

**U.S. Department of Labor**

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**Issue Date: 11 February 2009**

**Case No: 2009-TLC-24**

**In the Matter of:**

**Albert Thane Davis III,  
d/b/a/ Olo Ranch,  
Petitioner,**

**v.**

**UNITED STATES DEPARTMENT OF LABOR,  
Respondent.**

**DECISION AND ORDER**

This matter arises under the temporary alien agricultural labor certification provisions in Section 218 of the Immigration and Nationality Act (the “Immigration Act”), codified at 8 U.S.C. § 1188, and its implementing regulations published at 20 C.F.R. Part 655. Olo Ranch (“Petitioner”) applied on December 29, 2008 for the certification from the United States Department of Labor that is required for it to obtain H-2A visas from the Department of Homeland Security. Such visas would admit three alien farm workers to the United States, under Section 218 of the Immigration Act, which permits the temporary admission of nonimmigrants to perform seasonal agricultural work.

On January 21, 2009, Mr. Myers, the Certifying Officer, advised Mr. Davis that the temporary alien agricultural labor certification application had been reviewed, but it was determined that the Employer did not offer a wage rate in compliance with 20 C.F.R. § 102(b)(9). The Certifying Officer indicated that the application was not being accepted for consideration on the grounds that it could not be determined and certified that the employment of H-2A temporary alien agricultural workers in such labor or services would not adversely affect the wages and working conditions of workers in the United States similarly employed.

On January 22, 2009, Mr. Davis, through counsel, submitted a request for an expedited *de novo* review of the Certifying Officer’s denial of Mr. Davis’s application for three ranch hands under the H-2A program. The Administrative File was received in this office on January 27, 2009. A telephonic hearing took place on February 2, 2009.

For the reasons discussed below, the decision of the Certifying Officer is reversed.

**Evidence and Testimony**

The record in this case consists of the Administrative Record (ALJX 1)<sup>1</sup>, and Foreign Labor Certification Training and Employment Guidance Letter (TEGL) No. 15-06 (ALJX 2), as well as the transcript of the telephonic hearing (Tr.).

Mr. Davis, who is the owner of Olo Ranch, applied for temporary alien labor certification for three ranch hands on December 29, 2008 (AF 34-36). His application package included a cover letter from his attorney, Mr. Vard R. Johnson, Esq., dated December 22, 2008 (AF 34). Mr. Johnson indicated that he was enclosing ETA 750A, 790, and a 790 Supplement, as well as correspondence from Mr. Davis regarding his temporary or peakload needs for ranch hands. Mr. Johnson stated that this was the second year Mr. Davis had applied to the Department of Labor for H-2A workers, and he provided the case number for the previous case. Mr. Johnson stated:

I mention last year's case as the Department of Labor properly noted that the appropriate Adverse Effect Wage Rate was the **monthly** wage rate for cattle farm workers spending less than 50% of their time on open range. If you have any issue with the applicable Adverse Effect Wage Rate in the case at bar, please call me immediately as we will take whatever steps are necessary to move this case along.

AF 34. The ETA 750 indicated that the total hours per week were 40, and that the work schedule was 8:00 a.m. to 5:00 p.m., with a rate of pay of \$1528.00 monthly. The duties were described as:

General ranch duties depending on season. Spring activities include assisting with calving, feeding cattle, doctoring cattle for sickness, moving cattle to and from pasture, and fencing. Summer activities include putting up hay, maintaining windmills and pipelines, moving cattle to and from summer pastures and doctoring and shepherding cattle. Fall activities include fencing, windmill maintenance, machinery maintenance, weaning calves from cows, assisting with pregnancy checking and doctoring cattle.

AF 37. The application package included a letter from Mr. Davis, dated December 15, 2008. Mr. Davis described the nature of his business, indicating that he was the owner and operator of a cattle ranch in Grant and Cherry Counties in Nebraska. Mr. Davis described the ranch as 52,000 deeded acres of grazing land in the Sand Hills of Nebraska. He stated that the business of the ranch was cattle production and sale, and there are approximately 2200 cows on the ranch at all times.

