fide job opportunity open to all U.S. workers." (CO's Brief at 4).

The PERM regulations mandate:

If the employer is a closely held corporation or partnership in which the alien has an ownership interest, or if there is a familial relationship . . . , or if the alien is one of a small number of employees, the employer. . . must be able to demonstrate the existence of a bona fide job opportunity, *i.e.* that the job is available to all U.S. workers. . .

20 C.F.R. § 656.17(l).

Employer did not file an application for permanent employment of a foreign worker. The H-2A regulations workers do not contain a similar provision. The CO cited 20 C.F.R. § 655.103(d) to bolster its argument that the job opportunity must be bona fide.

That regulation provides:

[E]mployment is of a seasonal nature where it is tied to a certain time of year by an event or pattern, such as a short annual growing cycle, and requires labor levels far above those necessary for ongoing operations. . .

The above regulation does not mandate that Employer demonstrate the bona fide nature of the agricultural position.

A bona fide analysis arises in the H-2A program when the CO determines whether the qualifications listed in the job offer are acceptable. The Immigration and Nationality Act provides that "[i]n considering the question of 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.

(emphasis added).

The CO did not initially list 20 C.F.R. § 655.122(b) as a reason for the unacceptability of the application. (AF 48-49). The CO did list the regulation as a reason for denial in the denial letter. (AF 6-8). Therefore, Employer argues that the new citation for denial necessitates a remand. (Employer's Brief at 6, *citing Taylor Orchards*, 2011-TLC-00104, slip op. at 3 (Jan. 6, 2011)). In *Taylor Orchards*, the employer filed for administrative review after the CO denied its application for temporary labor certification. *Id.* at 1. The CO determined that the employer's qualification requirement was not normal and accepted, but instead of requesting substantiating documentation, the CO asked the employer to amend the application. The administrative law judge remanded the case because he determined that the employer had not had the opportunity to substantiate the acceptability of the qualification. *Id.* at 3. As this case involves a de novo hearing where new evidence may be submitted, I need not remand the case to afford Employer an opportunity to explain its qualification.

### **Normal and Accepted Qualification**

As evidenced in the above regulation, job qualifications must be consistent with normal and accepted qualifications among employers. Normal and accepted covers "situations which may be less than prevailing, but which are not unusual or rare." *John Gosney*, 2012-TLC-00009, slip op. at 8 (Dec. 30, 2011), *citing Snake River v. Farmers' Assoc.*, 1991 WL 539566, \*9 (D. Idaho, Oct. 1, 1991). The DOT or O\*Net listing for a position is probative evidence regarding whether an occupational requirement is a normal and accepted qualification. *See Overdevest Nurseries*, 2012-TLC-00018 (Feb. 16, 2012); *Strathmeyer Forests, Inc.*, 1999-TLC-00006, slip op. at 4 (Aug. 30, 1999). Employer filed an application for four first-line agricultural supervisors. (AF 64-72). Employer required ten months of experience for the position. (AF 67). The evidence demonstrates that ten months experience is a normal and accepted qualification for a first line supervisor of aquacultural workers.

On December 19, 2013, Ms. Valadez from the CO's office contacted Kendal Shaver, the acting rural services manager for the Virginia Employment Commission. (AF 43). Ms. Valadez asked Mr. Shaver if ten months of experience for a first line supervisor was "an acceptable requirement among non H-2A employers in the area of intended employment." (AF 43). On December 20, 2013, Mr. Shaver responded that the "[a]d hoc survey showed that 10 months experience is an acceptable requirement." (AF 42). During the hearing, Mr. Rotterman testified that the Virginia Employment Commission deemed the requirement acceptable. (TR 12).

O\*Net documentation confirms the acceptability of the requirement.<sup>1</sup> O\*Net online support contains a summary report for first-line supervisors of aquacultural workers. (EX 3). The report places the position in Job Zone Four (Considerable Preparation Needed) and SVP level range seven to less than eight. (EX 3 at 4). The O\*Net online support document for SVP levels explains that SVP level seven equates to over two and up to and including four years of experience. (EX 2 at 1).<sup>2</sup> The document constitutes strong evidence that Employer could have requested up to and including four years of experience. Mr. Rotterman testified that an employer can ask for any qualifications, so long as they are “[b]ona fide normal and accepted.” (TR 12). Mr. Rotterman testified that Employer could request a supervisor application or a ten month experience requirement “but part in parcel is having the workers to supervise.” (TR 18). Based on the O\*Net documentation, correspondence from the Virginia Employment Commission, and Mr. Rotterman’s testimony, I find that a ten month experience requirement is a normal and accepted qualification.

