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Issue Date: 23 February 2012

IN THE MATTERS OF:

CASE NO.: 2012-TLC-11
BARRY'S GROUND COVER

CASE NO.: 2012-TLC-23
EATON FARMS

CASE NO.: 2012-TLC-26
ERNST CONSERVATION

CASE NO.: 2012-TLC-30
WM. F. HAMMELL NURSERIES, LLC

CASE NO.: 2012-TLC-32
LAKE FOREST GARDENS
Employers

vs.

SECRETARY, U. S. DEPARTMENT OF LABOR,
EMPLOYMENT AND TRAINING ADMINISTRATION
DIVISION OF FOREIGN LABOR CERTIFICATION
CHICAGO NATIONAL PROCESSING CENTER
Respondent

Certifying Officer: John Rotterman
Chicago National Processing Center

Appearances: Wendell Hall, Esq.
Christopher Shulte, Esq.
Washington, D.C.
For Employers

Matthew Bernt, Esq.
Harry Sheinfeld, Esq.

For Respondent

Before: Clement J. Kennington
Administrative Law Judge

DECISION AND ORDER
REVERSING THE CERTIFYING OFFICER'S
DENIAL OF CERTIFICATION

These cases arise under the temporary agricultural labor provisions of the Immigration and Nationality Act, 8 U.S.C. Sections 1101 (a)(15) (H)(ii)(a) and 1184 (c)(1), and the implementing regulations at 20 C.F.R. Part 655 , Subpart B. In December 2011 and January 2012, the above named Employers filed requests for review of the Certifying Officer's (CO) denials of their H-2A applications for temporary alien labor certification. Pursuant to the Employers requests those cases came before me on appeal for a consolidated *de novo* review of the CO's denials in a accord with 20 C.F.R. Section 655.171.

A telephonic hearing was held before me on February 6, 2012 at which the the Employers and the Respondent were represented by counsel, and allowed to examine witnesses, introduce documents, and submit briefs pursuant to 20 C.F.R. Part 18 as provided in 20 C.F.R. Section 655.171(b). The Employers called John Rotterman, Certifying Officer at the Chicago National Processing Center (CNPC), John Stoltz of Workforce Development Partnership Bureau, Pennsylvania Department of Labor and Industry as adverse witnesses. The Employers also called Dr. Cole Gustafson of the Department of Agribusiness and Applied Economics at North Dakota State University, Barry Stiffler of Barry's Ground Cover, Donald Eaton of Eaton Farms and Calvin Ernst of Ernst Conservation Seed, Inc. and introduced the administrative files on each employer (AF 1-5), the Pennsylvania Survey on Normal and Common Practices and Results of Survey (EX-1 and EX-7); John Rotterman deposition testimony (EX-2a, depo. of Jan. 19, 2012, EX- 2b , depo. of Jan. 20, 2012); the curriculum vitae of Dr. Cole Gustafson (EX-3); letter

from Pennsylvania Department of Agriculture to Hon. Steven J. Purcell dated February 2012 (EX-4); e-mails between Steve Potter and Elizabeth Whitley-Fulton (EX-5); and draft denial letters from J. Wartenburg (EX-6). Respondent also called Rotterman and Stoltz as witnesses, and introduced the same documents as Employers except for Exhibits 3, 4, 5, and 6. The parties were advised to designate specific portions of the appeals file and Rotterman's testimony that they were relying on because of the length of each and the presence of information in those files unrelated to the issue in these proceedings.

1. STATEMENT OF THE CASE

A. Issue:

Although the record is rather lengthy the issue is concise and was accurately described by Respondent as follows: [1]

> Whether the prior work experience requirement included in the Employer's applications is a normal and accepted qualification required by non-H-2A employers in the same or comparable occupations as required by 20 C.F.R Section 655.122(b).[2]

B. Administrative Files

On December 9, 2011, the Chicago National Processing Center (CNPC) received from Barry's Ground Cover an Application for Temporary Employment Certification (ETA Form 9142) requesting approval to hire 8 foreign, non-immigrant, seasonal, nursery workers for its operations in Clymer, Pennsylvania. As listed, the job required a minimum of one month work experience in nursery and tree production handling both manual and machine tasks associated with nursery production. Worker duties included planting, digging, mulching, transplanting, mowing, watering in nurseries and seasonal holding houses, fertilizing, pruning, spraying spacing, watering, tagging and other plant

[1] Although other deficiencies were identified by the certifying officer in the above cases, those deficiencies were or will be resolved by the parties and thus have not been addressed by the undersigned.

