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Issue Date: 17 February 2012

OALJ Case No.: **2012-TLC-00024**

ETA Case No.: **C-11349-30897**

In the Matter of:

G. DEEUGENIO & SONS
Employer.

Appearances:

Leon Sequeira, Esq., Seyfarth Shaw LLP
For the Employer

Vincent Costantino, Esq., Office of the Solicitor
For the Certifying Officer, U.S. Department of Labor

Before: Pamela J. Lakes
Administrative Law Judge

DECISION AND ORDER

This matter arises under the temporary agricultural employment provisions of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(15)(H)(ii) and 1184(c)(1), and the implementing regulations set forth at 20 C.F.R. Part 655, Subpart B. On January 13, 2012, G. DeEugenio & Sons ("Employer") filed a request for a *de novo* administrative hearing to review the Certifying Officer's denial of its H-2A application pursuant to 20 C.F.R. §655.171(b).

STATEMENT OF THE CASE

On December 15, 2011, Employer filed an application for temporary labor certification for 30 farm workers with the Department of Labor's Employment and Training Administration ("ETA"). (DOL 1, AF 80-90)[1]. On December 22, 2011, the Certifying Officer ("CO") issued a

[1] Citations to the Administrative File (DOL 1) will appear as "AF" followed by the pertinent page number. As used in this decision, "DOL" refers to the Department of Labor's Exhibits; "EX" refers to Employer's Exhibits; and "ALJ" refers to Administrative Law Judge Exhibits. Although the Administrative File (as corrected) was admitted as DOL 1, I will refer to it as "AF" followed by the pertinent page number. The original copy of the Administrative File, which has been marked as ALJ 1 for identification purposes, was missing a page and the parties agreed to substitution of DOL 1, which was renumbered. An index with the new page numbers appears as ALJ 2.

Notice of Deficiency ("NOD"), finding three deficiencies. (AF 40-51). The first deficiency involved Employer's requirement of one month of experience in pruning commercial fruit-bearing trees.[2] *Id.* Based upon a survey conducted by the New Jersey State Workforce Agency ("SWA"), the ETA determined that this experience requirement was not normal and accepted among non-H-2A employers in the same or comparable occupation or crops. *Id.*

In response to the NOD, Employer submitted a letter by Jerome Frecon, an agricultural agent from the Rutgers Cooperative Extension of Gloucester County, in which he opined that "a well and professionally pruned fruit tree will bear fruit earlier, produce more fruit, and produce fruit on a tree that lives longer" and that "[a] poorly pruned tree may not produce any fruit and may cause the tree to die prematurely."[3] (AF 19, 23-24). Employer also responded that it was concerned for the safety of its workers because pruning requires the use of chain and pole saws. (AF 24).

On January 6, 2012, the CO denied Employer's application for temporary labor certification. (AF 6). Although Employer provided an explanation for its experience requirement, the CO found that it failed to address the SWA survey results or provide documentation establishing that the 30-day requirement was normal and accepted among non-H-2A employers in the same or comparable occupation or crops. (AF 7).

Employer filed a request for a *de novo* hearing on January 13, 2012. (AF 1). The Office of Administrative Law Judges received the Administrative File on January 24, 2012 and a hearing was held on February 7, 2012.[4] At the hearing, Director's Exhibits 1 to 3 and Employer's Exhibits 1, 4, and 9 were admitted.[5] (Tr. 25, 43, 51, 165, 129, 237). Director's Exhibit 4 is now admitted. **SO ORDERED.** Employer Exhibits 5 to 8 were provisionally admitted with the understanding that they would be supplemented with the relevant job classification. (Tr. 126-29). Employer filed these supplements on February 8, 2012, and Employer Exhibits 5 to 8 are now admitted. **SO ORDERED.** At the hearing, I determined that Employer's Exhibits 2 and 3 should not be admitted unless they were certified under penalty of perjury or presented as affidavits. (Tr. 260). Employer resubmitted these exhibits under penalty of perjury on February 15, 2012, and they are now admitted and EX 2A and EX 3A. **SO ORDERED.** Both parties filed their briefs electronically on February 15, 2012.

FACTUAL BACKGROUND

Employer is a family farm of about 500 acres, which grows peaches, nectarines, and apples in Southern New Jersey. (Tr. 124). Dr. Louis DeEugenio, owner of the farm, testified on

[2] The other two deficiencies are not at issue on appeal.

