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**Issue Date: 02 February 2015**

OALJ Case No.: 2015-TLC-00013  
ETA Case No.: H-300-14346-037292

In the Matter of:

**R. HART HUDSON FARMS, INC.,**  
Employer.

Certifying Officer: Chicago National Processing Center

Appearances:

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*For the Employer*

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*For the Certifying Officer*

Before: JOSEPH E. KANE  
Administrative Law Judge

**DECISION AND ORDER**  
**AFFIRMING THE CO'S NOTICE OF DEFICIENCY**

This matter arises under the temporary agricultural employment provisions of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184(c)(1) and 1188, and the implementing regulations presented at 20 C.F.R. Part 655, Subpart B. The H-2A program permits employers to hire foreign workers to perform agricultural work within the United States on a temporary basis.

## STATEMENT OF THE CASE

R. Hart Hudson Farms, Inc. (the “Employer”) is a tobacco grower in South Hill, Virginia. In October 2014, the Employer filed an Agricultural and Food Processing Clearance Order, Form ETA 790, and corresponding attachments with the Virginia Employment Commission (“VEC”) seeking temporary labor certification under the H-2A temporary agricultural program. On December 10, 2014, the VEC issued a Notice of Denial on the basis that the Employer’s three-month experience requirement was not normal or common among non-H-2A employers in a comparable crop and occupation. (AF 21-23).<sup>1</sup>

On December 12, 2014, the Employer filed an H-2A Application for Temporary Employment Certification (“Application”) with the United States Department of Labor’s Employment and Training Administration (“ETA”). (AF 40-78). The Employer requested certification for sixteen “General Farmworkers” to work on its tobacco farm, SOC (O\*Net/OES) occupation title “Farmworkers and Laborers, Crop, Nursery, and Greenhouse,” occupation code 45-2092. (AF 40). On the Application and in the job order placed with the Virginia State Workforce Agency (“SWA”), the Employer listed the following job duties:

To perform various duties associated with the production of tobacco such as greenhouse preparation, cultivating, preparing rows for planting, [], fertilizing, harvesting, spraying, irrigating, loading [and] unloading of tobacco bales of up to 800 lbs, delivery of product to market, tractor driving, [and] general farm work. Job involves stooping, lifting and working outside in inclement weather [and] outdoor temp[eratures] below 30 to in excess of 100 degrees. Must be able to lift [and] carry up to 70 lbs. Must have three months verifiable prior experience in job offered. After 3 days, workers required to keep up with other co-workers related to performance and productivity of the tasks required to produce crops.

(AF 42, 59-60).

On December 18, 2014, the CO at the Office of Foreign Labor Certification (“OFLC”) issued a Notice of Deficiency (“NOD”). (AF 10). The CO found that the Employer’s three-month experience requirement did not meet the requirements of 20 C.F.R. § 655.122(b). (AF 13). The CO explained that a Virginia SWA survey of non-H-2A employers found that the Employer’s three-month requirement was not normal or accepted within Virginia for non-H-2A employers in the same or comparable occupation or crop. (*Id.*). Accordingly, the CO requested that the Employer either remove the three-month experience requirement, or submit documentation establishing that the requirement is normal and accepted among non-H-2A employers in the same or comparable occupation or crop.<sup>2</sup> (*Id.*).

In a letter dated December 23, 2014, pursuant to 20 C.F.R. § 655.171(b), the Employer requested a de novo administrative hearing to review the Certifying Officer’s (“CO”) denial of

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<sup>1</sup> In this Decision and Order, “AF” refers to the Administrative File, “DOLX” refers to the CO’s Exhibits, “EX” refers to Employer’s Exhibits, “Tr.” refers to the transcript of the telephone conference on January 12, 2015, and “TR” refers to the transcript of the telephonic hearing on January 21, 2015.

<sup>2</sup> The CO found other deficiencies that are not at issue on appeal.

its H-2A Application. (AF 1). The Employer alleges that the three-month experience is normal and accepted among non-H-2A tobacco growers. (AF 1-7).