[2]Employers phrased the issue as: whether based on the totality of circumstances requiring a qualification of one to three months experience is so unusual or rare among similar non-H-2A employers in Pennsylvania that it can be deemed a bad faith impediment for the recruitment of domestic workers.

maintenance. The job also involved counting and inventory, propagating plants from cuttings, loading finished plants onto wagons and trucks, removing and covering seasonal holdings, planting and digging field grown plants and carrying varying size pots carefully so that minimal leaves, limb and root damage occurs. The jobs also involved heavy mechanized field work using power machinery including power shears, chain saws, high lift and fork lift and tractors with and without direction. (AF-1, pp 141-150).

CNPC denied the application pursuant to 20 C.F.R. Section 655.122(b) because it contained a one month experience requirement and a survey conducted by the Pennsylvania SWA from March 1, 2011 to April 30, 2011 (the Survey) which was received by the CNPC on December 12, 2011 of non H-2A employers found the one month experience requirement was not within the normal or accepted practice within the state for non-H-2A employers in the same or comparable occupation or crops. (AF-1, pp. 125-128). Specifically, CNPC stated that the survey found that out of 18 non H-2A nursery employers responding to survey, 14 did not have any experience requirement. (AF-l, p. 9)[3].

On December 29, 2011, CPNC received an Application for Temporary Certification from Eaton Farms of Leesport, Pennsylvania seeking approval to hire 5 foreign, non-immigrant, seasonal, nursery workers for its operations in Leesport, Pennsylvania. The job duties were the same as those described in Barry's Ground Cover but the experience requirement was for three months. (AF-2, pp. 156,158,165). On January 5, 2012, the CNPC denied the application pursuant to 20 C.F.R. Section 655.122 (b) because it contained a three month experience requirement which allegedly is not supported by the Survey which showed, as noted above, out of 18 non H-2A responding nursery employers, 14 did not have any experience requirement. (AF-2, p. 11)

On December 8, 2011, CNPC received an Application for Temporary Certification from Ernst Conservation Seed, Inc. seeking to employ 8 foreign, non-immigrant, seasonal, nursery workers for its operations in Meadville, Pennsylvania. The job duties and experience requirement were the same as those described in Barry's Ground Cover. (AF-3, pp. 257-296). On January 11, 2012, CPNC denied the application on the same grounds cited in Barry's Ground Cover. (AF-3, pp. 109-115).

[3] Contrary to what Counsel for Employers listed in its appeal, CPNC did not rely upon a Utah SWA survey in its denial.

On January 6, 2012, CNPC received an Application for Temporary Certification from Wm F. Hammell Nurseries, LLC seeking to employ 18 foreign, non-immigrant, seasonal, nursery workers for its operations in Honey Brook, Pennsylvania. The duties required three months experience in tree and shrub nursery with extensive ball and burlap field harvesting as well as perform all duties of the entry level workers. Workers were expected to use power equipment to perform heavy mechanized field work, take inventory and grade plants, prepare trees and plants for planting, pruning, shearing, digging and wrapping, crimping wire baskets, lifting carry and loading and unloading of nursery stock. Field work includes irrigation, ditching, shoveling, hoeing, hauling, ground preparation, weeding and other nursery related operations. The power equipment included tractors, planters, sprayers, and cultivators. (AF-4, pp. 149, 150).

On January 12, 2012, CNPC denied Hammell Nursery's application on the same grounds that it did in Barry's Ground Cover, namely that the Survey allegedly showed that it was not a normal or accepted practice in Pennsylvania for non-H-2A employers to require such experience in the same or comparable occupation or crop. (AF-4, pp. 119-123).

