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Issue Date: 16 February 2012

OALJ Case No.: 2012-TLC-00018

ETA Case No.: C-11354-30955

In the Matter of

OVERDEVEST NURSERIES, L.P.,
Employer

Certifying Officer: William L. Carlson
Chicago National Processing Center

Appearances: Wendel Hall, Esquire
CJ Lake, LLC
Washington, DC
For the Employer

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Office of the Solicitor
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Washington, DC
For the Certifying Officer

Before: **WILLIAM S. COLWELL**
Associate Chief Administrative Law Judge

DECISION AND ORDER
AFFIRMING THE CO'S NOTICE OF DEFICIENCY

This matter arises under the temporary agricultural labor provisions of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a) and 1184(c)(1), and the implementing regulations at 20 C.F.R. Part 655, Subpart B. On January 5, 2012, the Employer appealed the Certifying Officer's ("CO") Notice of Deficiency and requested a de novo hearing. *See* 20 C.F.R. § 655.171(b).

On January 30, 2012, I conducted a hearing in this matter. The Employer called Mr. Rafael Di Stasio, Mr. Ray Blew, and Mr. Edward Overdevest to testify at the hearing. The Employer offered Employer's Exhibits ("EX") 1-29 into evidence and requested that the evidentiary record be held open so that the Employer could take the deposition of Mr. James Johnson. On February 2, 2012, the Employer submitted the deposition testimony of Mr. Johnson as EX 30. The CO offered CO Exhibits ("CX") 1-6 at the hearing. The parties submitted post-hearing briefs on February 8, 2012.

STATEMENT OF THE CASE

Administrative File

On December 20, 2011, the United States Department of Labor's Employment and Training Administration ("ETA") received an application from Overdevest Nurseries, L.P., for 55 "Order Pullers," SOC (O*Net/OES) occupation title "nursery worker," and occupation code 42-2092.01.¹ AF 147-155.² On the application and in the job order placed with the New Jersey State Workforce Agency ("SWA"), the Employer listed the job duties for the position as:

Familiar with a range of proper plant names and sufficiently familiar with plant identifications so as to accurately and timely pull and load orders on delivery trucks. Generate occasional written reports. Nine months recent nursery experience is required. Under supervision of production manager carries out all assigned tasks involving planting, cultivating, harvesting and shipping horticultural products. Capable of repositioning necessary stock to shipping area and properly loading delivery trucks. Upon arrival, employee will need to demonstrate their familiarity with names of basic plants. Capable of frequent heavy lifting of plants weighing up to 50 lbs (heavier with assistance). Plants, cultivates and harvests bare root, balled and burlapped trees and shrubs, containerized trees, shrubs and perennials and annuals and performs related duties in environmentally controlled structures. Sticks cutting and plant liners. Prunes, transplants, spaces, stakes, irrigates, and culls plants to ensure development of marketable products. Harvests, packs, labels, loads, and stores trees, shrubs and perennials using techniques appropriate for individual varieties. Uncover and/or recover poly-covered winter storage houses and pull lath strips to prepare storage houses for new poly covers. Install and remove poly blankets used for winter protection.

When assigned by production manager, serves as member of order pulling and shipping group, coordinating the accurate pulling of orders and loading properly

¹ This appears to be a typographical error, as the occupation code that corresponds to the occupation title of "nursery worker" is "45-2092.01."

² Citations to the administrative file will be abbreviated "AF" followed by the page number.

on delivery trucks and also re-positioning of necessary stock from fields to shipping area. May grade trees, shrubs, and perennials. May drive and operate tractors. Performs other general nursery tasks as necessary.

AF 149, 157, 163.

On December 27, 2011, the CO issued a *Notice of Deficiency* (“NOD”) to the Employer, finding that the Employer’s nine-month experience requirement was not consistent with the normal and accepted qualifications required by non-H-2A employers in the same or comparable occupation or crop, as required by 20 C.F.R. § 655.122(b). AF 125-129. The CO explained that a survey conducted by the New Jersey SWA on April 11, 2011 to April 29, 2011 found that 70% of 36 non-H-2A nursery greenhouse employers required one week or less of experience, and 87% of 24 non-H-2A nursery dig and ball non-H-2A employers required one week or less of experience. AF 127. Accordingly, the CO required the Employer to either remove the nine-month experience requirement, or submit documentation to establish that the requirement is normal and accepted among non-H-2A employers in the same or comparable occupation or crop.³ Instead, the Employer opted for a de novo hearing of the NOD. AF 1-124.

Testimonial Evidence

A de novo hearing was held on January 30, 2012.⁴ In addition to the testimonial evidence at the hearing, the Employer submitted the deposition testimony of John Rotterman (EX 1) and James Johnson (EX 30). The testimonial evidence is summarized below.

Mr. John Rotterman

Mr. John Rotterman’s deposition testimony was taken on January 19 and 20, 2012. EX 1. Mr. Rotterman is a Certifying Officer within the Department of Labor, and his primary responsibility is the H-2A program. EX 1 at 5. Mr. Rotterman stated that ETA Handbook 398 discusses the standard of “normal and accepted” as “less than prevailing, not unusual or rare,” but noted that it also states that “it should be closer to prevailing than not.” EX 1 at 9. Mr. Rotterman stated that it is the CO’s position that when a survey shows that 33% or more

³ The CO also found several other deficiencies, which are not at issue on appeal.

⁴ Citations to the hearing transcript will be abbreviated “Tr.” followed by the page number.

employers surveyed engage in a particular practice, it is considered “normal and accepted” under the regulations. EX 1 at 9-10.

Mr. Rotterman stated that the CO views SWA surveys as creating a rebuttable presumption that a certain practice or qualification is, or is not, normal and accepted. EX 1 at 10. Mr. Rotterman noted that if the SWA is not capable of conducting a survey, the CO will consider the Standard Occupational Classification (“SOC”) code to determine the normal requirements. EX 1 at 12.

Mr. Rotterman stated that based the New Jersey SWA survey results, the CO determined that the Employer’s nine-month experience requirement was not normal and accepted among non-H-2A employers. EX 1 at 51.

Mr. Ray Blew

Mr. Ray Blew is the owner and chairman of the board of Centerton Nursery. Tr. at 39. Centerton Nursery is a “container” operation, meaning that it grows its plants in containers. *Id.* Mr. Blew stated that his business is very similar to Overdevest Nurseries’ operations. *Id.* Mr. Blew stated that he does not participate in the H-2A program, and that if he was seeking new employees to fill a “key production, not managerial position,” he would seek employees with 12 months of experience. Tr. at 40. Mr. Blew stated that each year, he hires about three or four new people without experience and trains them. Tr. at 40, 48.