The Office of Administrative Law Judges received the Administrative File on January 9, 2015. On January 12, 2015, I held a conference call to schedule a hearing date. The parties agreed to participate in a telephonic hearing on January 21, 2015. (Tr. 7-9). On Tuesday, January 20, 2015, the Georgia Legal Services Program Farmworker Division (“GLSP”) filed a motion for leave to submit a brief as amicus curiae and attend the hearing. On January 20, 2015, I granted GLSP’s motion. GLSP filed a brief as amicus curiae on January 21, 2015.<sup>3</sup> I held a telephonic hearing on January 21, 2015. At the hearing, I admitted EX 1<sup>4</sup> and DOLX 1-3<sup>5</sup> into the record.<sup>6</sup> Following the hearing, the Employer submitted ET Handbook No. 384, 54 FR 43347, and an O\*Net summary report for the occupation title “Farmworkers and Laborers, Crop,” occupation code 45-2092.02. I have marked these as EX 2 and EX 3 for identification, respectively. The Employer and the CO filed post-hearing briefs, and the record is now closed.<sup>7</sup>

### Testimonial Evidence

Four witnesses testified at the hearing on January 21, 2015. In addition to the testimonial evidence of Eve Bagley, Michelle Abraham, Lynette Wills, and Glenn Price Hudson, the Employer submitted Dr. Steve Bronars’ written testimony. I have only summarized the testimony pertaining to the narrow issue in this case.

#### *Eve Bagley*

Eve Bagley testified on behalf of the CO, and as an adverse witness on behalf of the Employer. (TR 20-60). Ms. Bagley testified that she has worked as a farm placement specialist at the VEC for twenty-two years. (TR 20). She administered DOLX 1, the 2014 Prevailing Practices and Wage Survey (“2014 SWA Survey”), which was taken between August 14, 2014 and October 30, 2014. (TR 22-23). She also administered the 2010, 2011, 2012, and 2013 SWA surveys. (TR 53).

Ms. Bagley testified at length regarding the 2014 SWA Survey, noting she surveyed everyone “in the reporting area,” which encompasses thirteen counties. (TR 28-29). Eight eligible employers responded to the 2014 SWA Survey, while two did not. (TR 24). She stated

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<sup>33</sup> Amicus curiae are contemplated under 20 C.F.R. § 655.171(a). Under the Rules of Practice and Procedure for administrative hearings before the Office of Administrative Law Judges, “[t]he amicus curiae shall not participate in any way in the conduct of the hearing, including the presentation of evidence.” 29 C.F.R. § 18.12. In the instant case, GLSP’s brief included information that was not contained in the administrative record. As I will not consider information that is not contained in the administrative record, I have not considered the exhibits attached to GLSP’s brief.

<sup>4</sup> EX 1 is Dr. Steve Bronars’ written testimony and curriculum vitae.

<sup>5</sup> DOLX 1 is the Prevailing Practices and Wage Survey Supporting Information from 2014; DOLX 2 is the Prevailing Practices and Wage Survey Supporting Information from 2010 to 2013; and DOLX 3 is a list of the VEC’s responses to inquiries received from the Employer’s counsel.

<sup>6</sup> The Employer objected to the CO’s surveys, DOLX 1 and 2, as “fundamentally unreliable.” (TR 7). As this objection pertains to the sole issue in this case, I will address the Employer’s objection in the Discussion section.

<sup>7</sup> On January 27, 2015, counsel for the Employer and counsel for the CO electronically filed a joint motion for an extension of time to file briefs, which I subsequently granted.

the 2014 SWA Survey was the sole basis for determining the Employer's minimal experience requirement was not normal and accepted. (TR 29). Ms. Bagley agreed that, based on her experience conducting Handbook 385<sup>8</sup> surveys, the SWA surveys are supposed to be conducted at the crop activity level as opposed to the occupational level. (TR 30). She agreed that Handbook 385 requires a survey to include three employers in order for it to produce a potentially valid result. (TR 31).