According to Mr. Davis, the busiest months on the ranch are between February 15 and November 30. The hands must get the cows in place for the calving season during the last two weeks of February; calving is in full swing in March and April. In May and June, the hands move cattle out to pasture, repair fences and windmills, and monitor the cattle for sickness. During July and August, the peak summer months, the hands spend a considerable amount of time putting up hay for winter grazing. In September and October, the hands repair fences and windmills on the winter range, and sort and wean cattle. In November, the range work comes to a close with the sorting of cattle and calves, and the movement of cattle from the summer ranges

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<sup>1</sup> For ease of reference, I will cite to portions of the Administrative Record as "AF."

to the winter area. December, January, and early February are the least busy, as the bulk of the work of the ranch hands is to feed cake to cows and hay to all animals. Mr. Davis indicated that he customarily employs 4 to 5 year round ranch hands, and supplements this number with 3 to 5 additional ranch hands during the seasonal or peakload period. AF 49-50.

On January 5, 2009, Mr. Robert E. Myers, the Certifying Officer, issued a Modification Letter, setting out two deficiencies. In his attachment to his January 5, 2009 letter to Mr. Johnson, Mr. Myers stated:

DOL regulations at 20 CFR 655.102(b)(9) require that if the employer pays by the hour they must offer the worker at least the Adverse Effect Wage Rate (AEWR), the prevailing hourly wage rate, or the legal federal or state minimum wage rate, whichever is highest. The current AEWR in the state of Nebraska is \$9.90 per hour. The employer is offering \$1,528 per month. The offer needs to be presented as an hourly wage.

AF 32. Mr. Myers also instructed Mr. Davis to complete Item 8 on the ETA 750, which had been left blank. He noted that the Employer indicated that he anticipated providing 40 hours of work a week, but the hours listed in Item 8 added up to 48 hours. Mr. Davis was instructed to amend item 8 to indicate the correct anticipated hours of work a week.

Finally, Mr. Myers instructed Mr. Davis to complete item 11 by indicating the deductions the workers could expect to have deducted from their wages. AF 32.

In his January 6, 2009 response, Mr. Johnson provided a modified ETA 750A and 790 addressing all of the deficiencies but the adverse effect wage requirement of \$9.90 an hour. He stated that the work at issue was that of a ranch hand, and was subject to the specialized adverse effect wage rates allowed by 20 C.F.R. § 655.93(b). He indicated that the previous year, Certifying Officer Marie C. Gonzales accepted and certified Mr. Davis's application for three ranch hands for the same temporary positions at issue. He noted that in addition to approving the specialized adverse wage rate for the three hands, she amended the ETA 750A to increase the proposed monthly wage from \$1,500.00 to \$1,528.00. Mr. Johnson stated:

It is obvious that the National Processing Center saw the monthly wage (and not the hourly wage) as appropriate and that it utilized the specialized adverse effect wage rate for ranch workers, rather than the standard OES hourly rate.

Mr. Johnson enclosed a copy of the previous approved ETA 750. AF 15-16.

The Appeal File includes several e-mails between Mr. Johnson and Mr. Shane Barbour, a Program Analyst with ETA. AF 12-13. Mr. Barbour first contacted Mr. Johnson on January 15, 2009 regarding the wage rate offer. He stated that Mr. Davis's previous application was certified with a monthly wage rate of \$1,528 a month, but that there was not an approved monthly wage rate in Nebraska for the Ranch Hand position. He stated that "Actually, the prevailing monthly wage rate is only for cattle farm workers spending more than 50% of their time on the open range. Sorry for the confusion. The appropriate wage offer for this application is the current AEWR in Nebraska of \$9.90 per hour."

Mr. Johnson responded immediately, stating that the previous year, Lynette Wills, who is also a Certifying Officer, told Mr. Davis that because Nebraska had not developed a special AEW for ranch hands, she was using the Wyoming special AEW for Mr. Davis's case. She informed them that \$1,600.00 a month was the Wyoming AEW for ranch hands working more than 50% of the time on the open range, and \$1,500 a month was the Wyoming AEW for ranch hands working less than 50% of the time on the open range. Because the ranch hands that Mr. Davis needed to hire would work less than 50% of the time on the *open*<sup>2</sup> range, they used \$1,500.00 in connection with their previous filing.

Mr. Johnson stated that in connection with the previous application, Mr. John Abraytis had called Mr. Davis to say that DOL needed to increase the wage to \$1528.00 a month; they subsequently did so. Mr. Johnson stated that until Mr. Barbour's e-mail, no one had suggested that the hourly wage rate for Nebraska ranch hands who spend less than 50% of their time on the open range was appropriate. Mr. Davis told Mr. Johnson that ranch workers in Nebraska just did not get that kind of money, and thus they stayed with the only figure that, until the denied application, had DOL's seal of approval, the figure of \$1,528.00 a month.