On January 11, 2012, the CPNC received the Application for Temporary Labor Certification from Lake Forest Gardens seeking to employ eight foreign, non immigrant seasonal nursery workers with at least three months experience in a tree and shrubbery nursery with extensive ball and burlap field harvesting as described previously in Hammell Nurseries' application above, for its Fombell, Pennsylvania operations. On January 18, the CNPC denied Lake Forest Gardens application on grounds similar to Barry's Ground Cover, i.e., the application contained a three month experience requirement which was contrary to the Survey that allegedly found the prior experience required not to be the normal or accepted practice of its non H-2A employers in the same or comparable occupation or crops. (AF-5, pp. 125).

During the administrative handling of their cases prior to CNPC denials, the Employers were represented by agent Mas H2A, In turn Mas made the following arguments in favor of certification: (1) It is a common practice among Pennsylvania nursery growers to require job experience, possess prior work experience as a condition of employment and in past years CNPC acquiesced to such a requirement; (2) the Pennsylvania SWA in prior years processed a number of Pennsylvania H-2A nursery job orders requiring varying degrees of prior job experience as the normal and accepted practice; (3) the Employers have requested a modicum of prior experience in order for them to satisfactorily and safely

perform their duties without undue detrimental effect upon production and safety to themselves and others with whom they work; (4) statute, regulation, and past practice support Employer's ability to require experience. *See Temporary Agricultural Employment of H-2A Aliens in the United States,* 75 Fed.Reg. 6884, 6907 (allowing employers to set the qualifications with DOL repeatedly rejecting suggestions it set the qualification as long as the employers qualifications were consistent with the normal and accepted standard pursuant to 20 C.F.R. Section 655.122 and were not rare or unusual which is substantiated prevailing practice survey.

In response CNPC defended the validity and methodology of the Survey distinguishing those cases cited by Employers as involving different and problematic surveys. CNPC stated that the Survey involved a mail out to all 281 applicable employers (100% of the universe), from which they received 18 or 6% responses which they deemed sufficient. Further it assumed that 4 out of the 18 or 63 out of the 281 did require some experience (22.42%) but that was insufficient to meet the requirement for normal and accepted.[4] CNPC denied the value of past precedent wherein it had certified employers with an experience requirement since they were not based upon any surveys. It also rejected the opinion of the Pennsylvania Workforce Development Bureau (PWDB) that conducted the Survey and opined between 33% to 45% of the nursery applications that Pennsylvania received request three months experience which was the norm in the nursery trade because it did not appear to be based upon any survey or hard data. (AF-3, pp.111-113).

C. Regulation:

20 C.F.R. 122(b) is the governing regulation in these cases and provides as follows:

> 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

[4] CNPC actually misstated its survey to include 218 and not 281 thus establishing an even higher percentage of positive responses of 28.89%

substantiate the appropriateness of any job qualification specified in the job offer.

D. Testimony:

John Rotterman

John Rotterman is a certifying officer for CNPC. As a certifying officer he is responsible for the H-2A program and makes the final determination on applications filed by Employers in these cases.[5] The objective of the program is to allow foreign workers to come and work in the United States in the absence of willing, able and available domestic workers. The applications are initially processed by a state work agency (SWA) who forwards the job order with other documentation to CNPC. According to Rotterman, the SWA are solely responsible for establishing prevailing wage and prevailing practices. A normal or accepted practice is one that is less than prevailing, not unusual or rare made from a determination of the totality of evidence including extension offices or expedited services. The CNPC has set the threshold at 33% or more of employers engaged in practice for it to be considered normal or accepted. (EX-2a, pp. 9,10).

Rotterman does not consider past certifications as having any precedential value if he is processing a new case with new evidence. If a SWA had conducted a recent survey on a job requirement CNPC begins with analysis of that. If such a survey is not available, CNPC relies upon SWA's educated opinion or applicable extension offices or, absent that, SOC codes. (Id. at 12,13). Rotterman recognizes no methodology or statistical validity applying to the Survey. (Id. at 18). If the employer disputes the Survey's validity, the burden is on the Employer to show occupational qualification that are normal and accepted. (Id. at 22). In this case John Stoltz provided Rotterman with a summary of Survey results that showed 14 out of 18 employers required no experience. Furthermore the Employers submitted no relevant evidence to refute or show that experience was a normal and accepted practice of non H-2A employers. (Id. at 32).