Ms. Bagley discussed the different types of tobacco that employers in Virginia grow, the jobs involved in growing tobacco, the types of pests that affect tobacco plants, and various other facets of being a tobacco worker. (TR 37-46). She stated that, as it relates to growing tobacco, the term "planting" is not ambiguous; it could mean either planting in a greenhouse or a field. (TR 33). She explained that when tobacco workers are hired, they undergo a three-day training period. (TR 46).

Ms. Bagley testified that she is familiar with O\*Net,<sup>9</sup> and she agreed that it provides job profiles for various occupations. (TR 36). She also agreed that the specific vocational preparation ("SVP") refers to a level of experience that people generally need to perform adequately in a specific job. (*Id.*). She testified that the O\*Net SVP level of experience associated with the occupation at issue in this case is zero to three months. (*Id.*).

Following adverse questioning by the Employer's counsel, Ms. Bagley testified on behalf of the CO. She stated that the SWA surveys always govern decisions regarding granting or denying job orders. (TR 56). Furthermore, when asked whether she knew of an instance where the CO did not accept one of the surveys as the basis for action on an H-2A application, Ms. Bagley responded "No." (TR 57).

Ms. Bagley testified she has never encountered a non-H-2A employer that requires prior work experience. (TR 55, 58-59). She explained that although the Employer prefers workers with experience, it was excluded from the 2014 SWA Survey because it hires predominantly H-2A workers. (TR 55).

### *Michelle Abraham*

Michelle Abraham testified on behalf of the CO, and as an adverse witness on behalf of the Employer. (TR 61-78). She has worked for the VEC for twenty-one years. (TR 66). For five years, she worked as a farm placement specialist conducting tobacco surveys at the field office level. (TR 66-67). Following that, she managed the foreign labor certification program for seven years at the administrative level. (TR 66). At present, she is a state monitor advocate, which involves representing the best interests of U.S. farm workers. (TR 66-67). Furthermore, Ms. Abraham grew up on and worked on a tobacco farm, and she worked for the R.J. Reynolds Tobacco Company prior to joining the VEC. (TR 68).

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<sup>8</sup> Handbook 385 includes procedures for conducting surveys of wages paid to domestic agricultural workers. (EX 2).

<sup>9</sup> 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.

Ms. Abraham testified she did not have a role collecting, preparing, or designing the 2014 SWA Survey, or in denying the Employer's Application. (TR 61). She testified she was familiar with the 2014 SWA Survey results, she knew the information was gathered between August and October 2014, and she was aware that eight employers were surveyed. (TR 62, 65). When asked whether she believed that any non H-2A tobacco growers were "missed" by the survey, she responded she did not think so. (TR 70).

Ms. Abraham explained that the regulations require a prevailing practice survey to be completed every year. (TR 69). Based on the 2014 SWA Survey results, the VEC "found that no experience was the prevailing practice among non-H-2A growers in th[e] crop reporting area." (TR 69-70). Thus, Ms. Abraham explained, the VEC applied the 2014 SWA Survey results to the Employer's job order. (*Id.*). Consequently, the VEC denied the Employer's Application based on the results of the 2014 SWA Survey. (TR 77). In her opinion, the 2014 SWA Survey is valid. (TR 74). Ms. Abraham clarified that SWA survey results from prior years do not affect the validity of the 2014 SWA Survey. (TR 70). Furthermore, she explained that the experience requirements of H-2A employers are irrelevant, as H-2A employers are "not included" in making "determinations on occupational qualifications for prevailing practice surveys." (TR 70-71).

Ms. Abraham testified that during the seven years that she ran the foreign labor certification program, a prevailing practice survey never demonstrated that experience was required in the crop and activity at issue in this case. (TR 68-69). She clarified that neither the 2013 SWA survey nor the VEC ever made a finding that the three-month experience requirement was normal and accepted in 2013. (TR 71-73). Although the VEC and Chicago National Processing Center ("CNPC") accepted the Employer's 2013 Application containing a three-month experience requirement, she believed they did so in error. (TR 71-72). She explained that she advised the agency there had been an error, and testified that once the job order was accepted, there was no way to renege the acceptance. (TR 72).