Mr. Johnson sent an e-mail to Mr. Barbour the following day, indicating that he needed an answer, as Mr. Davis had a February 15 deadline. Mr. Barbour responded, stating that he had consulted with everyone who was involved in the previous year's decision. He stated that the special monthly AEWs applied only to Open Range livestock occupations, and that Mr. Davis's job opportunity did not qualify for treatment as open range. Thus, the AEW of \$9.90 an hour was the wage rate.

On January 21, 2009, Mr. Myers notified the Employer that certification was denied for the three job opportunities, because the Employer did not offer a wage rate in compliance with 20 C.F.R. 655.102(b)(9). In explanation of the certification of the \$1,528.00 a month wage rate in the previous certification, Mr. Myers stated that the AEW in effect at the time of certification was \$9.55 an hour, which, multiplied by 40 hours a week, and then multiplied by 4, was \$1,528.00 a month. This was why Mr. Davis was required to amend his wage offer from \$1,500 a month to \$1,528.00 a month. According to Mr. Myers, the AEW of \$9.55 an hour was applied, but incorrectly converted to a monthly wage rate. He stated that the AEW for Nebraska at the time of filing the current application was \$9.90 an hour, and must be applied.

On January 21, 2009, Mr. Johnson submitted Mr. Davis's request for expedited *de novo* review of the Certifying Officer's refusal to certify Mr. Davis's application for three ranch hands under the H-2A program.

At the hearing, Mr. Davis testified that his ranch, which is 52,000 acres, or about 80 square miles, has been in his family since 1888. The region is known as the Sandhills, which is an arid semi-desert. The headquarters of the ranch, where the administrative offices are located, is on the south end, and the ranch runs north about 15 miles and then east. It is not one contiguous block of ground.

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<sup>2</sup> I have discussed further below Mr. Davis's understanding of the term "*open range*."

At the ranch headquarters is Mr. Davis's house and office; his parents have a house next door. There is a cook house and bunkhouse, a barn, two shops, and several outbuildings. There are also two houses, called camp positions, several miles from headquarters. The ranch is all fenced. They have 2,200 mother cows, about 100 bulls, and the calves that are born in the spring. Mr. Davis does not maintain a feedlot on the ranch. Mr. Davis described the Sandhills as beach sand, with high hills and valleys, ground that is too delicate to farm.

Mr. Davis's current employees feed hay in the morning, and then break the ice on the range cake if necessary. The cattle are left out on the range as long as possible; when the grass is gone, or there is a big snow cover, they need to be brought closer to the hay. His employees either load their horses in the horse trailer and take them to wherever the cattle need to be, or do their work in tractors or pickups. In the summertime, the hands put up hay to feed to the cattle, put up fencing to keep the cattle in, move the cattle around, fix windmills, and fix pipelines. He stated that they "absolutely" spend more than half of their time in the range production of livestock.

Because of the seasonality of the work, starting the first of March, the calving process begins. Mr. Davis needs additional workers to help with the process. He stated that if they are calving heavily, and there is bad weather, the hands sit out in their pickups to watch the cows and calves. But 99 percent of the time, once their work is done, they return to their residence at night. Although he tells his employees that they need to start work at 7:30, sometimes it is rainy, and he sends them home; during calving season, it can be a 24 hour a day job. There is no set hourly schedule, although he tries to get everybody started at the same time in the morning. His employees are on call 24 hours a day, primarily during the calving season. Sometimes the cattle break out onto the highway, and they need to get the cows and fix the fence, or watch them until morning. He pays his workers on a monthly basis, which is the custom in the area.

Mr. Davis acknowledged that he indicated on his application for certification that his workers would be working less than 50 percent of the time on the open range. He stated that he was confused about the definition of open range, which in his mind referred more to a place where the pasturing ability is shared with other people. Although he does some of that, his ranch is fenced, and he did not know if he fit in the category of *open* range. He also thought that his workers were required to stay in camps to fit into the open range category. To him, camp meant staying with the cattle in the mountains. He does not maintain mobile camps on his ranch.

After being certified last year, Mr. Davis submitted the same application for certification this year. The first time he learned that the Department of Labor made a mistake with his previous certification application was when he received Mr. Myers' January 21, 2009 letter.

Mr. Myers also testified at the hearing. He was asked about the requirements for exemption for employees engaged in the open range production of livestock. He stated that the question of whether a particular job qualifies as open range is one that he would inquire more about; it is not set in stone, but is a discretionary fact-based determination. It depends on whether the workers need to be out on the range and may not come back at night, and they need to be on call 24/7. He stated that if an applicant wanted to use the 15-06 exemption, they would need to indicate that they had some sort of open range, and state why it was an open range. He

would ask for justification if there was a question about whether it qualified as open range. He defined an open range as an excess acreage of land, or a lot of land. If it is bound or fenced, it has to be a lot of land.