Rotterman acknowledged that the assessment of labor market practices is by regulation left up to the individual state workforce agencies (SWAs). (Id. at 102). Further: (1) the ETA form 9142 filled out by the employers is done under

[5] Rotterman made decisions in all cases but Barry's Ground Cover. However, he is familiar with the process utilized in that case.

penalties of perjury; (2) employer have the right to set qualifications for workers consistent with the regulations; (3) CNPC looks first to a survey and absent that, reaches out to the agricultural field extension offices, local farm bureau or educators in the agricultural field to determine normal and accepted practice. (Id. at 166, 167, 237, 238); (4) employers who require experience generally require them to provide references; (5) the Pennsylvania SWA was not instructed by CNPC nor did the Pennsylvania SWA reach out to those sources named in item #3 above (EX-2b, p. 20); (6) CNPC does not knowingly use surveys that contain data from H-2A employers (Id. at 51); (7) CNPC does not knowingly use surveys that include different crops or occupations from those employers who filed the application (Id. at 51); (8) in making a determination on those crops or occupations to use CNPC relies upon the SWA to chose the appropriate codes (Id. at 56); (9) CNPC did not review the actual survey results when denying the applications; (10) in reviewing the answers to the survey which showed some employers checking references from past employers about experience while denying they require experience, Rotterman would normally inquire further or have the SWA do further inquiry (Id. at 62);(11) the SWA survey included responses from employers who used foreign workers or did not have any employees which should have raised further questions about their inclusion which were not looked into; (Id. at 65-69); (12) if a practice is found not to be normal and accepted it should apply the same for all employers; (Id. at 109).

At the hearing Rotterman affirmed the SWA's control of the survey with CNPC conducting no independent survey or examining state practices. (Tr. 12). CNPC has no specific threshold for determining survey reliability. In this case the Pennsylvania SWA provided CNPC with only a summary of the survey and not the actual survey itself, with no information from the agricultural extension agents, farm bureau or educators in the state. (Tr.13,14).

John Stoltz

John Stoltz worked for the Pennsylvania Department of Labor and Industry, the SWA for the State of Pennsylvania and is the supervisor over the Special Programs Coordination Services responsible for the H-2A program during the period of time when the Survey was conducted and provided to the CNPC. CNPC requested only a summary of the survey. (Tr. 57). The survey was sent to those employers listed by the Center for Work Force as coming in the SOC code 111-421 and 111-422. (Tr. 19). CNPC did not request and the SWA did not make any

recommendations on the acceptability of the employer job orders. (Tr. 18). Stoltz had no idea of where the number of commercial nurseries said to be 2600 came from (Tr. 40). Stoltz received back 18 surveys, 16 of which answered the question of experience. (Tr. 41). Of the Employers involved herein none were azalea farmers, corn farmers, tissue cultural farmers, or cut rose growers which were among those surveyed and no effort was made in the survey to include similar growers to those reflected on the instant applications. (Tr. 44). Of the 16 responding, 6 checked references for past experience, of which two employed H-2A workers, and one had no workers at all. (Tr. 45).

For those that indicated they checked references for past experience, none allegedly required past experience thus creating an ambiguity requiring further inquiry which was not done. (Tr. 46). Accordingly, it was possible that 8 out of the 16 did require experience which was never checked out. (Tr. 47). In providing the data to CNPC, Stoltz was not aware of what, if any, standards were used to determine whose information was relevant to the survey results. Stoltz never checked the reliability of the survey data with the Pennsylvania Nursery and Landscape Association or agricultural extension agents. (Tr. 54).

Donald Eaton

Donald Eaton is the owner of Eaton Farms, a 175-acre, family owned container nursery that grows all of its more than 300 different variety of trees in pots for shipment throughout New England and the Midwest. (Tr. 66). The Spring (April through Mid-June) is the employer's busiest season when it makes 70% of its sales and does 80% of its production. During that time new crops are potted, pruning takes place and pesticides are applied. Production involves propagation to seedlings to liners to finished products. Propagation involves taking a cutting, sticking it in the soil and treating it with a rooting hormone. Many of those functions can be trained except for plant identification and handling of cuttings and plants. Pruning involves knowledge of bud selection, growth, and tree identification. H-2A workers are needed and used in these operations and require experience when hired. Also H-2A workers are needed with experience when used in irrigation, soil mixing, pesticide application, fertilizing, plant loading and handling and equipment operation. (Tr. 67-73). The employer needs experienced workers ready to start from the get go because of the short term seasonality of the industry. Without these workers the employer may well go out of business. (Tr. 74).