#### *Glenn Price Hudson*

Glenn Price Hudson testified on behalf of the Employer. (TR 78-117). Mr. Hudson is a fifth-generation tobacco grower in Southfield, Virginia and he works at the Employer's farm. (TR 78-79). He has been involved in the Virginia tobacco industry for thirty-five years. (TR 101). Mr. Hudson explained that the Employer only grows flue-cured tobacco. (TR 80). He testified at length about the history, size, and physical infrastructure of the Employer's farm. (TR 79-82). He also explained the various phases involved in growing tobacco and the consequences of having inexperienced workers working in the greenhouse, at the transplanting, cultivation, or fertilization phases, or operating machinery. (TR 83-86). He described various safety concerns associated with hiring inexperienced workers, and stated hiring experienced workers will protect his workforce and his farming operation. (TR 86-88).

Mr. Hudson explained in considerable detail that the Employer's farm is not comparable to the farms surveyed in 2014. For example, he explained the Employer's farm is larger, more "evolved," and more commercial than the farms included in the 2014 SWA Survey. (TR 94-95).

He also provided various opinions regarding the types of tobacco grown by the employers who were surveyed in 2014. (TR 95-101).

Mr. Hudson testified that if a tobacco grower produces an inferior product, it does not have a good chance of maintaining a contract or staying in business. (TR 89). When asked whether he can “just train” workers, Mr. Hudson responded, “No, you don’t just train them. No. It’s a matter of years of experience as to what they know and what they do not know.” (TR 93). Although the Employer is only requiring three months of experience, Mr. Hudson explained that “those three months of experience” derive from “years” of experience “either with John Doe as a grower,” or “from ... Nayarit, Mexico ... where they raise tobacco.” (*Id.*). Mr. Hudson explained that in the last ten years, he was unaware of any domestic worker with tobacco farming experience that has sought employment at the Employer’s farm. (*Id.*).

Mr. Hudson explained that although the Employer did not require experienced workers in 2006, 2007, 2008, 2009, 2010, 2011, and 2012, because it has become “more high tech,” and the training has become lengthier, it now requires workers with three months of experience. (TR 105-106). He testified that, based on his extensive experience growing tobacco, three days is an insufficient amount of time within which to train inexperienced workers. (TR 106-108).

#### *Lynette Wills*

Lynette Wills testified on behalf of the CO. (TR 118-126). She is one of the three CO’s at the CNPC. (TR 118). Ms. Wills started working at the CNPC in May 2005 as an immigration program analyst. (TR 120). She was promoted to a lead immigration program analyst position, and in May 2014 was subsequently promoted to a supervisory immigration program analyst position. (TR 120-121). She explained that the SWA conducts “normal and accepted surveys” in order to determine the normal and accepted employment requirements of non-H-2A employers. (TR 119).

Ms. Wills testified that she did not become involved in the instant case until the Employer appealed. (TR 121). She described how the CO considers information it receives from the SWA. (TR 121-122). She described that in the present case, the SWA refused to provide the Employer a job number because based on the most recent survey, the Employer had excessive experience requirements. (TR 122). She testified that relying on a SWA survey is a sufficient basis for the CO to deny an application or issue a Notice of Deficiency. (*Id.*).

On cross-examination, Ms. Wills explained that SWA surveys are reported in the Agricultural On-Line Wage Library (“Library”). (TR 125). She agreed the Library is not always up to date. (*Id.*). She testified that if for some reason a SWA survey were unacceptable, it would not be posted on the Library. (*Id.*).

## Documentary Evidence

### *DOL Exhibit 1*

DOLX 1 is the VEC's 2014 Prevailing and Common Practices Survey Supporting Information for tobacco. The Farmville local office collected survey information from August until October 2014. The 2014 SWA Survey shows that 110 employers were in the crop, area, and occupation in question. Of the eight non-H-2A employers surveyed, all responded "None" to the question: "What is the minimum amount of experience you require for workers?"