### **Bona Fide Qualification**

Listed job qualifications must be bona fide as well as normal and accepted. 20 C.F.R. § 655.122(b). While conceding that a supervisor might need ten months of experience, Mr. Rotterman expressed concern that H-2A workers would not be performing supervisory work and would not have a workforce to supervise. (TR 16). (TR 22-3). In contrast, Employer argued that the request for supervisors stemmed from legitimate changes in the business plan and input from government agencies. The determinative question is whether the ten month experience requirement relates to Employer’s bona fide business needs or constitutes an impermissible attempt to limit H-2A worker displacement.

### **The Certifying Officer’s Evidence**

The CO presented various concerns relevant to the issue of whether Employer has a bona fide need for supervisors with ten months of experience. The CO questioned if Employer will have a domestic workforce to supervise, if the number of domestic workers justified four supervisors, and if the offered wage is consistent with bona fide need. Furthermore, the CO expressed concern that Employer included the experience requirement to prevent H-2A worker displacement under the fifty percent rule.

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<sup>1</sup> DOT codes have been replaced by OES codes and O\*Net descriptions. 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 terms of the degree of education, experience, and on the job training which is necessary.

<sup>2</sup> 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. There are nine SVP levels, each with a different range of SVP years.

The CO pointed to Employer's December 31, 2013 letter as evidence that the ten month qualification for supervisory workers is not bona fide. Specifically, the CO noted that this letter demonstrates that the H-2A workers will likely not have a domestic workforce to supervise.

Mr. Rotterman explained his analysis of the letter and the payroll records:

We were looking for evidence of a temporary front line workforce independent of this application that would be subject to the supervision of the workers sought in the application. What we ended up with by the Employer's payroll reports and business assessment items previously referred to is real doubts as to whether that front line workforce would exist and whether the supervisors were actually needed.

(TR 30).

In the above testimony, Mr. Rotterman was referring to Employer's business necessity letter. In that letter, Employer noted that, due to the lack of experienced domestic workers, it is forced to "train inexperienced workers, most of whom leave once they see what the job entails." (AF 32). Employer noted that most of the eight domestic workers were students and all worked part time. (AF 32). According to Employer, two employees quit, three employees returned to college, one joined the military, one was terminated for cause, and another left to serve a jail sentence. (AF 32-33).

The CO noted that Employer's letter casts doubt on whether Employer can hire and maintain a suitable domestic workforce for the H-2A workers to supervise. The CO argued that Employer could have reduced the concerns by providing additional information regarding its recruitment of domestic workers. (TR 41). Mr. Rotterman stated that Employer could have mentioned attending job fairs or forming relationships with local vocational schools. (TR 41). Regarding whether the H-2A workers would actually function as supervisors, Mr. Rotterman emphasized that the primary job duties described on the application consisted of front line entry level work. (TR 42). During the hearing, Mr. Rotterman testified that Employer should not need four supervisors to supervise a total of three entry level workers. (TR 22). On the application, Employer listed the number of workers to be supervised as three. (AF 66).

In addition, Mr. Rotterman questioned the motivation for the requirement:

The change between last year's filing and this one certainly called into question [the] legitimacy of the transition. If the folks as indicated in the letter from the VEC [Virginia Employment Commission] were doing training and some degree of supervision last year, it's unclear what they gain in changing the classification this year other than making it higher tier entry. We've seen other folks when they ask for supervisory applications or positions offer significantly more money because they're having a hard time getting folks that might be in the labor market. The Employer didn't do that in this instance. So, it's unclear why they went from three to ten [months of experience] while essentially leaving everything else the same.

(TR 23).

Given the concerns with size of workforce, wages, motive, and job duties, the CO argued that the ten month requirement is not bona fide.

### Employer's Evidence

Employer submitted hearing testimony and documentary evidence in support of the position qualification. During the hearing, Mr. Vigliotta addressed the CO's concerns regarding supervisor to entry level ratio and recruitment of domestic workers. He testified that each supervisor would supervise three domestic workers for a total of twelve domestic workers. (TR 81). Mr. Vigliotta testified that he will need twelve workers to handle the quantity of spat he is preparing for this season.

Employer also presented evidence to combat the CO's concern that it filed for supervisors to prevent H-2A worker displacement by domestic workers. Employer explained that it filed for supervisors to correctly align the application with actual H-2A worker duties. It referred to correspondence from the Virginia Employment Commission to support this claim.

Mr. Will Jacobs of the Virginia Employment Commission provided the following information:

Per prior guidance from the Wage and Hour division and visits by inspectors to their business the company determined that the aquacultural operations are best served by the H-2A visa process as the work that is being performed is aquacultural in nature. Similarly, it has been determined that the work being performed more closely matches a supervisory nature rather than that of a regular aquacultural farm worker. This is due to the fact that the workers, in returning to this employment on a yearly basis have obtained skills and train and supervise others in the aquacultural operations of this business.