Based upon Eaton's experience with the Pennsylvania Nursery Association, he testified that it was the normal and accepted practice among non-H-2A growers to require three months experience when hiring employees. (Tr. 76).

Barry Stiffler

Barry Stiffler, the owner of Barry's Ground Cover, started Barry's Ground Cover 26 years ago. Barry's Ground Cover (BGC) is a wholesale green house nursery that raises annuals, perennials, vegetables, and herbs from seed cuttings for shipment to chain store and garden centers. (Id. at 82). Products are started from seedlings in a germination chamber and then transplanted into other container as a finished product. Other plants are from cuttings, rooted and then placed into other containers as the final product. (Id. at 83). Once products are potted or placed into containers they are set in different greenhouses or hot house and irrigated depending upon what the plant needs. BGC raises a wide variety of plants including 50 kinds of herbs, hundreds of annuals from geraniums, petunias, impatiens, and different types of ground cover. (Id. at 84). The employer needs to hire experienced H-2A workers to avoid improper watering, sanitation, plant handling that can easily kill plants. (Id. at 84-86). Debudding also requires prior experience to avoid disturbing the plant heart or inner nodal planting. BGC's busy season is March to May. Based upon Stiffler's knowledge of the Pennsylvania nursery industry, which covers many years of interaction with nursery growers, it is a normal and accepted practice among non-H-2A employers to require three months of experience when seeking workers to perform jobs for which they employ H-2A employees. (Tr. 89). [6]

Dr. Cole Gustafson

Dr. Gustafson, Department Chair of Agri-business and Applied Ecomonics at North Dakota State University, testified as an expert in statistics as it applies to economics and farming practices. (Tr. 96-98). Dr. Gustafson reviewed the Survey and analyzed it as to survey size, response rate, how the questions were framed, and the consistency across responses. Concerning survey size, as it increases the likelihood, also increases the likelihood of being more precise with its conclusions. The response rate or percentage of usable surveys as opposed to those mailed out or delivered in person is looked at to determine if low numbers affect the accuracy

[6] Although Stiffler testified that the practice about non H-2A employers was to require three months experience, his application requested only one month. The record does not indicate why he requested less experience than the norm.

or bias of the survey. Framing is looked at to determine if there is any misinterpretation of questions. Consistency is looked at to determine if there is any ambiguity or misunderstanding of questions. (Tr. 99-102). Dr. Gustafson also reviewed the Survey to calculate the average of all responses, the standard deviation or variation of responses and the confidence interval or range over which the actual number lies.

In his reviews of the survey and the e-mails associated with it, concerning the issue of experience, there was no evidence of standard deviation or confidence intervals being obtained. The Survey did not follow generally accepted survey methodologies in that it was not weighted to reflect the nursery industry in Pennsylvania, which has a large number of small operations compared to the larger nursery operations employing 50 or more employees which are few in number, which easily leads to bias.

The response rate of 17 out of 281, or 6%, raises questions about the accuracy of, or representativeness of, the group surveyed or its biasness. (Tr. 104-106). Dr. Gustafson was surprised that there was no in person follow up to show why a response was not received. (Tr. 108). The Survey focus is on employers and not employees which can lead to bias.

Of the survey findings, which allegedly had 18 responses, one was blank, which should have been kicked out or considered a no response. Another response was started but never completed. Also the size of the employer's business is important because the small firm will very often obtain workers through word of mouth as opposed to the larger firms that recruit from larger distances where experience of the worker is not known. The SWA survey should have taken that factor into account by a weight process or linking of questions and responses.

Also the Survey does not inquire into the duties to be performed with some small nurseries needing low skill workers as opposed to the larger ones needing more high skilled workers. (Tr. 110,111). Further, the Survey did not follow Department of Labor guidelines by including responses from firms that had foreign workers, with 2 out of the 18 responses having an experience requirement. (Tr. 118, 119).