### *DOL Exhibit 2*

DOLX 2 is the VEC's Prevailing and Common Practices Survey Supporting Information for tobacco for years 2010, 2011, 2012, and 2013. The survey results show that all of the non-H-2A employers surveyed between 2010 and 2013 responded "None" to the question: "What is the minimum amount of experience you require for workers?"

### *DOL Exhibit 3*

DOLX 3 is a letter dated January 15, 2015 from Michelle Abraham to the CO's counsel regarding the VEC's responses to inquiries received from the Employer's counsel. Ms. Abraham explained that employers were included or excluded in the 2014 SWA Survey "based on their hiring of migrant and/or seasonal farmworkers utilizing the appropriate definitions found at 20 CFR 651.10 and in accordance with the provisions related to prevailing practices found in ETA Handbook 398 and ETA Handbook 385." (DOLX3 at 1). She explained that employers "who were located in the South Hill Crop Reporting Area and employed tobacco farmworkers (Farmworkers and Laborers, Crop: 45-2092-02)" were included in the 2014 SWA Survey. (*Id.*). Ms. Abraham explained that employers who do not employ migrant or seasonal farmworkers in accordance with definitions found at 20 C.F.R. § 651.10 and H-2A employers who employ migrant and/or seasonal farmworkers were excluded from the survey. (DOLX3 at 2). She stated there were ten potential employers in the population eligible to complete the 2014 SWA Survey before any employer was excluded. (*Id.*). Finally, Ms. Abrahams clarified that two non-H-2A employers refused to participate in the 2014 SWA Survey. (*Id.*).

### *Employer's Exhibit 1*

EX 1 is a report authored by Dr. Stephen G. Bronars. Mr. Bronars is a Senior Economist at Welch Consulting, which specializes in economic and statistical research. He holds a B.A., M.D., and PhD. in economics. (EX 1 at 5). Dr. Bronars stated the Employer hired him to assess the accuracy and validity of the Prevailing Practices and Wage Survey for Agricultural Employment. Dr. Bronars opined the SWA surveys do not accurately reflect the minimum experience requirements for seasonal employees at larger growers such as the Employer. (EX 1 at 1).

Dr. Bronars relied on various factors in reaching his conclusion that the 2014 SWA Survey is an insufficient basis upon which to make a reasoned inference regarding the normal

practices of large tobacco farms. He stated the SWA surveys document the practices of smaller growers, noting that only two non-H-2A employers out of the twenty-five polled in the past five years employ as many as twenty seasonal workers. (EX 1 at 2). Dr. Bronars also noted that it would be difficult for a larger operation such as the Employer to remain competitive if it hired inexperienced workers. (EX 1 at 2-3).

Furthermore, Dr. Bronars stated that, based on his interview with Glenn P. Hudson, seasonal workers at the Employer's tobacco farm often work with mechanized equipment, which can lead to increased training expenses. (EX 1 at 2). Furthermore, inexperienced workers with minimal training are likely to have high accident and injury rates. (*Id.*). Dr. Bronars also opined the survey data was inconsistent and the sample was inadequate. (EX 1 at 3-4).

Dr. Bronars concluded by reiterating that the employers questioned in the 2014 SWA Survey "do not appear to use production processes similar to Hudson Farms." (EX 1 at 4). Furthermore, he noted that the survey responses do not accurately indicate the "common practices for larger growers." (*Id.*). Finally, he concluded that larger growers "would not be as efficient or competitive if they could not require prior work experience as a prerequisite for the job." (*Id.*).

#### **APPLICABLE LAW**

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 employing foreign workers will not adversely affect the wages and working conditions of U.S. workers similarly employed.<sup>10</sup> 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."<sup>11</sup> 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.