Mr. Blew noted that he believes that it is normal and accepted among both H-2A and non-H-2A container production nurseries to seek experienced new hires for “key positions.” Tr. at 41-42; EX 3. Mr. Blew stated that he based this belief on 40 years in the nursery business and conversations with other employers. Tr. 42, 46-47. Mr. Blew noted that he was surveyed as part of the New Jersey SWA survey, and that on the survey, he indicated that he was a greenhouse nursery, and added a handwritten note stating that he was a container nursery. Tr. at 42. Mr. Blew stated that a container nursery is different than a greenhouse operation, but that a “greenhouse comes the closest” to matching a container nursery. Tr. at 43. Mr. Blew stated that greenhouse operations are heated and grow poinsettias and geraniums, while container nurseries grow woody shrubs and perennials. Tr. 48-49. Mr. Blew stated that the reason that he circled “no” on the survey under the heading “Experience Normally Required” is that he believed that question only applied to H-2A employers. *Id.* Mr. Blew stated that if he understood that the

question to be whether or not he required experience, he would have indicated that 12 months of experience were required. Tr. 43-44.

Mr. Blew stated that the letter that was submitted by him, EX 3, was a form letter that was sent to him by Mr. Overdevest. Tr. 44-45. Mr. Blew stated that he had “no idea” who wrote the statements in the letter, but indicated that he filled out the portions that had been left blank in the letter. Tr. 45. Mr. Blew stated that he knows there are 300 greenhouses or nurseries in his county in New Jersey, and that he was familiar with the employment practices of 30 or 40 of those employers. Tr. 45-46. Mr. Blew stated that he had “no idea” which nurseries in southern New Jersey do and do not use the H-2A program. *Id.*

Mr. Rafael Di Stasio

Mr. Rafael Di Stasio is a farm labor coordinator for the New Jersey Department of Labor, which is the SWA for New Jersey. Tr. at 52-53, 79. Mr. Di Stasio has been in that position for about 10 years. Tr. at 79. Mr. Di Stasio testified that the New Jersey SWA conducted surveys of the normal and common practices of greenhouse and dig and ball nurseries, but that it does not conduct surveys of container nurseries. Tr. at 55-56. Mr. Di Stasio testified that the SWA maintains a list of non-H-2A growers and employers, and that it maintains its list from a local farm bureau list of agricultural employers. Tr. at 59, 81. Mr. Di Stasio stated that he estimated that there were 65 dig and ball employers in southern New Jersey, and 75 greenhouses in southern New Jersey. Tr. at 104. Mr. Di Stasio stated that the New Jersey SWA tries to survey small, medium, and large employers. Tr. at 115. Mr. Di Stasio noted that southern New Jersey includes the counties of Cumberland, Gloucester, Salem, Cape May, Camden, Burlington, Ocean, and Monmouth. Tr. at 105.

Mr. Di Stasio testified that Mr. Custodio conducted all of the surveys in person, and that he had conducted the survey interviews in at least two previous seasons as well. Tr. at 59, 64. Mr. Di Stasio testified that the survey results correspond to the occupation of nursery worker, SOC code 45-2092.01 Tr. at 65, 87.

Mr. Di Stasio stated that he looked at the Employer’s specific job duties when classifying it on the job order as a nursery worker. Tr. at 106-107. Mr. Di Stasio stated that he considered a container nursery comparable to greenhouse and dig and ball nurseries because workers at all three types of nurseries fit within the “nursery worker” SOC code. Tr. at 115-116. Mr. Di Stasio

stated that the nursery worker SOC code encompasses a broad variety of jobs and tasks. Tr. at 117.

Mr. Edward Overdevest

Mr. Overdevest is a part owner of Overdevest Nurseries, L.P. Tr. at 123. Mr. Overdevest stated that Overdevest Nurseries has evolved from a dig-and-ball nursery to a highly diversified container operation with approximately 2,000 varieties of plants. Tr. at 124-125. Mr. Overdevest testified that Overdevest Nurseries does have a greenhouse that it uses during seed propagation, but that most of its production is outside. Tr. at 127. Mr. Overdevest explained that after a root system has developed into a small plant, or a “liner,” the liner is potted into a larger container, which is moved into the outdoor production area. Tr. at 127-128. Mr. Overdevest noted that the liner can take anywhere from three months to six years before it becomes a marketable plant. Tr. at 128. Once a plant is outside in the production area, it will be trimmed, pruned, fertilized, and re-spaced as it grows. Tr. at 128-129.

Mr. Overdevest noted that container-grown plants are more vulnerable to disease and insect issues than plants that are grown in the ground. Tr. at 129. Mr. Overdevest stated that while plants grown in a field setting are irrigated once a month, it is necessary to irrigate container-grown plants as often as once a day. Tr. at 129. Additionally, container-grown plants require more pruning than dig-and-ball-grown plants. Tr. at 129. Mr. Overdevest added that container-grown plants are often moved between three and five times to ensure adequate spacing. Tr. at 129-130. Mr. Overdevest explained that order pullers grade plants in terms of size and quality during the production cycle. Tr. at 132. The grading process determines the Employer’s inventory numbers. *Id.* After the inventory process of tagging the plants is completed in the fall, the Employer covers the production area with a thin lay of plastic in order to protect the plants during the winter. Tr. at 132-133.

Mr. Overdevest explained that a “picking ticket,” which is a botanical classification of plants, is generated per order received, and the order pullers assemble all of the plants on each picking ticket. Tr. at 134. Mr. Overdevest noted that order pullers are expected to have a working knowledge of the plants’ botanical names, rather than just the plants’ common names, and be familiar with the plants in terms of how they look and the appropriate quality of plant to be shipped. Tr. at 135-137. After an order puller selects all of the plants on the picking ticket, the order puller loads the delivery truck and checks the plants to ensure that the soil is moist

enough. Tr. at 138. Mr. Overdevest noted that it is important for order pullers to have some familiarity with the grades and botanical names of various plants when they begin working, because otherwise they will have to spend all of their time trying to locate the plants. Tr. at 139.

Mr. Overdevest considered duties listed under the O*Net “nursery workers” occupational title, and indicated that the tasks listed in O*Net touch on a number of duties that order pullers perform. Tr. at 140. However, Mr. Overdevest added that the O*Net job description omits important duties such as ensuring the proper spacing of plants, as well as plant knowledge and judgment capability. Tr. at 141.

Order pullers provide early warnings of diseases in early spring and will not pull any plants if there is an indication of disease or insects. Tr. at 147. If the order pullers see any issue with the plants, they will either pass that information to a supervisor or write it in their written report. *Id.* Mr. Overdevest reiterated that his order pullers are empowered to make many decisions with respect to spacing plants, moving plants, deciding which plants get shipped, and which plants might be developing a disease. Tr. 148. Mr. Overdevest stated that there is not very much oversight of the order pullers, and that the Employer does not have anyone at the loading dock doing quality control. *Id.*

Mr. Overdevest stated that he wrote the SOC code for nursery worker in the application because it was the only classification that was reasonably close to the order puller position. Tr. at 158-159. Mr. Overdevest stated that when he completed the SWA survey, he indicated that he was a greenhouse nursery because it was the closest response to a container nursery. Tr. at 163-164. Mr. Overdevest explained that greenhouse nurseries typically involve heated structures, and usually produce different types of plants than container nurseries. Tr. at 200. Mr. Overdevest stated that greenhouses usually grow bedding plants, petunias, impatiens, and poinsettias. *Id.* In Mr. Overdevest’s opinion, it is normally accepted for non-H-2A container production nurseries like Overdevest to require at least nine months of experience for a new hire. Tr. at 196.

