



Date: May 8, 1998

Case No.: 98-TLC-10

*In the Matter of:*

**TOUGAS FARM,**  
Employer.

Appearance: Robert E. Williams, Esq.  
McGuinness & Williams  
for Employer

Jinny Chun, Esq.,  
for the U.S. Department of Labor

Before: JOHN M. VITTONI  
Chief Administrative Law Judge

### **DECISION AND ORDER**

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), 1184 and 1188, and the implementing regulations set forth at 20 C.F.R. Part 655, Subpart B.<sup>1</sup> This Decision and Order is based on the written record, consisting of the Employment and Training Administration appeal file ("AF"), and the written submissions from the parties. §655.112(a)(2). Tougas Farms (hereafter "Employer") has requested expedited review of the decision by a U.S. Department of Labor Certifying Officer ("CO") denying its application for temporary alien agricultural labor certification for Farmworker, Fruit II, based on the finding that Employer's requirement of 30-days of experience is excessive and inappropriate pursuant to §655.102(c). The standard of review is "for legal sufficiency" of the record. §655.112(a)(1).<sup>2</sup>

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<sup>1</sup> Unless otherwise noted, all regulations cited in this decision are in Title 20.

<sup>2</sup> In contrast, review under §655.112(b) allows for a *de novo* evidentiary hearing to be conducted.

## STATEMENT OF THE CASE

### Background

On March 20, 1998, Employer filed forms ETA 750A and 790 seeking to fill one position of "Farmworker, Fruit II"<sup>3</sup> for the period of June 1, 1998 until November 1, 1998 (AF 113-118).

On March 31, 1998, CO issued a letter accepting Employer's application and making the following changes:

- ETA 750A - item 13 Job Duties: deleted "30 days farm experience";
- ETA 750A - item 14 Experience: deleted number "1" under months;
- ETA 790 - item 10 Hours per Week: "40" has been entered;
- ETA 790 - item 11 Job Specifications: deleted "30 days farm experience";
- ETA 790 - item 14 Location and Description of Housing: "See ES 338" has been entered; and
- ETA 790 - item 17 Transportation: "SEE ATTACHMENT II #17" has been entered.

(AF 108-109). The CO found Employer's positive recruitment plan acceptable and instructed Employer to advise him (the CO) "of all recruitment activities at least through 30 days prior to your date of need. This report must be received in the Regional Office no later than 05/09/98 so that we can make a determination on whether to grant or deny the certification . . . ." (AF 109).

Employer responded with a letter and attachments dated April 10, 1998 (AF 90-107). Employer questioned the CO's authority to accept an application and make unilateral changes to the application which alter the conditions of employment. Employer also informed the CO that he did not accept the CO's changes to ETA 750 items 13 and 14 and ETA 790 item 11. These items pertain to Employer's requirement that applicants have at least 30 days experience (AF 92).<sup>4</sup> Employer argues that its experience requirement is a normal and accepted qualification for Farmworker, Fruit II, as evidenced by Employer's 17 years of experience as a farmer, experts in the field, survey data and the U.S. Department of Labor's Dictionary of Occupational Titles ("DOT"). Employer attached 6 letters from independent persons in the agricultural or farming industry to support his assertion that requiring 1 month experience is normal (AF 98-106). Three of the letters are dated February, 1997, and are from commissioners of Massachusetts's, Connecticut's and New Hampshire's Departments of Agriculture. The letters appear to be in response to a particular H-2A application which was denied because it included an experience

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<sup>3</sup> Dictionary of Occupational Titles Vol. 1, 403.687-010 FARMWORKER, FRUIT II (agriculture) (4<sup>th</sup> ed. 1991).

<sup>4</sup> Because neither Employer's April 10, 1998 letter, or its request for expedited review disputes the CO's changes to ETA 790 items 10, 14 and 17, I shall not consider them in this review, and the application shall reflect those changes.

requirement for the position of farmworker.<sup>5</sup> Each letter states affirmatively that it is common, normal and accepted practice in their states that employers of agricultural workers require some experience in agriculture, and even to require production standards (AF 98-100). Only the letter from the Connecticut commissioner references 30-days of experience, the others are silent as to the amount of experience that is normally required.

The record contains 2 letters from the University of Massachusetts at Amherst, Department of Plant and Soil Sciences (AF 101-103). One is from a professor and the other is from an extension educator, small fruit specialist. These letters are addressed to Saul Roman at the U.S. Department of Labor, Employment and Training Administration, Region I,<sup>6</sup> and speak about the care that needs to be taken in harvesting, pruning, tree training and picking fruits, indicating that minimal experience in agriculture (30-days) is necessary to avoid serious damage to fruit and loss of profits. The executive director of the New England Apple Council also submitted a letter defending the 30-day experience requirement (AF 104). Employer also submitted what appears to be a page from a market research plan prepared by the Pan Atlantic Consultants, dated February 9, 1998 (AF 105). This page outlines the first phase of the research and states that “the principal finding developed during Phase I was that each commodity sector [in the agribusiness] faces the challenges created by a lack of . . . the availability and quality of labor.”