Although the regulations do not define "normal and accepted," judges have interpreted the phrase as meaning less than prevailing but clearly not unusual or rare.<sup>12</sup>

The Employer bears the burden of establishing that the three-month requirement is normal and accepted.<sup>13</sup> Whether an employer requests administrative review or a de novo

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<sup>10</sup> 20 C.F.R. § 655.103(a).

<sup>11</sup> 8 U.S.C. § 1188(c)(3)(A).

<sup>12</sup> See *Westward Orchards, et al., 2011-TLC-00411* (July 8, 2011); see also *Snake River Farmers' Ass'n, Inc. v. U.S. Dept. of Labor*, 1991 WL 539566, \*9 (D. Idaho, Oct. 1, 1991).

hearing, the Administrative Law Judge must affirm, reverse, modify the CO's decision, or remand for further action.<sup>14</sup> In this case, the Employer requested a de novo hearing. Since new evidence that was not before the CO may be submitted at a de novo hearing, the Administrative Law Judge must independently determine if the employer has established eligibility for temporary labor certification. Therefore, the standard of review in a de novo case cannot be for abuse of discretion on the part of the CO, as the Administrative Law Judge may receive evidence not available to the CO when it rendered its decision.<sup>15</sup> Based on the issue before me and the evidence of record, I make my determination based on whether the Employer has carried its burden to establish by a preponderance of the evidence that its Application is sufficient.

## DISCUSSION

The sole issue in this case is whether the Employer's three-month experience requirement is consistent with the normal and accepted qualifications required by employers that do not use H-2A workers in the same or comparable occupation and crop, as required by 20 C.F.R. 655.122(b). The CO argues that the Employer's three-month experience requirement is not consistent with the normal and accepted qualifications required by non-H-2A employers in the same or comparable occupation and crop. In contrast, the Employer alleges the three-month experience is normal and accepted among non-H-2A tobacco growers.

In support of its position, the CO relies on the 2014 SWA Survey of tobacco growers in Virginia, which reflects that none of the eight non-H-2A tobacco growers surveyed requires its workers to have any experience prior to being hired. (DOLX 1). Ms. Bagley and Ms. Abraham testified at length regarding the purpose of the SWA surveys. They explained that neither the 2014 SWA Survey nor and prior SWA surveys found that a three-month experience requirement was normal and accepted. Ms. Bagley has worked at the VEC for over twenty-two years. Based on her extensive experience, I find her testimony to be credible. Additionally, I give probative weight to Ms. Abraham's testimony, as she has worked at the VEC for twenty-one years as a farm placement specialist, a foreign labor certification program manager, and presently as a state monitor advocate.

At the hearing, the Employer objected to the CO's surveys, DOLX 1 and DOLX 2, as "fundamentally unreliable." (TR 7). The Employer urges the court to rely on data from the Agricultural Employment Practice Survey Library ("Library") and the Dictionary of Occupational Titles ("DOT") to conclude that requiring three months of experience is a normal and accepted job requirement. For the reasons discussed below, I reject the Employer's contention and conclude the 2014 SWA Survey is valid.

The Employer alleges that the 2014 SWA Survey was "narrow." (Employer's Post-Hearing Brief at 9). However, the evidence demonstrates the 2014 SWA Survey was inclusive. Ms. Bagley testified that she surveyed every employer "in the reporting area," which encompasses thirteen counties in Virginia. (TR 28-29). Furthermore, when asked whether she believed that any non H-2A tobacco growers were "missed" by the survey, Ms. Abraham stated

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<sup>13</sup> 20 C.F.R. §§ 655.103(a), 655.122(b).

<sup>14</sup> 20 C.F.R. § 655.171.

<sup>15</sup> See *Catnip Ridge Manure Application, Inc.*, 2014-TLC-00096, slip op. at 2 (Aug. 15, 2014).

she did not think so. (TR 70). The Employer has not advanced any evidence establishing that the 2014 SWA Survey excluded any non-H-2A tobacco growers in the reporting region. Thus, I find that because the VEC attempted to survey all of the eligible employers in the reporting area, the 2014 SWA Survey was as inclusive as it could have been.