Michael Pechart

Michael Pechart is employed as the Executive Deputy Secretary of Agriculture for the State of Pennsylvania. Pechart's prior experience consists of 7 years for the Pennsylvania Farm Bureau where he was governmental relations director and oversaw the Farm Bureau's labor program. (Tr. 120). In his current position he assisted the Secretary of Agriculture for the State of Pennsylvania in writing a letter stating: "I believe that it is a normal and accepted practice for Pennsylvania growers, landscape and nursery employers to require successful job applicants to have work experience." Pechart testified that agriculture in Pennsylvania and the U.S. required an experienced work force to identify, in the fruit business for example, the difference between fruit and flower buds when pruning. (Tr. 121). Further it was a normal and accepted practice for nursery workers who were not engaged in the H-2A program to require experience. (Tr. 121-122).

Regarding the Survey, which included 18 respondents, Pechart stated that of more than 2600 Pennsylvania commercial wholesale nurseries registered with the State of Pennsylvania, the response rate was too small to be considered reliable. (Tr.122). Of the total universe of commercial wholesale nurseries, 281 is substantially less than the overall number of commercial wholesale nurseries in the state. (Tr. 123). Further, surveys are not reliable ways of determining practice because of low response rates. Rather direct contact is a much better way to proceed. (Tr. 124). Of the 2600 commercial nurseries all require experience, (Tr. 129).

II. ARGUMENT

Respondent argues that each job qualification must be bona fide and consistent with normal and accepted qualifications required by employers that do not use H-2A workers in the same or comparable occupations and crop. In determining whether a qualification is appropriate, the Secretary or CO is to apply the normal and accepted qualifications of non H-2A in the same or comparable occupations and crops. In that regard the burden is on the Employers seeking the H-2A workers to show in this case that the experience requirement is normal and accepted, which in this case CO Rotterman has determined to be that work requirement engaged in by more than 33% of the non H-2A employers. The SWA initially determines by survey or other data whether the requirement is met. If the survey does not show employer meeting the requirement the employer is permitted to submit other data showing by a totality of evidence that it meets the

requirement, otherwise, as in this case, the application for H-2A workers was denied.

Respondent argues that John Stoltz, of the Pennsylvania SWA, provided a survey to CO Rotterman which allegedly showed that 14 out of 18 respondents did not require any experience. According to Respondent's counsel, the survey, which was sent out to 281 nurseries that were comparable to the employers herein, only 16 responded, of which only 2 required prior work experience. When Employers sent in their responses to the CO none of the information received was deemed relevant and thus the Employers' worker applications were again denied. At the hearing, the evidence submitted by Employer from Donald Eaton showed knowledge only of his business or a handful of other businesses, and that of Barry Stiffler was also limited to his business and did not detract from the survey data. In like manner the testimony of Pechart, of the Pennsylvania Department of Agriculture, did not show of the 2600 commercial nurseries, how many use or do not use the H-2A program, and of the non-H-2A employers how many were comparable to Employer.

Respondent argues that because the work experience requirement is judged under a lesser than normal and accepted standard than the prevailing wage standard, the survey need not be statistically valid in order to have any probative value citing *Westward Orchards* ,2011-TLC-00411. However, Respondent correctly notes under the Administrative Procedure Act that any oral or documentary evidence may be received by an administrative court but the court may not base its decision on unreliable evidence or that which the court determines is not probative. 5 U.S.C. Section 556(d). Further, the CO in this case based his decision on the reasoned basis that the experience requirement was neither normal nor accepted by non H-2A employers in Pennsylvania, which was not rebutted by the Employers.

However, if I find that such a requirement is normal and accepted, these cases should be remanded for further processing of the applications in accordance with the H-2A regulations.

On the other hand, the Employers argued they represent a cross section of the more than 2600 commercial / wholesale operations in Pennsylvania, with only 28, or about 1 percent, utilizing the H-2A program. Thus testimony or other evidence of business practices of Pennsylvania commercial / wholesale nursery industry necessarily reflects as a whole upon the practices of non H-2A commercial / wholesale nurseries. As of January 14, 2011, John Stoltz of the

Pennsylvania SWA, stated in response to an inquiry from Libby Whitley of Mas Labor, about the prevailing practice of requiring experience in Pennsylvania, that he estimated between 33% to 45% of the nursery applications he received request three months experience, which is the norm in the nursery trade. Stoltz further stated that that had been the prevailing practice in the last two years because of the duties involved which include pruning, balling, planting, transplanting and handling of trees and plants. In the past the Employers had their applications approved at least in part on this information.