Mr. Overdevest testified that he drafted form letters and sent them to approximately 25 non-H-2A container nursery operations. Tr. at 198-199. Mr. Overdevest stated that a production position is a position essential to production that involves the more sophisticated aspects of production, thus requiring a greater degree of knowledge, experience, and expertise. Tr. at 211. Mr. Overdevest testified that he considers order pullers and managers to be key production positions at Overdevest. *Id.*

Mr. Overdevest testified that container nurseries are different from dig-and-ball nurseries in terms of the scope of plants grown, the types and variety of plants grown, the way they are grown, and the degree of intensity. Tr. at 201. Mr. Overdevest added that the degree of mechanization varies between greenhouses, container nurseries, and dig-and-ball nurseries. *Id.* Mr. Overdevest explained that there are two segments to a “nursery,” one is a container nursery, and the other is dig-and-ball. Tr. at 202. Mr. Overdevest agreed that greenhouses, container nurseries, and dig-and-ball nurseries all involve growing plants, moving plants, fertilizing plants, and selling plants. *Id.* Mr. Overdevest stated nursery workers at his container nursery harvest and transplant, or “pot” and “up-pot” plants, and label plants. Tr. at 203-204. Mr. Overdevest noted that nursery workers also label plants and inspect them to assess quality. Tr. at 204.

Mr. James Johnson

Mr. James Johnson’s deposition testimony was taken on February 1, 2012. EX 30. Mr. Johnson works with the Rutgers Cooperative Extension, which is part of the New Jersey Agricultural Experiment Station. EX 30 at 6-7. Mr. Johnson has worked as a cooperative extension agent for nearly 35 years, 30 of which have been working with nurserymen in Cumberland County, New Jersey. EX 30 at 7-8. In that capacity, Mr. Johnson conducts research on nutrient management, water quality, and pest control, and conveys that information to growers. EX 30 at 8-9. Mr. Johnson testified that he does not generally do any work surrounding nursery employers’ employment practices, but that he has picked up knowledge over the years by discussing employers’ expectations of their employees. EX 30 at 52.

Mr. Johnson testified that three to nine months of experience is normal and accepted minimum requirements for both H-2A and non-H-2A nursery workers, depending on the size of the nursery, the position, and the wage expectations. EX 30 at 19-20. Mr. Johnson explained that he does not differentiate between H-2A and non-H-2A employers because each would require the same amount of experience. EX 30 at 68. Mr. Johnson testified that he was generally familiar with the order puller positions at Overdevest Nurseries, and that nine months of experience is the minimum amount of experience he believes is appropriate for the position. EX 30 at 21.

Mr. Johnson testified that he knows that Overdevest Nurseries participates in the H-2A program, but does not know if there are others. EX 30 at 27. Mr. Johnson also testified that based on his experience with the nursery industry, that it is not abnormal or rare for a non-H-2A

container nursery similar to Overdevest Nurseries to require a minimum of nine months of experience for an order puller position. EX 30 at 47-48.

Documentary Evidence

EX 2-8 and 11-24 are letters written by nurseries in New Jersey to Dr. Carlson regarding the amount of experience each nursery would require for key production positions.

EX 2 is a letter from Mark Fedechko, President of Marjac Nursery. Mr. Fedechko stated that his nursery is representative of wholesale, container, and B&B production nurseries in New Jersey, and that he does not participate in the H-2A program. Mr. Fedechko stated that he has varying job responsibilities within his production department, and that the key production jobs require increasing judgment and skill as the positions move toward management level. Mr. Fedechko stated that if he had to hire new employees to fill key production positions that were not managerial, he would seek up to eight months of experience. Mr. Fedechko stated that he believed that Overdevest Nurseries' nine-month experience requirement was not rare or unusual for either an H-2A or non-H-2A nursery.

EX 3 is a letter from Raymond Blew, who is the Chairman of the Board of Centerton Nursery. Mr. Blew stated that Centerton Nursery does not participate in the H-2A program, and that if he had to hire new employees to fill "key production (not managerial) positions," he would seek up to 12 months of experience. Mr. Blew also stated that he believes that Overdevest Nurseries' nine-month experience requirement is not rare or unusual for an H-2A or non-H-2A of Overdevest's size and diversity.

EX 4 is a letter from Richard Hesselein, President of Pleasant Run Nursery. Mr. Hesselein stated that his nursery is representative of wholesale, container production nurseries in New Jersey, and that he does not participate in the H-2A program. Mr. Hesselein stated that if he had to hire new employees to fill key production positions that were not managerial, he would seek up to 12 months of experience. Mr. Hesselein also stated that he believes that Overdevest Nurseries' nine-month experience requirement is not rare or unusual for an H-2A or non-H-2A of Overdevest's size and diversity.

EX 5 is a letter from Mr. Porter, owner of Breezy Acres Farm. Mr. Porter stated that his nursery is representative of wholesale, container production nurseries in New Jersey, and that he does not participate in the H-2A program. Mr. Porter stated that if he had to hire new employees to fill key production positions that were not managerial, he would seek up to 12 months of

experience. Mr. Porter stated that he believes that Overdevest Nurseries' nine-month experience requirement is not rare or unusual for an H-2A or non-H-2A of Overdevest's size and diversity.

EX 6 is a letter from Scott Daum, partner and owner of Four Seasons Nursery and Landscape Company. Mr. Daum stated that his nursery is representative of wholesale, container production nurseries in New Jersey, and that he does not participate in the H-2A program. Mr. Daum stated that if he had to hire new employees to fill key production positions that were not managerial, he would seek up to 12 months of experience. Mr. Daum stated that he believes that Overdevest Nurseries' nine-month experience requirement is not rare or unusual for an H-2A or non-H-2A of Overdevest's size and diversity.

EX 7 is a letter from Frank Loew, owner of Loew's Nursery. Mr. Loew stated that Loew's Nursery is a wholesale container nursery in Cumberland County, New Jersey, and that he does not participate in the H-2A program. Mr. Loew stated that to find the right workers to fill the nursery positions requires many weeks or months of experience.

EX 8 is a letter from Steven Wagner, General Manager of Brock Farm Nurseries. Mr. Wagner stated that his nursery is representative of wholesale, container production nurseries in New Jersey, and that he does not participate in the H-2A program. Mr. Wagner stated that if he had to hire new employees to fill key production positions that were not managerial, he would seek up to 12 months of experience. Mr. Wagner stated that he believes that Overdevest Nurseries' nine-month experience requirement is not rare or unusual for an H-2A or non-H-2A of Overdevest's size and diversity.