[3] The record was supplemented with a more detailed discussion by Mr. Frecon (with an attached article about pruning) at the hearing. (EX 1).

[4] At the hearing, counsel for the Department of Labor argued that this case was moot because Employer had submitted a second application for 30 farm workers that eliminated the experience requirement in order to get the application approved on an emergency basis. (Tr. 5-6). The Department of Labor stated that application was certified a few days prior to the hearing. (Tr. 5). However, as two different applications were involved, and only the instant one required experience, I determined that the current case was not moot. (Tr. 9). However, Employer agreed that if the current appeal were successful, the other application would be withdrawn. (Tr. 4-9, 169, 262).

[5] ALJ Exhibits 1, 2, 3 and 4 were marked for identification purposes but not admitted.

behalf of Employer, and he stated that he helps to manage the farm with his wife, son-in-law, and another manager. *Id.* He testified that the farm has been participating in the H-2A program since 1998 and that they have been requiring pruning experience for at least 10 years. (Tr. 125). He stated that the farm typically has between 2 and 48 employees, of which about 44 are usually H-2A workers. (Tr. 124-25).

In its application for labor certification, Employer designated the positions it sought to fill as "Farmworkers and Laborers, Crop" with an O*NET[6] code of 45-2092.02. (AF 80). The job duties included tilling soil, planting stock, and doing pruning activities using a variety of non-mechanical tools. (AF 89). In addition, an attachment to the ETA 9142 noted that workers may remove blossoms and that fruit thinners will "thin fruit using hands to knock off excess fruit, spacing remaining peaches approximately one hand width apart, taking care to walk around [the] entire tree before moving onto [the] next." *Id.* The job description also noted that "[w]orkers will be assigned rows of trees and must prune each tree according to the predetermined standard." *Id.* One month of verifiable experience pruning commercial fruit-bearing trees was required. (AF 83, 89).

During the hearing, Dr. DeEugenio testified that he requires experience of his farmworkers because pruning fruit trees, especially peach trees, is very difficult and requires precise technique, which one gains through experience. (Tr. 130-31). He stated that the pruning crew is under the direct guidance of the farm's manager and that he and the other managers typically prune the trees themselves during their first year of life because young trees that are not pruned properly have a shortened survival. (Tr. 131). He clarified that a supervisor is watching the pruners at all times. (Tr. 156). He testified that Employer decided not to prune its apple trees the previous year because it was unable to obtain experienced workers. (Tr. 134).

Employer also submitted an article entitled "Pruning Peach Trees" by Richard P. Marini, an extension specialist in horticulture with Virginia Tech, which notes that, "[y]oung peach trees must be pruned carefully to develop and maintain fruiting wood near the tree center" and that "[i]mproper pruning will reduce yield and fruit quality." (EX 1). The article outlines the different techniques that should be employed for pruning trees at various stages of their lives. *Id.*

At the hearing, the Department of Labor submitted into evidence the raw data for the SWA survey relied upon by the CO, which surveyed apple growers in Southern New Jersey. (DOL 2). The summary of the survey results, which was considered by the CO, revealed that only 1 of the 19 non-H-2A employers surveyed required 1 month of experience or less. (AF 57). The Department of Labor also submitted raw data relating to a survey of peach growers in Southern New Jersey, which apparently was not before the CO when he considered the labor certification application.[7] (DOL 2). The summary for this survey reflects that only 1 of 21 farms

[6] The O*NET is a database containing information on hundreds of standardized and occupation-specific descriptions. http://www.onetonline.org/help/online/zones. At the hearing, the CO, John Rotterman, explained that the O*NET, or SOC code, provides a framework through which to understand the general nature of a job. (Tr. 188).

[7] Mr. Distasio testified that he sent the peach survey summary to the CO; however, Mr. Rotterman, one of the COs involved, later testified that it was not considered when they denied the labor certification application because it did not make it into the administrative file. (Tr. 37-39, 209-10). However, as this is a *de novo* hearing, the survey can be considered in determining whether the experience requirement is normal and accepted despite the fact that it was not previously before the CO. 20 C.F.R. § 655.171(b).

surveyed require 1 month of experience or less for non-H-2A employees. (DOL 4). Although the surveys simply note that they were for hand-picking and do not specify which occupation was at issue, John Rotterman, the CO who testified on behalf of the Department, stated that hand-picking apples or peaches would only fall within the SOC code designated by Employer—Farmworker and Laborer, Crop. (Tr. 234). Mr. Rotterman testified that the size of a survey pool may have a bearing on the results; however, the surveys are not required to be statistically valid. (Tr. 251). He testified that the Chicago National Processing Center will reject SWA survey results if they are unclear or if it seems the interview forms were not filled out correctly. (Tr. 240).

