



Issue Date: 25 January 2021

BALCA Case No.: 2021-TLC-00059
ETA Case No.: H-300-20351-963023

In the Matter of:

FLEETWOOD FARM WINERY, LLC,
Employer.

Appearance: Thomas P. Bortnyk, Agent
Fleetwood Farm Winery, LLC
Leesburg, VA 20175
For the Employer

Lynette Wills
Certifying Officer
Chicago National Processing Center
For the Certifying Officer

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This matter arises under the temporary agricultural labor or services provision of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1188 and its implementing regulations at 20 C.F.R. Part 655, Subpart B. The temporary alien agricultural labor certification (“H-2A”) program permits employers to hire foreign workers to perform agricultural work within the United States on a temporary basis.

On December 31, 2020, Fleetwood Farm Winery, LLC, (“Employer”) filed a request for expedited administrative review of the Notice of Deficiency issued by the Certifying Officer (“CO”) in the above-captioned H-2A temporary alien labor certification application. I received the Administrative File (“AF”) from the Department of Labor’s Employment and Training Administration (“ETA”) on January 15, 2021. The CO’s brief was received on January 15, 2021, and Employer’s brief was received on January 18, 2021. Pursuant to 20 C.F.R. § 655.171(a), this decision and order is based on the written record and is issued within five calendar days of the receipt of the AF.

BACKGROUND

On December 24, 2020, the ETA received an application for temporary labor certification from Employer. AF 26-48.¹ Employer requested certification for seven Farmworkers and Laborers, Grapes (OES Code 45-2092) from March 1, 2021 until December 15, 2021. AF 34. Employer indicated that the need was seasonal in nature, and explained that:

This job requires a minimum of three months of verifiable agricultural field work experience, preferably working in a diversified crop farm, nursery, sod farm, and/or vineyard handling both manual and mechanized tasks. Saturday work required. Must be able to lift/carry 60 lbs.

AF 35.

Identify and remove the proper canes and vines while retaining the fruiting wood and renewal spurs. Must demonstrate and consistently utilize pruning practice that assure vine balance and preserve vine health. Manage vineyard canopy management to permit light and air circulation. Install and maintain bird netting. Assist/move harvested from field to processing area. Grade and pack fruit by hand or with mechanized packing equipment, including but not limited to bagging machines, bin feeding machines, box machines, labeling machines, regular and high stacking forklifts. Sort graded fruit in appropriate containers according to packing instructions. Deliver pallets of finished product to cold storage. Load/unload product. Prepare orders for shipping. Keep material and product records accurately. Supervisors will explain and demonstrate picking requirements to all workers at the start of the season and as needed thereafter to ensure quality standards. Bruised or damaged fruit will be noted by supervisor(s) in a post-inspection quality report. Supervisors may issue written disciplinary notice to workers with a significant number of culls, bruised, or damaged fruit. Repeated failure to follow quality control instructions may result in disciplinary action up to and including termination. May perform general indoor tasks or post-harvest activities (e.g., packing or moving products to storage at winery facility) when outdoor vineyard work is not available (all such activities will be performed incident to or in conjunction with vineyard operation).

AF 45.

On December 31, 2020, the CO issued a Notice of Deficiency (“NOD”) stating that Employer failed to establish job requirements that are consistent with “the normal and accepted qualifications that do not use H-2A workers in the same or comparable occupations and crops under 20 C.F.R. § 655.122 (b).” AF 11-14.

The CO identified Employers failure to establish that the three month experience

¹ References to the 185-page appeal file will be abbreviated with an “AF” followed by the page number.

requirement in its application is a “normal and accepted qualification by employers who do not use H-2A workers in similar occupations and crops.” AF 13. The CO provided that the 2020 survey conducted by the Virginia State Workforce Agency (“SWA”) showed that out of the nine responses only five non-H-2A growers required experience and one non-H-2A grower required 24 months of experience. *Id.* The 2019 survey provided that out of the nine responses six non-H-2A growers did not require any experience and one required over 12 months of experience. *Id.* The CO also stated that the survey completed by Employer on September 16, 2020, did not indicate that workers were required to have specific skills, maintain a quality standard, or a minimum amount of experience for new seasonal workers. *Id.* The CO noted that the research and letters of support did not demonstrate the need for three months experience. Instead the CO stated that the research showed Employers ability to include a trial period of up to five days for workers to learn and practice pruning grapevines. The CO also noted that workers were not required to solely perform grapevine pruning but also farm work related to other crops, nursery crops, and sod.

The CO requested Employer provide “permission to remove the three-month experience requirement in Items A.8a., B.2, and B.6 of its ETA Form 790A or submit documentation that establishes the requirement is normal and accepted among non-H-2A employers in the same or comparable occupation or crops.” AF 14.

On December 21, 2020, Employer requested administrative review of the NOD. AF 1-2. In its request, Employer argues that the SWA’s prevailing practice surveys are insufficient to establish no experience as a prevailing practice due to the sample size of the survey responses. *Id.* Employer also noted that even if the surveys are valid they only account for workers manual job duties. However, Employer represents that their workers are required to perform mechanized duties and apply chemicals, placing them as a hybrid between 45-2092 and 45-2091. Lastly, Employer argues that the CO rejected the evidence proving that the experience requirements are common within the industry without further explanation.

APPLICABLE LAW

When considering a request for administrative review pursuant to 20 C.F.R. § 655.171, the presiding Administrative Law Judge (ALJ) may only render a decision “on the basis of the written record and after due consideration of any written submissions (which may not include new evidence) from the parties involved or amici curiae.”² Under 20 C.F.R § 655.141 (c), an employer may appeal from a Notice of Deficiency.