EX 9 is a letter from Peter J. Furey, Executive Director of the New Jersey Farm Bureau. Mr. Furey stated that among nursery growers, he has found it to be normal and common practice to need workers who have prior experience to adequately perform key production tasks. Mr. Furey stated that for larger and/or more diversified operations such as Overdevest Nurseries, an experience requirement of up to one year is not rare or unusual for both H-2A and non-H-2A employers.

EX 10 is a letter from James Johnson, Agricultural Agent of the Rutgers Cooperative Extension of Cumberland County. Mr. Johnson stated that based on the requirements of a nursery position, between three and nine months of technical experience is the normal accepted minimum requirement needed to satisfy the needs of both H-2A and non-H-2A employers. Mr. Johnson stated that experience through a full crop cycle (one year) is the optimal amount of time

to allow a worker to acquire an understanding of plant materials and systems to effectively produce and ship plants.

EX 11 is a letter from Dominick Mondì, Executive Director of the New Jersey Nursery and Landscape Association. Mr. Mondì stated that given the diverse skills required in the nursery industry, he believes that it is normal and accepted to require at least a full season of experience for positions like the order puller. Mr. Mondì stated that this requirement was not rare or unusual for both H-2A and non-H-2A employers.

EX 12 is a letter from Noble McNaughton, owner of Indian Mills Nursery. Mr. McNaughton stated that his nursery is representative of wholesale, container production nurseries in New Jersey, and that he does not participate in the H-2A program. Mr. McNaughton stated that if he had to hire new employees to fill key production positions that were not managerial, he would seek up to nine months of experience. Mr. McNaughton stated that he believes that Overdevest Nurseries' nine-month experience requirement is not rare or unusual for an H-2A or non-H-2A of Overdevest's size and diversity.

EX 13 is a letter from Donald Knezick, President of Pinelands Nursery & Supply. Mr. Knezick stated that his nursery is representative of wholesale, container production nurseries in New Jersey, and that he does not participate in the H-2A program. Mr. Knezick stated that if he had to hire new employees to fill key production positions that were not managerial, he would seek a minimum of nine months of experience. Mr. Knezick stated that he believes that Overdevest Nurseries' nine-month experience requirement is not rare or unusual for an H-2A or non-H-2A of Overdevest's size and diversity.

EX 14 is a letter from Roger Ruske, owner of Cumberland Nurseries. Mr. Ruske stated that his nursery is representative of wholesale, container production nurseries in New Jersey, and that he does not participate in the H-2A program. Mr. Ruske stated that if he had to hire new employees to fill key production positions that were not managerial, he would seek up to 18 months of experience. Mr. Ruske stated that he believes that Overdevest Nurseries' nine-month experience requirement is not rare or unusual for an H-2A or non-H-2A of Overdevest's size and diversity.

EX 15 is a letter from Joseph Infante, owner of Infante Farms. Mr. Infante stated that his nursery is representative of wholesale, container production nurseries in New Jersey, and that he does not participate in the H-2A program. Mr. Ruske stated that if he had to hire new employees to fill key production positions that were not managerial, he would seek up to nine months of

experience. Mr. Ruske stated that he believes that Overdevest Nurseries' nine-month experience requirement is not rare or unusual for an H-2A or non-H-2A of Overdevest's size and diversity.

EX 16 is a letter from Suzanne Van Sciver, owner of Quinton Nursery. Ms. Van Sciver stated that her nursery is representative of wholesale, container production nurseries in New Jersey, and that she does not participate in the H-2A program. Ms. Van Sciver stated that if she had to hire new employees to fill key production positions that were not managerial, she would seek up to 12 months of experience. Ms. Van Sciver stated that she believes that Overdevest Nurseries' nine-month experience requirement is not rare or unusual for an H-2A or non-H-2A of Overdevest's size and diversity.

EX 17 is a letter from George Dean, owner of Dean's Evergreens, Inc. Mr. Dean stated that his nursery is representative of wholesale, container production nurseries in New Jersey, and that he does not participate in the H-2A program. Mr. Dean stated that if he had to hire new employees to fill key production positions that were not managerial, he would seek up to nine months of experience. Mr. Dean stated that he believes that Overdevest Nurseries' nine-month experience requirement is not rare or unusual for an H-2A or non-H-2A of Overdevest's size and diversity.

EX 18 is a letter from Keith MacIndoe, General Manager of Johnson Farms Inc. Mr. MacIndoe stated that his nursery is representative of wholesale, container production nurseries in New Jersey, and that he does not participate in the H-2A program. Mr. MacIndoe stated that if he had to hire new employees to fill key production positions that were not managerial, he would seek up to ten months of experience. Mr. MacIndoe also stated that he believes that Overdevest Nurseries' nine-month experience requirement is not rare or unusual for an H-2A or non-H-2A of Overdevest's size and diversity.

EX 19 is a letter from David Scott, President of Scott Farm Nursery. Mr. Scott stated that his nursery is representative of wholesale, container production nurseries in New Jersey, and that he does not participate in the H-2A program. Mr. Scott stated that if he had to hire new employees to fill key production positions that were not managerial, he would seek up to 12 months of experience. Mr. Scott stated that he believes that Overdevest Nurseries' nine-month experience requirement is not rare or unusual for an H-2A or non-H-2A of Overdevest's size and diversity.

EX 20 is a letter from Kevin Fenning, Field/Container Production Manager of Fernbrook Nursery. Mr. Fenning stated that his nursery is representative of wholesale, container production

nurseries in New Jersey, and that he does not participate in the H-2A program. Mr. Fenning stated that if he had to hire new employees to fill key production positions that were not managerial, he would seek up to 24 months of experience. Mr. Fenning stated that he believes that Overdevest Nurseries' nine-month experience requirement is not rare or unusual for an H-2A or non-H-2A of Overdevest's size and diversity.

EX 21 is a letter from Robert Kessel Jr., partner of Kessel's Nursery. Mr. Kessel stated that his nursery is representative of wholesale, container production nurseries in New Jersey, and that he does not participate in the H-2A program. Mr. Kessel stated that if he had to hire new employees to fill key production positions that were not managerial, he would seek up to nine months of experience. Mr. Kessel stated that he believes that Overdevest Nurseries' nine-month experience requirement is not rare or unusual for an H-2A or non-H-2A of Overdevest's size and diversity.

EX 22 is a letter from Luis Sepers, Managing Partner of Sepers Nursery. Mr. Sepers stated that his nursery is representative of wholesale, container production nurseries in New Jersey, and that he does not participate in the H-2A program. Mr. Sepers stated that if he had to hire new employees to fill key production positions that were not managerial, he would seek up to nine months of experience. Mr. Sepers stated that he believes that Overdevest Nurseries' nine-month experience requirement is not rare or unusual for an H-2A or non-H-2A of Overdevest's size and diversity.