However in March, 2011, based upon a new survey sent to 281 employers classified in two NAICS Codes (111421 and 111422), the Employers had their applications rejected as not meeting the normal and accepted standard. The employers grouped in these codes were not comparable to the current employers and no attempt was made by Stoltz to assess their comparability. Further this questionnaire at most reached only 11% of the industry, which Stoltz acknowledges did not provide a reliable picture of industry practice. When informing CNPC of the survey results Stoltz said, of the 281 surveys sent out, only 18 replied, with 14 saying they required zero experience, and two said they require three months. A month later Stoltz reported 14 requiring no experience with two requiring three months and two requiring one month. Despite the difference between his expectations and the results, Stoltz made no attempts to verify the responses. CNPC accepted Stoltz's survey despite the low response rate of 6% and found it valid, constituting hard data, despite the fact that it significantly differed from the opinion of a respected source.

While acknowledging that the burden of proof lies with the growers, the growers need only produce enough evidence that, if creditable, would support a finding in their favor. *Dept. of Labor v. Greenwich Collieries*, 512 U. S. 267, 279 (1994). Once this is done, the burden shifts to DOL to rebut this case. *Greenwich Collier's* at 279-280.

The Employers claim they met their burden by Stolz's statement, when he explained the "prevailing practice":

> In the last two years [requiring experience] has been the case for nursery workers and is the prevailing practice in PA. With the duties of pruning, bailing, planting, transplanting, the employer wants people who know how to properly handle trees and plants that will be sold to the public as well as how to operate mechanized equipment.

The requirement was confirmed by Pechart, the Executive Deputy Secretary for Pennsylvania, testifying that it was normal and accepted, among 99% of the nurseries who do not participate in the H-2A program, to require experience for skilled positions such as those at issue. This was corroborated by Eaton and Stiffler's testimony, who testified based upon decades of experience in the Pennsylvania nursery business, for similar non-H-2A employers with whom they have contact, require experience. Other growers support the requirement for three months experience as contained on their applications under penalty of perjury.

Respondent relies exclusively on an unreliable survey to attack Employer's prima facie case which under the APA they may not do. The survey is flawed because: (1) the response rate of 6 % is too low to provide an accurate reflection of the entire population; (2) there is no test for non–response bias; (3) the survey did not survey comparable occupations or comparable employers; (4) the majority of employers responded with respect to unskilled labor positions as opposed to those more skilled positions which Eaton and Stiffler required; (5) the responses on experience revealed a significant ambiguity making it impossible to determine if respondents understood the question; (6) the survey did not take into account the size of the firm responding, with small firms in small communities typically knowing a worker candidate, as opposed to the large firm that hires many more people from greater distances requiring other indicators to evaluate the same factors already known to them. Further there was no attempt to verify the data despite the divergence between expectations and results, nor a calculation for standard deviation or confidence interval. Finally, there is no evidence to suggest the growers need for experienced workers was not needed for their survival and thus represented a bona fide requirement. Thus Respondent survey should be dismissed as unreliable and the applications denial reversed and returned for expeditious processing.

III. DISCUSSION

The Immigration and Nationality Act (INA) and the H-2A require DOL to make two determinations before certifying an employer may hire or use H-2A workers. First, there are not sufficient, able, willing and qualified U. S. workers to perform the temporary agricultural jobs for which an employer desires to hire H-2A workers and second, that the employment of foreign workers will not adversely affect the wages and working conditions of similarly employed U.S. workers.

8 U.S.C. Section 1188 (a); 20 C.F.R. Section 655.100. Consistent with those determinations, and the need to balance competing interests of protection of U.S. workers with the rights of employers to secure labor when there is a shortage of qualified domestic workers, the H-2a program was developed.