Rafael Distasio, farm labor coordinator at the New Jersey SWA, testified that the SWA survey results are gathered through in-person interviews, usually within a period of two weeks. (Tr. 21). He testified that Mr. Custodio, a SWA employee, was provided with a list of employers by the ETA and that he conducted as many interviews as possible from September 16-30, 2011. (Tr. 72-80).[8] According to his testimony, those conducting the interviews are not required to interview all employers on the list. (Tr. 47). He stated that the list included 70 apple growers[9] and 70 peach growers and that the answers are collected from anyone on the farm that is able to provide the pertinent information. (Tr. 22, 74, 93). Mr. Distasio stated that the interview results, which are recorded on a Prevailing Wage/Prevailing Practices Survey Interview Record, are entered into a database and that he then compiles a summary based on the results, which he sends to the CO. (Tr. 22, 29).[10] He testified that the ETA designs the survey questions. (Tr. 26, 63).

During the hearing, Dr. DeEugenio testified that the survey results gathered by the SWA were incorrect. (Tr. 137). He noted that his farm is called Summit City Farms and not Summit City Orchards, as the interview record indicates. *Id.* In addition, he noted that while the interview record states that Employer has 45 domestic employees, it only has 3. *Id.* He also stated that there was no indication that he provides housing or the use of a kitchen to his workers; however, he provides both to all foreign workers. (Tr. 139-40). Furthermore, he stated that the reference to providing plane tickets was incorrect; Employer provides bus tickets to employees. (Tr. 140). Dr. DeEugenio also stated that the form falsely notes that he does not require experience of his workers. (Tr. 141-42). In addition, he stated that the acreage, percent of crop completed, and crop quality were incorrect. (Tr. 143). He testified that he does not recall being interviewed by Mr. Custodio in recent years and that his wife, son-in-law, and manager told him they were not interviewed either. (Tr. 145-46).

Dr. DeEugenio testified that there are only about 5 or 6 farms in Southern New Jersey of a similar size to his. (Tr. 132). He suggested that the managers of small farms in the area likely prune their trees themselves, but he stated that no successful commercial fruit grower to his knowledge would use inexperienced pruners. *Id.* Employer also submitted a more detailed letter from Jerome Frecon, an agricultural agent with the Rutgers Cooperative Extension of Gloucester

[8] Mr. Distasio testified that the individual interview records reflect that Mr. Custodio only obtained survey results between September 19 and September 28, 2011 despite there being a few more available days during the survey period. (Tr. 73-74).

[9] Mr. Distasio later testified there were 100 apple growers in the area available to interview. (Tr. 93).

[10] From Mr. Distasio's later testimony, it appears that he simply receives a summary of the data from the interview records (broken down into three parts) and not an electronic replica of the survey forms taken by Mr. Custodio in the field. (Tr. 102-06).

County, who had submitted a previous letter when the case was before the CO. (EX 1). Mr. Frecon wrote that most orchards in New Jersey are relatively small and not involved in commercial production and "are able to function without the H-2A program by employing the same experienced workers year-round or nearly year-round." *Id.* Mr. Frecon wrote that according to the USDA, there are approximately 2,400 farms in New Jersey and less than 500 have more than 10 employees. *Id.* During the hearing, Mr. Distasio acknowledged that the size of a farm may affect its practices. (Tr. 95).

Employer also submitted letters from the owners of two farms that were surveyed by the New Jersey SWA. Mr. Heilig of Heilig Orchards indicated that some of the survey answers attributed to his farm were incorrect, specifically those referring to his crop quality and the suggestion that he raises sheep. (EX 2A). Mr. Heilig said that he vaguely recalled responding to general questions about the status of his crop production when a state official came to his farm in August 2011; however, he believed that person was with the State Department of Agriculture and not the Department of Labor. *Id.* Mr. Heilig wrote that he does not participate in the H-2A program and that he requires his farmworkers to have more than 30 days of experience. *Id.* In noting that certain answers attributed to his farm were incorrect, he did not specifically mention the response which stated that no experience was normally required. (EX 2A; DOL 2 at 18-19).