EX 23 is a letter from J. Lindsay Clarkson, President of Tuckahoe Nurseries. Mr. Clarkson stated that his nursery is representative of wholesale, container production nurseries in New Jersey, and that he does not participate in the H-2A program. Mr. Clarkson stated that if he had to hire new employees to fill key production positions that were not managerial, he would seek up to 12 months of experience. Mr. Clarkson stated that he believes that Overdevest Nurseries' nine-month experience requirement is not rare or unusual for an H-2A or non-H-2A of Overdevest's size and diversity.

EX 24 is a letter from Charles Kuperus. Mr. Kuperus is a lifelong farmer and stated that experienced employees are essential for the nursing industry to remain competitive in the marketplace.

EX 25 is an Overdevest Nurseries sample picking ticket used by the order pullers.

EX 26 is email correspondence between Chad Ford, an analyst at the Chicago National Processing Center, and Rafael Di Stasio from the New Jersey SWA. On December 22, 2011,

Mr. Di Stasio confirmed with the CNPC that based on the New Jersey SWA’s survey results, 70% of non-H-2A nursery greenhouse employers required one week or less of experience, and 87% of non-H-2A dig and ball nursery employers require one week or less of experience.

EX 27 is Centerton Nursery’s prevailing practices survey interview record. The survey indicates that no experience is normally required.

EX 28 is a summary of the 20 aforementioned letters written by nursery employers. The summary states that on average, the 19 employers who responded to the survey would seek up to 12 months of experience for a key production position.

EX 29 is Overdevest Nurseries’ 2012 Product Guide. The Product Guide indicates that the Employer has one production manager and four assistant production managers. EX 29 at 162.

EX 30 is James Johnson’s deposition testimony, summarized in the testimonial evidence section above.

CX 1 is the appeal file, which will be referred to as “AF.”

CX 2 is the New Jersey SWA’s survey results for Nursery-Greenhouse in southern New Jersey. The survey states that 36 employers were surveyed, and of these, 18 require no experience, one required one day or less of experience, six required one week or less, eight required one month or less, two required three months or less, and one required more than six months of experience. CX 2 at 2.

CX 3 is the New Jersey SWA’s survey results for Nursery-Dig & Ball in southern New Jersey. The survey states that 23 employers were surveyed, and of these, 12 require no experience, eight required one week or less, and three required one month or less of experience. CX 3 at 2.

CX 4 is a compilation of the responses to the two New Jersey SWA surveys. A summary of the employers and their survey responses is provided below.

	Name of Nursery	Type of Nursery	H-2A Employer?	Amount of Experience normally required
1 (CX 4 at 1)	Overdevest Nursery	Greenhouse	Yes	More than 6 months
2 (CX 4 at 2)	Blue Sterling Nursery	Greenhouse	Refused to respond	Refused to respond
3 (CX 4 at 3, 4)	B & M Nursery	Dig & Ball; Greenhouse	No	None

4 (CX 4 at 5)	Aldine Nursery	Greenhouse	No	None
5 (CX 4 at 6, 7)	Garrison Nursery	Dig & Ball; Greenhouse	No	1 month or less
6 (CX 4 at 8)	Church's Seashore Nursery	Greenhouse	No	None
7 (CX 4 at 9)	A. Ferrucci & Sons	Greenhouse	No	1 week or less
8 (CX 4 at 10, 11)	Ales Nursery	Dig & Ball; Greenhouse	No	None
9 (CX 4 at 12)	Beals Nursery	Dig & Ball	No	None
10 (CX 4 at 13, 14)	Brock Farm Nursery	Dig & Ball; Greenhouse	No	1 month or less
11 (CX 4 at 15)	Caspers Nursery	Dig & Ball; Greenhouse	No	None
12 (CX 4 at 16)	Centerton Nursery	Greenhouse; Container (written by hand)	No	None
13 (CX 4 at 17)	Lehner Farms Nursery	Dig & Ball	No	None
14 (CX 4 at 18)	Carl Mehaffey's Nursery	Dig & Ball	No	1 month or less
15 (CX 4 at 19)	Sepers Countryside Nursery	Dig & Ball	No	None
16 (CX 4 at 20)	Monayham Nursery	Dig & Ball	No	1 week or less
17 (CX 4 at 21)	Cumberland Nurseries	Greenhouse	Refused to respond	Refused to respond
18 (CX 4 at 22)	Ivy Acres of New Jersey	Greenhouse	No	1 month or less
19 (CX 4 at 23)	Hayhew Farms Greenhouses & Nursery	Greenhouse	No	1 month or less
20 (CX 4 at 24)	Carl's Nursery	Greenhouse	No	1 month or less
21 (CX 4 at 25)	Aldrick's Nursery	Greenhouse	No	None
22 (CX 4 at 26)	Cohansey Nurseries	Greenhouse	No	None
23 (CX 4 at 27, 28)	Dean's Evergreens	Dig & Ball; Greenhouse	No	1 week or less
24 (CX 4 at 29)	R.F. DeMarco	Greenhouse	No	None
25 (CX 4 at 30, 31)	Edgar Joyce Nursery	Dig & Ball; Greenhouse	No	None
26 (CX 4 at 32, 33)	Ferrucci Nursery	Dig & Ball; Greenhouse	No	None

27 (CX 4 at 34, 35)	Bellone's Nursery	Dig & Ball; Greenhouse	No	None
28 (CX 4 at 36)	Galloway Nursery	Greenhouse	No	None
29 (CX 4 at 37)	Gorrell Brothers	Dig & Ball	No	1 week or less
30 (CX 4 at 38)	SMP Farm	Greenhouse	No	More than 6 months
31 (CX 4 at 39)	Great Northern Plant	Greenhouse	No	None
32 (CX 4 at 40)	Halka Nurseries	Dig & Ball	No	1 month or less
33 (CX 4 at 41, 42)	Harmony Valley	Dig & Ball; Greenhouse	No	None
34 (CX 4 at 43)	Prickett Nursery	Dig & Ball; Greenhouse	No	1 week or less
35 (CX 4 at 44)	Lucas Greenhouses	Greenhouse	No	None
36 (CX 4 at 45)	Manetas Farm	Greenhouse	No	3 months or less
37 (CX 4 at 46)	Marjac Nursery	Dig & Ball	No	1 week or less
38 (CX 4 at 47)	Newfield Nursery	Greenhouse; Container (written by hand)	No	1 day or less
39 (CX 4 at 48)	Pinelands Nursery	Greenhouse	No	1 month or less
40 (CX 4 at 49)	Piney Hollows Nursery	Greenhouse	No	None
41 (CX 4 at 50)	Scott's Nursery	Dig & Ball; Greenhouse	No	1 month or less
42 (CX 4 at 51)	Sepers Nursery	Greenhouse	No	1 month or less
43 (CX 4 at 52)	Stites Nursery	Dig & Ball; Greenhouse	No	1 week or less
44 (CX 4 at 53)	Burks Fresh Meadow	Dig & Ball; Greenhouse	No	None
45 (CX 4 at 54)	Loew's Nursery	Dig & Ball; Greenhouse	No	1 week or less
46 (CX 4 at 55)	J.G. Ackerboom	Greenhouse	No	3 months or less