On April 22, 1998, the CO issued a letter denying Employer’s application (AF 86-88). The denial is based on the CO’s finding that Employer’s experience requirement of 30-days (or 1 month) is “inappropriate and unacceptable as stated at 655.102(c) . . . based on a “‘Common’ and ‘Normal’ Practice Survey” conducted by the Massachusetts Department of Employment and Training and “other sources of information available to the Regional Office.” (AF 87). The appeal file contains a copy of this survey (AF 15-72).

### Employer’s Brief

In his brief on appeal, counsel for Employer argues that requiring 30-days of experience for the position Farmworker, Fruit II, is “normal and accepted” within the meaning of the Act and regulations. (Employer’s Brief at 3). The Act, 8 U.S.C. §1188(c)(3)(A), and the implementing regulations, 20 C.F.R. §655.102(c), set the standard for determining when a specific qualification is appropriate in a job offer, and that is when the qualification is the normal and accepted practice of non-H-2A employers in the same or comparable occupations and crops. Counsel argues that ‘normal and accepted’ does not equate to ‘prevailing’ – ‘normal and accepted’ is something less. In support of this position, counsel cites ETA Handbook No. 398 at II-7 (1988), which states that “[t]he terms ‘normal’ and ‘common’ . . . for H-2A certification purposes mean situations which may be less than prevailing, but which (sic) clearly are not unusual or rare” (Employer’s Brief at 3).

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<sup>5</sup> The exact farmworker position is not mentioned. (AF 98-100).

<sup>6</sup> The matter *sub judice* also arose from a determination out of Region I.

Counsel argues further, that the 30-day experience requirement for Farmworker, Fruit II, is ‘normal and accepted’ as evidenced by the DOT. Counsel cites to *Hoyt Adair*, 96-TLC-1 (Apr. 19, 1996), for the proposition that “DOT listings, in and of themselves, are strong evidence that the position has been described by the Employer in a manner ‘consistent with the normal and accepted qualifications required by non-H-2A employers in the same or comparable occupations and crops.’” (Employer’s Brief at 4 (emphasis omitted) *citing Hoyt Adair, slip op.* at 6). Counsel also refers to letters from 6 experts in the field which support Employer’s position that minimal experience requirements are normal and accepted in the industry. Counsel also refers to 4 other letters from experts that appear in the appeal file (Employer’s Brief at 6; AF 77-84). These letters confirm the normalcy of the experience requirement and question the validity of the survey relied upon by ETA in making its finding that requiring 30-days experience is not normal or accepted.

Lastly, counsel for Employer questions the credibility and reliability of the ‘Common’ and ‘Normal’ Practice Survey conducted by the Massachusetts Department of Employment and Training, relied upon by the CO to deny the application. The survey asks whether the farms require experience from their U.S. workers (AF 7). Counsel argues that the answer to this question is meaningless because one does not know what job the U.S. worker occupies. “Experience is an attribute of an occupation, not a farm.” (AF 8). Counsel gives the example of Employer’s farm. Employer hires 3 workers on his farm during harvest and pre-harvest seasons, 2 of the jobs require prior experience (1 month and 6 months respectively), while the other job does not require that the worker have prior experience. Thus, counsel argues that Employer could answer that question as “yes” if he understood the question to mean “do you require experience from any of your U.S. workers in any job?” or Employer could have answered “no” if he understood the question to mean “do all the jobs on your farm require experience from U.S. workers?” The survey is broken down by crop and not by occupation. Because there are different jobs on any one farm and each job requires a different set of tasks and different level of skill, counsel asserts that this survey is too general and does not provide a legally sufficient basis for ETA to reject the application based on Employer’s 30-day experience requirement for the position of Farmworker, Fruit II.

### Solicitor’s Brief

Counsel for the CO argues that Employer’s discounting of the Massachusetts survey is based on unsubstantiated speculation. (CO’s Brief at 5). In response to the independent letters that Employer submitted, counsel states that the “‘experts’ make general statements, applicable to all employers, that experienced workers are better for business. . . . To the extent that the experts opine regarding the need for specific experience on fruit farms, their opinions are irrelevant to Tougas’ general farm experience requirement. . . . Neither Tougas or the experts offer any evidence in the way of statements from actual fruit growers to support their conclusion that an experience requirement is common or normal.” *Id.* at 5-6 and fn 3. Counsel responds to Employer’s contention that the Massachusetts survey is unreliable because it is vague and ambiguous by stating that “[t]he only logical reading of the question ‘[w]hich of the following qualifications did you require of U.S. worker? (sic) Education: Yes \_\_\_ No: \_\_\_ Experience: Yes \_\_\_ No \_\_\_’ is whether you ever require experience.” *Id.* at 7 (emphasis original).