Moreover, Dr. Bronars, who testified on behalf of the Employer, opined the 2014 SWA Survey sample was inadequate. (EX 1 at 3-4). I disagree that that the 2014 SWA Survey is invalid because of a small sample size. Ms. Bagley explained that only two of the ten eligible employers did not respond to the 2014 SWA Survey. (TR 25). Ms. Abraham's testimony regarding the 2014 SWA Survey corroborates that of Ms. Bagley. In a letter dated January 15, 2015, Ms. Abraham stated there were ten potential employers in the population eligible to complete the 2014 SWA Survey, and only two refused to participate in it. (DOLX3 at 2). Thus, eighty percent of the eligible non-H-2A employers participated, and all specified they do not require their workers to have any prior experience. Furthermore, even if the 2014 SWA Survey was not statistically valid, that does not render it completely invalid.<sup>16</sup> The INA and implementing regulations do not require SWA surveys to be "the product of some formal statistical rigor."<sup>17</sup> Thus, in addition to finding that the 2014 SWA Survey was inclusive, I find its small sample size does not render it invalid.

In addition, the Employer urges me to reject the 2014 SWA Survey because it collected data from small employers, which grow types of tobacco that differ from the flu-cured tobacco the Employer grows. (Employer's Post-Hearing Brief at 9). Dr. Bronars testified that it would be difficult for a larger operation such as the Employer to remain competitive if it hired inexperienced workers. (EX 1 at 2-3). Similarly, Mr. Hudson discussed the size of the Employer's operation, the type of tobacco it produces, and the need for skilled workers. Given Mr. Hudson thirty-five years of experience in the Virginia tobacco industry, I find that his testimony is credible and probative of the challenges the Employer faces. Nonetheless, while productivity and worker safety are important considerations for any employer, I find that the size of the Employer's tobacco farm is not a relevant consideration for the purposes of Section 655.122(b).<sup>18</sup> Furthermore, the purpose of the H-2A program is not to guarantee the productivity and success of H-2A employers. While the Employer may prefer to hire workers with more experience due to the size and scope of its operation, it must nonetheless show that its three-month experience requirement is indicative of the experience requirements of non-H-2A employers.

The Employer also argues the occupations surveyed in the 2014 SWA Survey were not comparable to the occupations of tobacco workers at its farm. (Employer's Post-Hearing Brief at 9). As discussed, the INA requires the Employer's qualifications and job requirements to fall within the normal and accepted qualifications required by non-H-2A employers in the same or comparable occupation and crop. All of the employers surveyed in the 2014 SWA Survey were tobacco growers. (DOLX 1). Although Mr. Hudson attempted to differentiate the Employer from the non-H-2A employers based on the type of tobacco it grows, I find that because the Employer

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<sup>16</sup> *Westward Orchards*, 2011-TLC-411, slip op. at 23-24 (July 8, 2011).

<sup>17</sup> See *Overdevest Nurseries L.P.* 2012-TLC-00018, slip op. at 18 (Feb. 16, 2012), citing *Westward Orchards*, slip op. at 23-24.

<sup>18</sup> See *Overdevest Nurseries L.P.*, slip op. at 24.

grows tobacco, it grows the same or comparable crop as the employers that responded to the 2014 SWA Survey. Furthermore, the VEC determined the non-H-2A employers had roughly the same duties and job descriptions as the Employer. Specifically, workers at the non-H-2A employers that were surveyed would plant, harvest, top, sucker, pull, weed, cut, clip, put stuff in the barn, and work in the greenhouses. (DOLX 1). Although each non-H-2A employer did not identify exactly the same job duties the Employer identified on its Application, all of them identified common duties associated with growing tobacco. Thus, I find the occupations and crops surveyed in the 2014 SWA Survey were similar enough to the Employer's occupations and crops to render the 2014 SWA Survey valid.