Employer also submitted a letter from Charles Haines, owner of Larchmont Farms. (EX 3A). Two interview records exist for Larchmont Farms; one for apples and another for peaches. (DOL 2 at 20-21). On both forms, "H-2A employer" was circled under the question asking if experience is normally required. *Id.* The apple survey indicates that 1 week or less of experience was normally required; the peach survey left the experience requirement blank. *Id.* In his letter, Mr. Haines wrote that he employs both non-H-2A and H-2A workers and that he requires at least 30 days of experience for non-H-2A workers who perform tasks like pruning. (EX 3A).

APPLICABLE LAW

In order to bring non-immigrant workers to the United States to perform agricultural work, an employer must demonstrate that: 1) 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 2) the employment of foreign workers will not adversely affect the wages and working conditions of U.S. workers similarly employed. 20 C.F.R. § 655.103(a). The Immigration and Nationality Act ("INA") provides that, "[i]n considering whether a specific qualification is appropriate in a job offer, the Secretary shall apply the normal and accepted qualifications required by non-H-2A employers in the same or comparable occupations or crops." 8 U.S.C. § 1188(c)(3)(A). Under the implementing regulations,

> 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.

20 C.F.R. § 655.122(b). Although the regulations do not define "normal and accepted," this term has been interpreted as meaning less than prevailing but clearly not unusual or rare. *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).

DISCUSSION

The issue in this case is whether Employer's requirement of one month of experience in pruning commercial fruit-bearing trees is consistent with the normal and accepted qualifications required by non-H-2A employers in the same or comparable occupations and crops. In support of the CO's denial of certification, the Department of Labor has submitted into evidence a survey of apple growers in Southern New Jersey conducted by the New Jersey SWA, which reflects that only 1 of the 19 non-H-2A employers questioned required 1 month of experience or less, and the others required no experience. (AF 57).[11] The Department also submitted a survey of 21 peach growers in Southern New Jersey, which again reflects that only 1 of the surveyed employers requires 1 month of experience or less when hiring non-H-2A employees. (DOL 4).

On its face, this survey supports the CO's determination that 30 days of experience is not a normal and accepted qualification among non-H-2A employers. However, Dr. DeEugenio's unrefuted testimony reflects that many of the answers attributed to his farm are incorrect. Of particular note is the response that Employer does not require experienced workers; although most of Employer's seasonal workers are hired under the H-2A program, it is clear that Employer has consistently required experience for any workers involved in pruning.[12] (Tr. 171-72). Furthermore, Dr. DeEugenio has presented unrefuted testimony that a number of the other answers attributed to Employer are incorrect, including that regarding the availability of housing and transport, the number of domestic workers, crop acreage, and crop quality. (Tr. 137-46). Based on this testimony, the validity of the survey summary is dubious.

In addition, representatives of two farms interviewed as part of the SWA survey also question the validity of the answers attributed to their farms. Although Mr. Heilig writes that his farm requires more than 30 days of experience, when discussing which answers he found incorrect, he did not refer to the question which indicated that he did not require experience. (EX 2A). Nonetheless, his assertion that he requires experience of his workers despite an indication to the contrary undermines the reliability of the survey. Likewise, Mr. Haines claims that Larchmont Farms requires at least one month of experience for non-H-2A workers, however, the interview record for peaches did not list what the requirements were. (EX 3A; DOL 2 at 20). Mr. Distasio, who compiled the survey summary, testified at the hearing that the SWA does not verify the information on the interview records with the employers surveyed. (Tr. 20). Mr. Rotterman, the CO, also confirmed that DOL did not do so either. (Tr. 228-31).

Based on the suggestions by various employers that the answers attributed to them were incorrect, I find that the survey is not sufficiently reliable to be probative on the issue of what is

[11] Included in the Administrative File are surveys for a number of other occupations and crops; however, the Department of Labor conceded at the hearing that these surveys are not probative as to whether it is normal and accepted to require experience among those picking apples, peaches, and nectarines, as these surveys were neither similar in crop nor occupation. (Tr. 40-41).