One of those requirements, which is central to this case, is that each job qualification 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. The burden is on the employer to establish the appropriateness of any job qualification, that is normal and accepted, i.e. not usual or rare. *See Westward Orchards,* 2011-TLC-00411 at 27 *citing* 20 C.F.R. Sections 655.03(a), 655.122 (b).

In this case, Barry and Ernst required one month prior experience with the other employers all requiring three months experience. In the past all of the employers were certified with similar or additional experience requirements. The CO used a 33% threshold to determine whether a requirement was normal and accepted among non-H-2A employers. Using only a summary of survey results provided by the Pennsylvania SWA, Respondent found none of the Employers herein established the experience requirement was normal and accepted. Although other data or sources of information could be used to verify the experience requirement none were used because the CO wanted to rely on "hard data" from the survey.

In looking at the survey I find that it provides little if any usable information regardless of whether it followed generally accepted survey methodologies. In fact none of the methodologies was apparently followed. First the survey was sent to 281 employers with no regard to whether they were engaged in the same type of nursery business as the instant Employers. For example the survey was sent to employers with a NAICS code of 11421 which included azalea farming, Christmas tree growing, corn farming, rose bush growing, sod farming, and tissue culture farming, none of which are the same or similar crops grown by employers here. Thus, the universe is hardly the same or similar to the Employers in question.

In addition, the survey size (281 out of 2600) and response level (18 or 16) is too low to achieve any accuracy level. The survey does not contain any standard deviation or confidence level and is not weighted for the difference in employer size which can have an effect on employer hiring practices. The survey had questions that created ambiguous responses, did not distinguish between skilled

workers which employer was seeking and unskilled laborers who were included on many responses. Equally important, some of the responses were from H-2A employers and those who did not employ any employees or who did not complete the survey. Also when the survey was received there was no attempt at any level to follow up to find out why the response level was so low or to clarify ambiguous responses.

There was no attempt to verify any data and thus I find the survey had little if any value in ascertaining non H-2A employer experience requirements. Leaving out the survey, the Employers correctly argue that one show should look to qualitative information which the CO has traditionally used in the past which includes because of their expertise in these matters SWAs, agricultural extension services, agricultural educators, and other informed sources to determine industry or non H-2A practice since the vast number of employers in any given industry, particularly those in agriculture, are composed of non H-2-A employers.

In that regard, the Employer presented Stoltz, who supervised Pennsylvania SWA program, Pechart, Executive Deputy Secretary of State of Pennsylvania, and various H-2A growers who submitted applications for certifications. In considering these opinions I have considered the obvious interest of these growers for certification but also recognized they are in a unique position to know their needs for skilled laborers with experience which DOL has in the past recognized and refused to substitute with their own opinion. In applying for certification the growers confirm through declaration subject to penalties of perjury that the qualifications or experience they seek are the normal and accepted standard among non H-2A commercial/wholesale nurseries in the same or comparable occupations or crops. In this case Stoltz testimony confirmed the prevailing practice in Pennsylvania or the norm in the trade has been to require three months experience which between 33% to 45% of their applications request. This was particular the case with nurseries that require pruning, balling, planting, and transplanting, handling of plants and trees and operation of mechanized equipment, Pechart confirmed the industry practice of requiring experience because of the technical, safety and health concerns involved. The growers also confirmed the need for experience which if not obtained could easily lead to their demise.

The Employers correctly argue that Respondent presented no evidence to contradict their credible prima facie case. However, Employers presented no authority that DOL is bound to follow all OMB Standards for Statistical Surveys or the Paperwork Reduction Act in this case. Nevertheless, I am bound by the

Administrative Procedure Act, 5 U.S.C. Section 556 (d), and 29 C.F.R Section 18.57 which demand that evidence be reliable, probative and substantive before it may be used to rebut the Employer's prima facie case and that when the party bearing the burden of persuasion establishes a case by credible evidence it must be rebutted or accepted as true. *See Greenwich Collieries*, 512 U.S. at 280.

In this case I find Respondent has failed to present any credible or reliable evidence to rebut the Employers' case, for a need of one to three months of experience for workers as contained in their applications for temporary labor certification, and accordingly reverse the CO findings and remand said applications for expeditious processing in accord with the H-2A regulations.

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CLEMENT J. KENNINGTON
ADMINISTRATIVE LAW JUDGE