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:

Job qualifications and requirements. Each job qualification 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

² Section 655.171 affords ALJs the ability to “either affirm, reverse, or modify the CO’s decision, or remand to the CO for further action.”

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. *See Westward Orchards, et al.*, 2011-TLC-00411 (July 8, 2011).

Employer bears the burden of establishing that the three month requirement is normal and accepted. 20 C.F.R. §§ 655.103(a), 655.122(b); *see also R.Hart Hudson Farms, Inc.*, 2015-TLC-00013, slip op, at 8 (Feb. 2, 2015). As an initial matter, it is settled that, throughout the labor certification process, the burden of proof in alien certification remains with the employer. *See, e.g., Garber Farms*, 2001-TLC-00006 (May 31, 2001) citing 20 C.F.R § 655.106(h)(2)(i) (relating to refiling procedures).

A Certifying Officer’s denial of certification must be upheld unless shown by the employer to be arbitrary or capricious, or otherwise not in compliance with law. *J and V Farms, LLC*, 2016-TLC-00022, at 3 (March 4, 2016) (H-2A); *Brook Ledge, Inc.*, 2016-TLN-00033, at 5 (May 10, 2016) (“BALCA reviews decisions under an arbitrary and capricious standard.”) (H-2B). Accordingly, an employer may not refer to any evidence that was not a part of the record before the CO.

DISCUSSION

The sole issue in this case is whether the CO denial 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 crops, as required by 20 C.F.R. § 655.122 (b). The CO argues that Employer’s three month experience requirements is not consistent with the normal and accepted qualifications required by non-H-2A employers in the same or comparable occupation and crop. The CO found that if the Employer’s request is normal and accepted Employer failed to meet its burden of proof.

Employer alleges the three month experience is normal and accepted among non-H-2A Vineyard farmers and that Employer adequately met its burden of proof with respect to the experience requirement.

Employer argues that the SWA’s survey is “insufficient to establish ‘no experience’ as a prevailing practice due to the statistically invalid sample size of the survey response.” In both the 2019 and 2020 surveys nine growers filled out the survey. However, even if the 2019 and 2020 SWA survey was not statistically valid, that does not render it completely invalid. *Westward Orchards*, 2011-TLC-411, slip op. at 23-24 (July 8, 2011). The INA and implementing regulations do not require SWA surveys to be the “product of some formal statistical rigor.” *See Overdevest Nurseries L.P.* 2012-TLC-00018, slip op. at 18 (Feb. 16, 2012), *citing Westward Orchards*, slip op. at 23-24. Thus, I find its small sample size does not render it invalid.

Employer noted that if the surveys conducted by the SWA are considered sufficient they still support their three month experience requirement. Employers Brief at 6. Employer reviewed the surveys conducted by the SWA in 2020. AF 64-81. Employer notes that some responses noted that the workers were required to use chemicals and have six to twenty four months of experience. However, the only survey response that used non-H-2A workers required twenty-four months of experience which was not comparable to Employer's request for three months of experience. The other responses to the survey required six to twelve months of experience and hired H-2A workers. None of the surveys provided that it was "normal and accepted" for Vineyard employers who hire non-H-2A workers to require three months of experience.

Employer produced a list of non-H2A employers in the relevant area which the SWA survey did not consider. AF 61-62. However, Employer did not provide any evidence that non-H2A employers require three months experience for "same or comparable occupations and crops." Nor did this list supply any information regarding the occupations in each of these vineyards. Instead Employer only notes the number of H-2A versus non-H-2A employers on the list but it offers no support for its arguments on experience requirements.

Employer submits two letters by Dr. Tony K. Wolf, which attest that prior work experience is "essential for certain . . . vineyard operations." AF 83-85. Dr. Wolf explains that vineyard farmworkers jobs can include machinery operation and pesticide spraying which would require prior work experience to safely execute. However, these letters do not provide a time frame of experience that is "normal and accepted" by other vineyard operators. Further, the letters do not establish that Employers requested experience requirement is one used by "employers who hire non-H-2A workers for similar occupations and crops." 20 C.F.R. § 655.122 (b).

Employer submitted several different documents explaining the pruning process and training necessary for grapevines. AF 8-141. However, these documents do not provide that it is "normal and accepted" that vineyards require workers to have three months of experience prior to being hired. While the Employer may prefer to hire workers with more experience, it must nonetheless show that its three month experience requirement is indicative of the experience requirements of non-H-2A employers.

Employer further argues that it relied on the Department of Labor's O*Net classification for both occupations roles 45-2092 and 452091 that notes an experience requirement of "over one month up to and including three months." See https://www.bls.gov/oes/current/oes_stru.htm#45-0000. However, I am unable to consider this evidence as it was not part of the record before the CO and Employer failed to update their ETA form to state that its position was hybrid between 45-2092 and 45-2091. Therefore, this evidence was not reviewed or taken into consideration in my final decision.

I find that Employer has not met its burden of showing that it is entitled to a temporary labor certification for its requested seven Farmworkers and Laborers. After reviewing the evidence considered by the CO and all the legal arguments, I agree with the CO's determination that Employer has not provided sufficient information to overcome the deficiency listed in the

NOD. Further, I find that Employer has not demonstrated that the decision of the CO was arbitrary or capricious. Accordingly, for the foregoing reasons, I find that the NOD issued by the CO was proper. Therefore, the denial is **AFFIRMED**.

ORDER

Wherefore, the Denial of Temporary Labor Certification issued by the Certifying Officer in this matter is **AFFIRMED**.

SO ORDERED.

WILLIAM P. FARLEY
Administrative Law Judge

Washington, DC