In support of the Massachusetts survey, counsel argues that the survey focused only on DOT classifications similar to Farmworker, Fruit II; i.e., SVP of 2.<sup>7</sup> Thus, counsel argues that *Hoyt Adair*, 96-TLC-001 (Apr. 19, 1996), is not applicable because the problem with that survey was that it was not specific enough about whether the results applied to the entry level Farmworker, Fruit II, SVP 2, or Farmworker, Fruit I, SVP 5 (CO's Brief at 6).

Counsel also argues that *Hoyt Adair* is not applicable because the decision is "questionable." *Id.* at 7-8. Counsel argues that the finding in *Hoyt Adair* that "the DOT listing in and of itself is sufficient to establish that both the combination of duties and experience requirement are normal and acceptable" is not supported by the regulations and sets a dangerous precedent. *Id. citing Hoyt Adair, slip op.* at 7. Counsel points out that the DOT is used as a reference guide to occupational information, but the regulations governing H-2A, unlike the regulations governing permanent immigrant labor certification, do not reference the DOT. *Id.* at 8, fn 5; *See* ETA Handbook No. 398, I-39, 40 and II-13, 14.

### Surveys

The Massachusetts Survey relied on by the CO in this matter is the result of 79 valid surveys out of a total 323 (AF 17). The data was arranged by crop, and 10 of those valid surveys were from apple farms (AF 22-24). Out of the 10 valid apple farm surveys, 8 responded to the question regarding experience -- 2 (or 20%) required experience of U.S. workers and 6 (or 60%) did not (AF 23).

The CO supplemented the file with a memorandum from Joseph F. Stoltz, Director, Office of Training and Employment Services (AF 120-155). This memorandum included sample state surveys to assist states in creating surveys to determine Agricultural Prevailing Practice and "Common and Normal" Determination Surveys. These sample surveys are targeted to specific regions, crops and agricultural activity. There are two surveys from Florida, one from the southern region and the other from the east coast (AF 128-129). The surveys focus on the crop "early/mids orange" and the activity "processing". The surveys defines "[a] prevailing wage practice is one in which a majority of employers employing a majority of workers adhere to the practice" and "[a] normal/common practice is one in which 33.3% or more of the employers employing 33.3% or more of the workers adhere to the practice." *Id.* at fn 1, fn 2.<sup>8</sup>

### **DISCUSSION**

Based upon my review of the record for legal sufficiency, I find that the CO has not set forth a legally sufficient basis for denying this application for temporary alien agricultural labor certification (for H-2A workers). Conversely, Employer has asserted a legally sufficient basis for

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<sup>7</sup> It is not clear to me that the survey focused on occupations bearing an SVP of 2.

<sup>8</sup> It is interesting to note that in the southern region of Florida, under the heading "Occupational Qualifications," the percent of applicable employers was "0%"; whereas in the east coast of Florida, it was 45.5%.

the application to be granted. Accordingly, I must reverse the CO's denial of temporary alien labor certification.

In the instant matter, the CO has specifically challenged Employer's compliance with the regulation at §655.102(c), appropriateness of required qualifications. Employer's application is for the employment of one Farmworker, Fruit II and requires that the worker has 30-days experience in agriculture. The CO has not challenged the job classification or duties. The duties required match the DOT for Farmworker, Fruit II (DOT code 403.687-010), and the experience required falls within the specific vocational preparation ("SVP") listed for that position within the DOT; i.e., SVP 2 or anything beyond sort demonstration up to and including 1 month. The fact that the job at bench has been described as a Farmworker, Fruit II, and the experience that Employer is requiring falls within the DOT listing, is strong evidence that the position has been described by Employer in a manner "consistent with the normal and accepted qualifications required by non-H-2A employers in the same or comparable occupations and crops" as required by §655.102(c).<sup>9</sup> The independent letters submitted by Employer from persons with vast amounts of experience in the area of fruit harvesting, support Employer's position that experience is normal and necessary for a successful and profitable operation.<sup>10</sup>