Of the 38 employers that indicated that they were greenhouse nurseries, two refused to respond and one was an H-2A employer. Of the remaining 35 greenhouses, 18, or 51%, stated that no experience was required. One greenhouse nursery employer stated that one day or less was required, and five greenhouse employers, or 14%, stated that one week or less was required. Eight greenhouse employers, or 23%, stated that one month or less was required, and two

greenhouse employers stated that three months or less was required. Only one non-H-2A greenhouse employer stated that more than six months of experience was required. In other words, only 9% of non-H-2A greenhouse nursery employers in southern New Jersey require more than one month of experience.

Of the 23 employers that indicated that they were dig-and-ball nurseries, 11 stated that no experience was required, and seven stated that one week of experience or less was required. Five dig-and-ball nurseries stated that one month of experience or less was required. The SWA survey found that 0% of the non-H-2A dig-and-ball nursery employers in southern New Jersey require more than one month of experience.

CX 5 is the O*Net summary report for “Nursery Workers,” occupation code 45-2092.01. O*Net lists the typical tasks associated with this occupation as:

- Plant, spray, weed, fertilize, and water plants, shrubs, and trees, using hand tools and gardening tools
- Harvest plants, and transplant or pot and label them
- Feel plants’ leaves and note their coloring to detect the presence of insects or disease
- Operate tractors and other machinery and equipment to fertilize, cultivate, harvest, and spray fields and plants
- Inspect plants and bud ties to assess quality
- Dig, cut, and transplant seedlings, cuttings, trees, and shrubs
- Move containerized shrubs, plants, and trees, using wheelbarrows or tractors
- Clean work areas, and maintain grounds and landscaping
- Haul and spread topsoil, fertilizer, peat moss, and other materials to condition soil, using wheelbarrows or carts and shovels
- Maintain and repair irrigation and climate control systems.

The “nursery workers” occupation falls into Job Zone One, with a Specific Vocational Preparation (“SVP”) range of “below 4.0.”

CX 6 is the O*Net SVP guide. SVP, as defined by the Dictionary of Occupational Titles, “is the amount of lapsed time required by a typical worker to learn the techniques, acquire the information, and develop the facility needed for average performance in a specific job-worker situation.” An SVP of 4 corresponds to “over 3 months up to and including 6 months.” Accordingly, as the nursery worker occupation has an SVP range of “below 4.0,” according to O*Net, the typical nursery worker will need anywhere been a short demonstration (Level 1) to up to three months (Level 3) to develop the necessary skills for the position.

DISCUSSION

Evidentiary Rulings

During the hearing, the Employer objected to the admissibility of the New Jersey SWA survey reports, CX 2 and 3, and the underlying surveys, CX 4, on the grounds that they are not reliable, as required by the Administrative Procedure Act (“APA”), inasmuch as they do not comply with “generally accepted survey principles” as stated under the Paperwork Reduction Act, and because they are hearsay under 29 C.F.R. § 18.802.

The APA provides that an agency must provide a hearing presided over by an ALJ “when required by statute to be determined on the record after opportunity for an agency hearing.” 5 U.S.C. § 554(a). Although the Immigration and Nationality Act (“INA”) provides for a hearing for certain H-2A determinations, the statute does not mandate a “hearing on the record” within the meaning of the APA.⁵ 8 U.S.C. § 1188(e)(1). Nevertheless, even if the APA did apply, CX 2-4 would not be inadmissible. Under the APA, “[a]ny oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence.” 5 U.S.C. § 556(d). The CO’s exhibits do not fall into any of those three categories. In addition, CX 2-4 are not inadmissible simply because they are hearsay.⁶ In administrative proceedings, hearsay evidence is not per se inadmissible; rather, “the only limit to the admissibility of hearsay evidence is that it bear satisfactory indicia of reliability.” *Calhoun v. Bailar*, 626 F.2d 145, 148 (9th Cir. 1980).

Finally, contrary to the Employer’s assertion that this evidence should be excluded under Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 590 (1993), the Federal Rules of Evidence do not apply in this proceeding. Furthermore, Rule 702 governs expert testimony. No expert testimony was proffered in this matter. The SWA survey need not be “the product of some formal statistical rigor,” as the Employer argues, to be admissible. *See Westward Orchards*, 2011-TLC-411, slip op. at 23-24 (July 8, 2011).

⁵ Under 8 U.S.C. § 1188(e)(1), the Department of Labor’s implementing H-2A regulations “shall provide for an expedited procedure for the review of a denial of certification under subsection (a)(1) of this section [conditions for approval of H-2A petitions] or a revocation of such a certification or, at the applicant’s request, for a de novo administrative hearing respecting the denial or revocation.” Not only does the INA not require a hearing on the record for review of a denial of certification, it also does not require a hearing for review of a Notice of Deficiency.

⁶ Furthermore, this evidence almost certainly falls into the hearsay exception for business records, 29 C.F.R. § 18.803(a)(6); Tr. at 91-92.

When an employer requests a de novo hearing before an Administrative Law Judge to review the CO's determination of an H-2A application for temporary labor certification, the applicable regulation at Section 655.171(b)(1) provides that:

[T]he procedures in 29 CFR part 18 apply to such hearings, except that:

- (i) The appeal will not be considered to be a complaint to which an answer is required;
- (ii) The ALJ will ensure that the hearing is scheduled to take place within 5 business days after the ALJ's receipt of the OFLC administrative file, if the employer so requests, and will allow for the introduction of new evidence; and
- (iii) The ALJ's decision must be rendered within 10 calendar days after the hearing.

Twenty-nine C.F.R. Part 18 is divided into two parts – Subpart A, which governs the general procedural rules, and Subpart B, which governs evidentiary rules.

While the Employer argues that CX 4 should be excluded as hearsay evidence under 29 C.F.R. § 18.802,⁷ I find that these evidentiary rules do not apply to H-2A hearings. When the H-2A hearing procedure was established in 1987, 29 C.F.R. Part 18 did not include Subpart B. 20 C.F.R. § 655.112(b)(1988); 52 Fed. Reg. 20507 (June 1, 1987). OALJ's Rules of Practice and Procedure did not include any evidentiary rules until 1990. 55 Fed. Reg. 13219 (Apr. 9, 1990). Furthermore, such stringent evidentiary rules are ill-suited to the expedited review process provided for under the H-2A regulations. Accordingly, as I indicated to the parties during the hearing, administrative adjudication favors admission of all relevant evidence for consideration, and I will accord more or less weight to the proffered evidence based on its probative value, reliability, and the fairness of its use. *See generally, Calhoun*, 626 F.2d at 148.