(AF 41).

Mr. Vigliotta also testified regarding how the Wage and Hour Division's audit played a role in the decision to apply for supervisors with experience. He testified that the agency conducted an audit in the summer of 2013. (TR 70). He noted that the officials were "very particular as to make sure that H-2A workers stayed within the job description." (TR 70). Mr. Vigliotta explained that, after the audit, they felt the need to submit an application with a very accurate job description. (TR 70). He explained that it was important to capture the supervisory nature of the position.

Employer also responded to the CO's doubts that a bona fide supervisory position would offer the same wage as the entry-level position. Mr. Vigliotta testified that Employer starts the entry level workers and the supervisors on \$9.75 per hour because it is the wage floor mandated by the Department of Labor. (TR 78). However, Mr. Vigliotta emphasized that Employer gives raises to both domestic and H-2A workers. Employer also responded to the CO's concern that it

added the ten month experience requirement to insulate H-2A workers from displacement. Mr. Vigliotta testified that he would be delighted to hire domestic workers instead of the foreign workers. (TR 69). Specifically, Mr. Vigliotta testified that a domestic workforce would be less expensive. (TR 80). He also testified that he hopes to reduce his need for future H-2A workers. (TR 69).

Furthermore, Employer addressed the CO's concerns that it will not acquire a domestic workforce. Mr. Vigliotta testified that he hired a high school student and a middle-aged worker during the week of the hearing. (TR 73). In addition, he testified that a "fair number of college students" apply for the entry-level position. (TR 77). Mr. Vigliotta testified that he is reluctant to hire additional entry level workers before he receives authorization for the H-2A supervisors. (TR 84). Mr. Vigliotta testified that workers walk in and ask for employment. He further testified that walk-ins are always asked to fill out an application which is then kept on file. (TR 74).

The CO and Employer have presented conflicting portraits regarding the bona fide nature of the ten month experience requirement. The CO questioned Employer's capacity to develop a domestic workforce and its motivation in listing the experience requirement. In contrast, Employer pointed to the confusion regarding the application and its legitimate motivation in listing the requirement.

Despite the legitimate changes in Employer's business, the CO raised several arguments questioning Employer's motivation and need for the experience requirement. The CO noted that it "defies credulity that four supervisors would be needed for an entry level staff of three people." (AF 8). However, Mr. Vigliotta testified that each supervisor would supervise three domestic workers for a total of twelve domestic workers. (TR 81). The CO also expressed concern that Employer was offering the same wage for the supervisory position as the entry-level position. Employer explained that the \$9.75 per hour operates as a floor, but that it will offer raises to both H-2A and domestic workers. The CO also argued that Employer included the experience requirement to insulate H-2A workers from displacement. Based on the evidence submitted, I find that Employer altered the application to request experienced supervisors in response to an exhortation from the Department of Labor to match the H-2A position description with the true job duties. Mr. Vigliotta explained that officials from the Department of Labor emphasized that H-2A workers must only perform work as described in the application. (TR 70).

Analyzing the evidence as a whole, I find that the ten month experience requirement is bona fide. Employer has demonstrated that it needs experienced supervisors to direct a workforce that will be handling a greater number of oysters. Mr. Vigliotta testified that he plans to hire a domestic workforce with no aquaculture experience. After describing the complexity and risk involved in performing the work, Mr. Vigliotta emphasized that the domestic workers must be trained before they can perform any portion of the job adequately. (TR 66). Employer presented evidence to demonstrate that the H-2A workers assumed supervisory roles in previous seasons. An e-mail from the Virginia Employment Commission confirmed that the H-2A workers performed a supervisory role last summer. (AF 41). The letter explained that "the workers, in returning to this employment on a yearly basis have obtained skills and train and supervise others in the aquacultural operations of this business." (AF 41). Although prior

workforce levels might not justify four supervisors, Mr. Vigliotta explained that he is preparing to increase the spat numbers from five million to ten or fifteen million. (TR 55). He also testified that he plans to utilize more of his available acreage. (TR 55). The record demonstrates that Employer has a bona fide need for experienced aquacultural workers to direct a larger domestic workforce in the handling of more oysters.

Based on the above reasoning, I find that the ten month experience requirement is bona fide and consistent with normal and accepted qualifications as required by 20 C.F.R. § 655.422(b).

### **ORDER**

Accordingly, the CO's decision is **REVERSED**, and the application for temporary labor certification is remanded for processing in accordance with the H-2A regulations.

KENNETH A. KRANTZ  
Administrative Law Judge

KAK/ecd/mrc