After reading the survey in the appeal file (AF 15-73), I do not find anything that indicates that the questions relating to experience were addressed to any specific occupation on a farm and I agree with Employer that the survey is confusing. The survey results are divided into two sections: 1) prevailing/common/normal practice survey and 2) prevailing wage. The section pertaining to practices, questions farms about workers in a specific crop, not about the specific occupation involved in a specific crop (AF 17-18, 52-53). There is no mention of the occupations being surveyed; whereas, in the section relating to prevailing wage, the introduction to the results states that the survey involves 5 different crops and 5 different job descriptions (AF 43-44). Counsel for the CO acknowledged that "the surveys of apple and strawberry growers do not indicate which of the five categories of entry level farmworkers were engaged at each of the farms". (CO's Brief at 7). Counsel goes on to state that "it is logical to assume that farmworker, fruit II worked at fruit farms." *Id.* I do not, however, find a survey reliable that is based only on assumptions. Just as the CO argues that the letters that Employer submitted from "experts" are unreliable because they are not specific, so do I find that this Massachusetts survey is too general to be of any probative value on the issue of "normal and common" practices of

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<sup>9</sup> I do not read *Hoyt Adair* as implying that the DOT sets an irrebuttable standard for an experience requirement. Rather, that decision indicates that where any countervailing evidence is not credible or probative, the DOT alone is sufficient to carry Employer's burden.

<sup>10</sup> While I agree with the CO that to permit employers to hire aliens with experience for reasons of increased profitability or efficiency is contrary to the Act, I do not agree that is Employer's argument. (CO's Brief at 5 citing *Zera Farms*, 98-TLC-008 (Apr. 13, 1998) quoting *Elton Orchards v. Brennan*, 50 F.2d 493, 500 (1<sup>st</sup> Cir. 1974)). What I read from the letters that Employer submitted is that farms that harvest the same or comparable crops, hire workers, which include U.S. workers, with experience. This may be motivated by profits, but what drives the farms into this practice is not the focus of the inquiry; rather, the focus is on what is the normal and common practice.

farms engaged in fruit farming and employing Farmworker, Fruit II to require 30-days of experience.<sup>11</sup>

The regulatory standard is that the job qualifications “shall be consistent with the normal and accepted qualifications required by non-H-2A employers in the same or comparable occupations and crops.” I find that the Massachusetts survey does not have sufficient probative value to overcome Employer’s citation of the DOT and supporting documentation. Further, I note that the “other sources of information available to the Regional Office” apparently relied upon by the CO in making his determination, are not contained in the record submitted for review. *See* AF 87. On the other hand, I find that the DOT listing is probative evidence that requiring 30-days experience for a Farmworker, Fruit II is normal and acceptable, and that the additional information provided by Employer corroborates the DOT listing. Employer’s letters of support are from credible sources, and each clearly support the need and normalcy for a 30-day experience requirement.

The DOT and the letters from experts that supplement the appeal file provide a legally sufficient basis for finding that a 30-day experience requirement is ‘normal and common.’ The CO’s reliance on the Massachusetts survey is misplaced as it does not provide sufficient definitive information to draw the conclusion that fruit farms engaged in the same or comparable crop, employing Farmworker, Fruit II, do not require any experience. The sample survey provided by the CO from the Oregon Employment Department is exemplary (AF 142-149). The Oregon survey begins by explaining that one survey should be filed out for each activity (AF 142) and then asks: “Do you normally require workers to have experience in this crop activity prior to hiring them? . . . If yes, how much experience do you require?” (AF 146 emphasis original). Even if I were to accept the “logical reading of the question” pertaining to experience that counsel for the CO suggests, I would still come to the same conclusion that the survey is meaningless for these purposes. Counsel for the CO suggests that the “logical reading of the question . . . is whether you ever require experience.” *Id.* at 7 (emphasis original). Such a reading makes it clear that this question is not targeted to any specific occupation on a farm, and survey questions which are not tailored to the job opportunity specified in the application do not provide a legally sufficient basis for denial of an H-2A application. *See Hoyt Adair*, 96-TLC-001, *slip op.*, at 8 (Apr. 19, 1996). Accordingly,

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<sup>11</sup> As counsel for the CO correctly pointed out, the DOT is not specifically mentioned in the regulations for temporary alien agricultural labor certification as it is in the regulations governing permanent alien labor certification. I would agree with the CO that a current survey that is targeted to the geographic area where the certification is being sought, may be stronger evidence than the DOT on the issue of ‘normal and common’ practices. Here, however, the survey relied on by the CO was not specific enough as to what job occupation it was addressing.

**ORDER**

The determination of the Certifying Officer in the above matter is hereby **REVERSED** and the Certifying Officer **ORDERED** to process the application in accordance with the regulations.

**SO ORDERED.**

**JOHN M. VITTONI**

Chief Administrative Law Judge