The Employer also suggests that because the 2014 SWA Survey information is not included in the Agricultural Employment Practice Survey Library ("Library"), created by OFLC, it is untrustworthy. (Employer's Post-Hearing Brief at 6). Although Ms. Wills testified that an unacceptable SWA survey would not be posted on the Library, she also agreed the Library is not always up to date. (TR 125). Furthermore, Ms. Abraham testified that the 2014 SWA Survey is valid. (TR 66-67, 74). Therefore, I reject the Employer's assertion that because the Library does not list the 2014 SWA Survey results, they are consequently unreliable or invalid.

The Employer also alleges the Library establishes that requiring tobacco workers to have up to three months of experience is normal and acceptable. (Employer's Post-Hearing Brief at 6). The Employer correctly notes that the Library's 2011 data shows it is normal and accepted to require "Farmworkers and Laborers, Crop Tobacco" in the South Hill, Virginia area to have "[u]p to three months" of experience. (AF 37). However, the survey was taken on August 1, 2011. (*Id.*). Ms. Abraham testified that prevailing practice surveys are conducted every year, and she explained that survey results from prior years do not affect the validity of the 2014 SWA Survey. (TR 69-70). Even if up to three months of experience was an acceptable requirement in 2011, the VEC correctly relied upon a survey taken between August and October 2014, the year in which the Employer filed its Application. (DOLX 1). Thus, the Library's outdated information has no bearing on whether the Employer's three-month experience requirement is currently normal and accepted among non-H-2A employers.

The Employer also urges the court to consider O\*Net, which establishes that three months of experience is a normal and accepted requirement for "Farmworkers and Laborers, Crop." (Employer's Post-Hearing Brief 7; EX 2). O\*Net is a successor to the DOT. The Employer states that Administrative Law Judges have considered O\*Net and the DOT in determining whether a qualification is normal and accepted. However, only when an Administrative Law Judge has determined that a SWA survey is invalid and not probative on the issue of normal and accepted practices should he or she consider alternative evidence in determining whether a job requirement at issue is normal and accepted among non-H-2A employers.<sup>19</sup> While caselaw establishes that the DOT listing for an occupation may be probative of whether an occupational requirement is a normal and accepted qualification, reliance solely on the O\*Net job classification is disfavored because it does not account for variation by state or by

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<sup>19</sup> 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).

crop.<sup>20</sup> As previously discussed, I have concluded the 2014 SWA Survey is valid. Moreover, it is more specific than O\*Net because it collected data from non-H-2A tobacco growers in Virginia. Therefore, I do not find it necessary to rely on alternative evidence in determining whether the Employer's job requirement is normal and accepted among non-H-2A employers.

For all of the above-mentioned reasons, I find that the Employer has failed to meet its burden to establish that the three-month experience requirement is consistent with the normal and accepted qualifications required by employers that do not use H-2A workers in the same or comparable occupations and crops, as required by 20 C.F.R. § 655.122(b).

### **ORDER**

In light of the foregoing, it is hereby **ORDERED** that the Certifying Officer's decision is **AFFIRMED**.

JOSEPH E. KANE  
Administrative Law Judge

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<sup>20</sup> See *Strathmeyer Forests, Inc.*, 1999-TLC-6, slip op. at 3-4 (Aug. 30, 1999) (the Administrative Law Judge relied on the DOT after finding that the Commonwealth of Pennsylvania's prevailing practices survey was internally inconsistent, and thus worthless for use as evidence for any purpose); *Westward Orchards, et. al.*, 2011-TLC-00411, slip op. at 26 (July 8, 2011) (because neither survey of record provided probative evidence, the Administrative Law Judge considered the OES/O\*Net occupation and all conflicting or corroborating evidence in order to determine whether the experience requirement was normal and accepted); *G. Defugenio & Sons*, 2012-TLC-00024, (Feb. 17 2012) (because the survey was not probative of the normal and accepted requirements, the Administrative Law Judge looked to the other evidence in the record to determine whether the one-month experience requirement was normal and accepted).