[12] Based on the current appeal and Employer's previous applications for labor certification, it is clear that Employer has required experience of its H-2A employees for at least the past few years. (EX 4, 5, 6, 7, 8)

normal and accepted. Furthermore, even assuming the survey is valid, it is not representative of large farms such as that owned by Employer. Although the INA and implementing regulations do not require a survey to be statistically valid to retain some probative value, *see Westward Orchards*, 2011-TLC-00041 (July 8, 2011), Mr. Distasio acknowledged that the size of a farm may affect its practices. (Tr. 95). Dr. DeEugenio testified that there are only about 5 or 6 large farms in Southern New Jersey, and he opined that all must rely on experienced pruners to be successful, whereas the managers of smaller farms can prune trees themselves. (Tr. 130-32). The interview records for the peach and apple surveys reflect that seven large farms were questioned, all of which grow peaches and four of which also grow apples. (DOL 2). Two of these farms—Employer and Larchmont Farms—have both stated that they require experience of their employees and that other non-H-2A employers also do so. Jerome Frecon, an agricultural agent with the Rutgers Cooperative Extension of Gloucester County, also submitted a letter stating that there are relatively few orchards in New Jersey with H-2A employers and that in his experience,

> the largest farms tend to use H-2A workers because the size of their operations requires so much labor at one time. Most orchards in the state are relatively small and not involved in commercial production and are able to function without the H-2A program by employing the same experienced workers year-round or nearly year-round.

(EX 1). Even assuming the survey is valid, the aforementioned evidence suggests that it is not probative because the results are skewed by the responses of smaller farms who rely on their managers or the same domestic workers to do their pruning.[13]

Because the survey is not probative of the normal and accepted requirements, I must look to the other evidence in the record to determine whether the one-month experience requirement is normal and accepted. When a SWA survey is deemed invalid or is not helpful in determining whether an experience requirement is normal and accepted, administrative law judges have looked to the *Dictionary of Occupational Titles* ("DOT") as evidence of what is normal and accepted within a profession. *See Jay R. Debadts & Sons Fruit Farm*, 2008-TLC-38 (July 3, 2008); *Strathmeyer Forests, Inc.*, 1999-TLC-6 (Aug. 30, 1999); *Tougas Farm*, 1998-TLC-10, USDOL/OALJ Reporter (May 8, 1998); *Hoyt Adair*, 1996-TLC-1, USDOL/OALJ Reporter (April 19, 1996). The DOT has since been replaced by O*NET, and although reliance solely on the O*NET job classification is disfavored given that it does not account for variation by state or crop, the O*NET listing can also provide probative evidence of whether an experience requirement is normal and accepted. *See Westward Orchards, et al.*, 2011-TLC-00041 (July 8, 2011); *Gosney*, 2012-TLC-00009 (Dec. 30, 2011).

Here, the O*NET Code Employer designated on its application was 45-2092.02, that for Farmworkers and Laborers, Crop. The job duties for this position are listed as follows:

> Manually plant, cultivate, and harvest vegetables, fruits, nuts and field crops. Use hand tools, such as shovels, trowels, hoes, tampers, pruning hooks, shears, and knives. Duties

[13] I reject Employer's argument that the survey is too general to be of probative value because it does not indicate the specific occupation surveyed. As Mr. Rotterman testified, handpicking peaches or apples could only fall within the SOC Code of Farmworker and Laborer, Crop, which was designated by Employer. (Tr. 234).

> may include tilling soil and applying fertilizers; transplanting, weeding, thinning, or pruning crops; applying pesticides; cleaning, packing, and loading harvested products. May construct trellises, repair fences and farm buildings, or participate in irrigation activities. (DOL 3).

Employer and the CO both conceded at the hearing that this description generally fits the duties of Employer's workers. (Tr. 150, 208). The job summary classifies this position as within Job Zone One, meaning little or no preparation is necessary. *Id.* The summary also notes that the specific vocational preparation ("SVP") range is "Below 4.0".[14] The SVP, as originally 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 situation.[15] An SVP of below Level 4 corresponds to an amount of lapsed time ranging from Level 1, which is "short demonstration only," Level 2, which is "anything beyond short demonstration up to and including 1 month," to Level 3, which is "over 1 month up to and including 3 months. Accordingly, Employer's one-month experience requirement falls within that projected for the job of Farmworker and Laborer, Crop.