Based on the foregoing, all of the proffered evidence has been admitted into evidence.

Nine-Month Experience Requirement

The sole issue in this case is whether the Employer's nine-month experience requirement is consistent with the normal and accepted qualifications required by non-H-2A employers in the same or comparable occupations and crops. 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

⁷ Under 29 C.F.R. § 18.802, "hearsay is not admissible except as provided by these rules, or by rules or regulations of the administrative agency prescribed pursuant to statutory authority, or pursuant to executive order, or by Act of Congress." Hearsay is defined under the OALJ Rules of Practice and Procedure as "a statement, other than one made by the declarant while testifying at the hearing, offered in evidence to prove the truth of the matter asserted." 29 C.F.R. § 18.801(c). A statement is defined as "(1) an oral or written assertion, or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." 29 C.F.R. § 18.801(a)(1)-(2).

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 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 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:

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.

While the regulations do not define “normal and accepted,” this standard has been interpreted as a standard where the requirement “may be less than prevailing but which clearly are not unusual or rare.” *Westward Orchards*, slip op. at 22 (citing *Snake River Farmers’ Ass’n, Inc. v. U.S. Dept. of Labor*, 1991 WL 539566, *9 (D. Idaho, Oct. 1, 1991)); see also *John Gosney*, 2012-TLC-9, slip op. at 8 (Dec. 30, 2011).

New Jersey SWA Surveys

The New Jersey SWA surveys at CX 4 show that 51% of greenhouse nurseries in southern New Jersey do not require any experience, and that 91% of all greenhouse nurseries require one month of experience or less. Additionally, the surveys indicate that 100% of dig-and-ball nurseries in southern New Jersey require one month of experience or less. Although the CO argues that CX 4 demonstrates that a nine-month experience requirement is not normal and accepted for the occupation of “nursery workers,” SOC code 45-2092.01, neither the occupational title nor the corresponding SOC code appear anywhere on the individual SWA surveys, CX 4, or the SWA survey results, CX 2-3.

In *Jay R. Debadts & Sons Fruit Farm*, 2008-TLC-38, slip op. at 4-5 (July 3, 2008), an ALJ found that a SWA survey that did not indicate the titles or job descriptions provided some evidence of the normal practices in that state, but that it was too vague to be considered a legally sufficient basis for denial. Likewise, in *Westward Orchards*, slip op. at 24, I found that a SWA survey was entitled to no weight because the SWA survey did not identify whether the results

applied to agricultural equipment operators or farm workers, which were the two occupations that the SWA surveyed.

Mr. Di Stasio testified that the SWA survey results only correspond to the occupation of nursery worker, SOC code 45-2092.01. Tr. at 65, 87. As no other occupations have been identified as work that is performed at nurseries, it is likely that the employers completing the surveys understood that the survey only sought information regarding the employers' nursery workers. Nevertheless, because that information is not contained in the survey, there is simply no way to confirm that the employers' responses correspond only to the nursery worker occupation. Accordingly, I find that the survey results are of limited probative value. See *Jay R. Debadts & Sons Fruit Farm*, slip op. at 4-5; *Tougas Farm*, 1998-TLC-10, USDOL/OALJ Reporter at 6-7 (May 8, 1998).

Employer's Evidence of "Normal and Accepted" Qualifications

The Employer has offered letters from 20 non-H-2A nursery employers in southern New Jersey in support of its argument that nine months of experience is normal and accepted among similarly situated non-H-2A nursery employers. Of these 19, eight of these employers responded to the SWA survey and stated an experience requirement that is significantly less than the experience stated in their letters. While Marjac Nursery's letter states that if it had to hire new employees to fill its "key production (not managerial) positions," it would seek up to eight months of experience, Marjac's SWA survey states that it normally requires one week of experience or less. EX 2, CX 4 at 46. Likewise, while Loew's Nursery's letter states that "finding the right people to fill those jobs requires many weeks or even months of experience," Loew's SWA survey states that it normally requires one week of experience or less. EX 7; CX 4 at 54. Similarly, although Brock Nursery's letter states that it "would seek up to 8 months of experience" to fill a "key production (not managerial) position," in the SWA survey, Brock Nursery stated that it requires one month of experience or less. EX 8; CX 4 at 13-14.

Similarly, the letters from Pinelands Nursery, Dean's Evergreen, Scott Farm, and Sepers Nursery all conflict with the employers' responses to the SWA survey. While Pineland Nursery's SWA survey stated that it required one month of experience or less, its letter states that it would seek a minimum of 12 months of experience for a "key production (not managerial) position." EX 13; CX 4 at 48. While Dean's Evergreen's SWA survey response stated that it

required one week of experience or less, Dean's Evergreen's letter states that it "would seek up to 9 months of experience" to fill a "key production (not managerial) position." EX 17; CX 4 at 27-28. Although David Scott of Scott Farm Nursery indicated on the SWA survey that he required one month or less of experience, his letter states that he "would seek up to 12 months of experience" to fill a "key production (not managerial) position." EX 19; CX 4 at 50. Finally, while Louis Sepers of Sepers Nursery, LLC, stated in his SWA survey that he required one month of experience or less, his letter also states that he "would seek up to 12 months of experience" to fill a "key production (not managerial) position." EX 22; CX 4 at 51.

None of these seven employers that provided conflicting responses testified at the hearing, and therefore, there is no explanation for their conflicting responses. As such, I find that their letters are not credible and entitled to no weight.

Mr. Blew of Centerton Nursery is the only employer who testified at the hearing who provided a letter that conflicted with his SWA survey response. Mr. Blew explained that he did not include an experience requirement on his SWA survey because he believed that question only applied to H-2A employers. Tr. at 48-49. Although this explanation resolves the conflicting responses, I still find that Mr. Blew's testimony is entitled to less weight. While Mr. Blew is of the opinion that it is not unusual or rare for both H-2A and non-H-2A nursery employers to require nine months of experience, Mr. Blew admitted that he has no idea which nurseries are and are not H-2A employers. Tr. at 45-46. Therefore, it is impossible to confirm that Mr. Blew is basing his opinion solely on the employment practices of non-H-2A employers. Additionally, while Mr. Blew stated that he seeks workers with 12 months of experience, he noted that he hires three or four nursery workers with no experience each year. Therefore, his 12 month experience requirement is not an absolute minimum requirement.