Although the O*NET provides probative evidence that one month of experience is normal and accepted, I must determine whether there is sufficient corroborating evidence. *See Westward Orchards*, 2011-TLC-00411 (July 8, 2011). Dr. DeEugenio testified that his family prunes the young trees themselves because they can die prematurely if pruned improperly. (Tr. 131). He also testified that he did not prune his apple trees last year because he was unable to obtain experienced workers. (Tr. 134). Employer submitted an article on pruning peach trees which substantiates Dr. DeEugenio's testimony that a very precise technique is required. *Id.* The article outlines the different pruning techniques that should be used at different stages of a peach tree's life, and it notes that improper pruning can reduce the yield and fruit quality. *Id.* Mr. Heilig and Mr. Haines also wrote that the way a tree is pruned can affect the yield and quality, and Mr. Heilig wrote that it would take at least a month to teach a worker to prune a peach tree. (EX 2A, 3A). Dr. DeEugenio testified similarly that a month or two would be required for such training. (Tr. 172). I find that Dr. DeEugenio's testimony regarding the delicate nature of peach trees is credible and consistent with the SVP range designated for a Farmworker and Laborer, Crop. Furthermore, the letters submitted by Mr. Heilig and Mr. Haines are substantiated by the followup letter from Mr. Frecon and the referenced (attached) article by Dr. Richard Marini on pruning peach trees, which outlines the precise technique required and warns that improper pruning can affect yield and quality. (EX 1).

A review of previous decisions issued by administrative law judges in this area reflects that they are very fact dependent. In *Westward Orchards*, 2011-TLC-00411 (July 8, 2011), the ALJ determined that a one-month experience requirement for picking and pruning apple trees was normal and accepted. There, the SWA survey was too general to be probative; however, the

[14] Employer labeled this position as Farmworker, Fruit although the occupational title is Farmworkers and Laborers, Crop. (DOL 1, p.80). Under the DOT, Farmworker, Fruit I had a SVP of 5, which corresponded to between 6 months and 1 year of experience. Farmworker, Fruit II had a SVP of 2, which as noted above, ranges from anything beyond a short demonstration up to and including one month.

[15] http://www.onetonline.org/help/online/svp (*citing* U.S. Department of Labor. (1991). *Dictionary of Occupational Titles* (Rev. 4th ed.). Washington, DC: U.S. Government Printing Office).

O*NET Code supported the experience requirement, and credible testimony suggested that it can take a few weeks to train workers and that improper pruning can damage a fruit tree. By contrast, in *Gosney*, 2012-TLC-00009 (Dec. 30, 2011), the ALJ determined that the SWA survey was too vague and general, and the O*NET listing supported the 3-month experience requirement for a livestock farmworker; however, the judge determined that the opinion letters supporting experience did not have a sufficient factual basis, and he affirmed the denial of certification on this basis. Although each case requires a specific factual analysis, I find that this case is more similar to *Westward Orchards*.

Here, the SWA survey is neither reliable nor probative and the O*NET listing supports the one-month experience requirement. Furthermore, that the one-month experience requirement is normal and accepted for all workers engaged in pruning is supported by Employer's credible testimony, attestations by other employers, an updated letter from an expert on pruning, and an article that discusses the delicate nature of peach trees and the precise technique necessary for pruning. Based on the totality of the evidence, I find that Employer has established that one month of experience is a normal and accepted requirement among peach and apple growers hiring non-H-2A farmworkers.

CONCLUSION

In reviewing the evidence *de novo*, I find that Employer has established that one month of experience is normal and accepted among non-H-2A apple and peach employers based upon the O*NET listing in addition to the credible testimony, article on peach pruning, and supporting letters. Accordingly, I find that the CO's denial should be reversed. Employer acknowledges that recruitment must still be conducted, however. Because the experience requirement was the only deficiency on which the denial was based, I find that this application should be remanded for recruitment purposes only.

ORDER

IT IS HEREBY ORDERED that the Certifying Officer's denial of temporary alien labor certification be, and hereby is, **REVERSED**, and that the case be, and hereby is **REMANDED**, and the Certifying Officer is instructed to accept this application for further processing.

A

PAMELA J. LAKES
Administrative Law Judge

Washington, D.C.