I find that the remaining 12 letters from employers are entitled to de minimus weight as well. All of these letters were drafted by the Mr. Overdeest, and it is unclear what type of job the employers are referring to in the letters. Tr. at 198-199. All of the letters refer to "key production (not managerial) positions." Notably, this is Mr. Overdeest's characterization of the order puller position, but there is no way of knowing if the individual employers who signed the letters considered a "key production (not managerial)" position to be the equivalent of a nursery worker. None of these employers testified, and so there was no opportunity to cross-examine them on their understanding of the duties of such a position. Additionally, all of these letters

state that the employers “would seek up to [x] months of experience” for its “key positions.”⁸ However, the maximum amount of experience that these employers would accept, or their preference with respect to experience, is irrelevant. Rather, it is necessary to gauge the minimum amount of experience that is required by these non-H-2A employers in order to determine how much experience is normal and accepted.

Moreover, these letters all state that nine months of experience is normal and accepted for both H-2A and non-H-2A employers of Overdevest Nurseries’ size and diversity. This statement is problematic because it conflates the experience requirements of H-2A and non-H-2A employers, while the employment practices of H-2A employers are irrelevant for the purposes of Section 655.122(b). Additionally, the size and diversity of Overdevest Nurseries is not legally relevant under Section 655.122(b). As the employers’ conclusions are premised on legally irrelevant facts, I find that these letters are entitled to minimal weight.

The letter from Mr. Furey of the New Jersey Farm Bureau is flawed for the same reason. Mr. Furey states that “[f]or larger and/or more diversified operations such as Overdevest Nurseries in Cumberland County, an experience requirement of up to one year is not unusual for both H2A and non-H2A program users/growers.” EX 9. However, as explained above, size and diversity is not legally relevant, nor are H-2A employers’ practices. As such, it is of limited probative value.

Additionally, the letter from Mr. Mondri of the New Jersey Nursery and Landscape Association provides little rationale for his conclusion that it is not rare or unusual for both H-2A and non-H-2A employers to require a full season of experience for certain positions like the order puller job description. EX 11. While Mr. Mondri states that he has exposure to over 100 nursery operations in New Jersey, he does not state how many of these operations do not use the H-2A program, nor does he specify how much experience the non-H-2A employers typically require. Additionally, Mr. Mondri’s letter is vague regarding how much experience is usually required, stating both that “some level of experience” is necessary, and that a “full season” is necessary. However, Mr. Mondri did not quantify the amount of experience that is normally required, and does not differentiate between H-2A and non-H-2A employers.

Mr. Johnson’s testimony is also of limited value. Mr. Johnson’s area of expertise is nutrient management, water quality, and pest control, and he conceded that he does not know

⁸ The only letter that phrases its experience requirement as the minimum amount of experience required, rather than the maximum experience required, is Pinelands Nursery, EX 13. However, as I found above, because the experience requirement conflicts with the employer’s response to the SWA survey, it is entitled to no weight.

very much about nurseries' employment practices. Tr. at 8-9, 52. Additionally, Mr. Johnson's letter states that anywhere from three to nine months of experience is normal and accepted among both H-2A and non-H-2A employers. EX 10. According to Mr. Johnson, the number of months usually required varies depending on the size of the nursery, the actual position, and the workers' wage expectations. Tr. at 19-20. However, neither the size of the nursery nor the workers' wage expectations are relevant considerations for the purposes of Section 655.122(b). Moreover, Mr. Johnson conflated the employment practices of both H-2A and non-H-2A employers.

As I find that the Employer's letters are of limited probative value and insufficient to meet the Employer's burden, I will also consider the OES/O*Net Code to determine whether the Employer's nine-month experience requirement is consistent with the typical amount of experience required for this position.

*OES/O*Net Code*

When an ALJ has found a SWA survey to be of limited probative value on the issue of normal and accepted practices, the ALJ has considered alternative evidence from the Dictionary of Occupational Titles ("DOT") in order to determine whether the job requirement at issue is normal and accepted among non-H-2A employers the same or comparable occupations and crops. 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). Caselaw establishes that the DOT listing for an occupation is probative evidence regarding whether an occupational requirement is a normal and accepted qualification. See *Strathmeyer Forests, Inc.*, slip op., at 4; *Tougas Farm*, USDOL/OALJ Reporter at 6. While reliance solely on the DOT listing or OES/O*Net job classification⁹ is disfavored because it does not account for variation by state or by crop, given that neither the New Jersey SWA survey nor the Employer's letters provide sufficiently reliable or probative evidence, I will consider the OES/O*Net code

⁹ DOT codes have been replaced by the OES codes and O*Net descriptions. O*Net is a database containing information on hundreds of standardized and occupation-specific descriptors. O*Net job descriptions contain several standard elements, one of which is a "Job Zone." An O*Net Job Zone "is a group of occupations that are similar in: how much education people need to do the work, how much related experience people need to do the work, and how much on-the-job training people need to do the work." See <http://www.onetonline.org/help/online/zones>

and description and all conflicting or corroborating evidence in order to determine whether the experience requirement is normal and accepted.

The Employer has titled the jobs that are the subject of this application as “order pullers.” The OES code that the Employer listed on its application is 45-2092.01, “nursery workers.”¹⁰ As the Employer’s job order includes, and Mr. Overdevest agreed that the “order pullers” perform, the majority of the job duties that are listed for the “nursery workers” occupation title, I find that this is the most appropriate occupational classification for the position of “order pullers.” *See* AF 167; Tr. 200-204; CX 5.

The occupation summary found on the O*Net website identifies the occupation as a Job Zone 1, meaning that little or no previous work-related skill, knowledge, or experience is needed for occupations falling in this zone, and provides a specific vocational preparation (“SVP”) of “Below 4.0.”¹¹ 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.”¹²

The OES/O*Net listing for nursery workers shows that anywhere from a short demonstration up to and including three months of experience is needed for a typical worker to learn the techniques, acquire the information, and develop the facility necessary for average performance as a nursery worker. The Employer’s nine-month experience requirement far exceeds the amount of experience that is considered normal for this type of work. Accordingly, I find that the Employer has failed to meet its burden to establish that the nine-month experience requirement is normal and accepted. 20 C.F.R. §§ 655.103(a); 655.122(b).

¹⁰ Although the Employer’s cover letter states that “[w]e do not necessarily agree that the code that we used in ETA Form 9142 is the best code or that it is the same as the positions that other employers might describe with the same code or that survey responses relating to this code have any relevance to this particular job,” AF 181, the Employer has not suggested any other O*Net Code that more accurately fits the position. The ETA Form 9141 Instructions specifically require the Employer to enter the SOC/O*Net code for the occupation that most clearly describes the work to be performed. *See* http://www.foreignlaborcert.doleta.gov/pdf/ETA_Form_9142_General_Instructions_FINAL.pdf.

¹¹ <http://www.onetonline.org/link/details/45-2092.02#JobZone>.

¹² SVP, as defined in Appendix C of the *Dictionary of Occupational Titles*, is the amount of lapsed time required by a typical worker to learn the techniques, acquire the information, and develop the facility needed for average performance in a specific job-worker situation. <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).

ORDER

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

A

WILLIAM S. COLWELL

Associate Chief Administrative Law Judge