According to Mr. Myers, if an applicant wants to qualify under the special procedure described at 15-06, he must indicate that in some way, shape, or form. Mr. Myers stated that the AEW in Wyoming for an enclosed range is \$1,500, and the AEW for an open range is \$1,600. Nebraska does not have a special wage rate, and thus the Wyoming rate for open range is used. He stated that if Mr. Davis had requested to qualify under the standard for the open range exception, they would have asked more questions to determine if he qualified.

Mr. Myers stated that with respect to Mr. Davis's previous application, the wage rate was calculated using the adverse effect wage rate for Nebraska, which was \$9.55, multiplied by 40 hours a week, for \$1,528 a month.

According to Mr. Myers, there was no indication in Mr. Davis's application that the position was open range production of livestock. The hours were 40 a week, and the work schedule was 8:00 to 5:00; the duties to be performed could be performed probably in a barn. The fact that Mr. Davis was asking to pay by the month did not indicate anything to him, because it did not match any of the special procedure wage rates.

Mr. Myers testified that, from the response to his notice of deficiency and the e-mail correspondence, it appeared that the Employer was trying to take advantage of the lowest wage rate by indicating that workers spend less than 50 percent of their time on the range, hoping to get the \$1,500 a month rate. He acknowledged that the e-mails from Mr. Johnson indicated that the Employer was looking for a special monthly wage rate. Mr. Myers stated that he would not handle this application any differently today.

Lynette Wills is a Certifying Officer who assists the H-2A analysts in the processing of cases, and reviews their decisions. She testified that although she was aware of this application, she had no working knowledge of the case, other than some discussion on how the wage rate was handled the previous year. She described the open range production of livestock as a 24/7 job, where the workers are on call. It normally encompasses thousands of acres, where the workers frequently are not able to return to a permanent bunkhouse or camp headquarters. She stated that those standards are not written, but are taken from the special procedures labor certification memorandum for sheepherders and goatherders under the H-2A program, at 24-01. She stated that the appropriate TEGL for the open range production of livestock is 15-06.

Ms. Wills stated that she would not consider an application that provided for a 40 hour work week, or an eight hour workday, as providing for the open range production of livestock. Although nothing in TEGL 15-06 suggests that a 40 hour work week would not qualify for open range production of livestock, her personal knowledge of the sheepherder guidelines indicates specifically that the anticipated hours of work must include on-call 24/7, in order to exempt employers from the hourly wage requirements. She stated that this is one of the criteria used in making an initial determination if the application is for open range, or a normal 40 hour work week. However, Ms. Wills has handled applications that indicated a 40 your work week, but

were treated as open range; those applications were modified if the job description indicated any open range activities.

Mr. John Abraytis, a program analyst, testified; he is the first person to work the files. He handled Mr. Davis's previous application. He could not recall how the wage was calculated, although he was sure that he consulted with someone. He stated that he "guessed" that the monthly wage comes out as an hourly wage multiplied by 40 times four. He did not recall anything else, but stated that he apparently made a mistake on that application.

## DISCUSSION

Title 20 C.F. R. § 655.112 provides employers the choice between administrative review or a *de novo* hearing before an administrative law judge of a denial of a temporary alien agricultural labor certification. Subsection (a) provides for administrative review at the request of the employer; it states that the administrative law judge assigned to review the file shall review the record for legal sufficiency, and shall not remand the case or receive additional evidence. The administrative law judge is required to issue a written decision within five working days after receipt of the case file, either affirming, reversing, or modifying the OFLC Administrator's denial.

Under Subsection (b), the employer may request a *de novo* hearing before an administrative law judge regarding the denial of a temporary alien agricultural labor certification. The procedures in 29 C.F.R. § 18 apply to the hearings, except that the appeal is not considered a complaint to which an answer is required; if the employer requests, the hearing must be scheduled within five working days after the receipt of the case file; and the administrative law judge's decision must be made within ten working days after the hearing. The administrative law judge must either affirm, reverse, or modify the OFLC Administrator's determination.

I interpret Section 655.112 to provide that, if an administrative review is conducted under subsection (a), the administrative law judge may only determine the legal sufficiency of the Certifying Officer's determination. In contrast, when the employer requests a *de novo* hearing, the administrative law judge is not restricted to a determination of the legal sufficiency of the Certifying Officer's determination, but reviews the administrative record and the testimony from the hearing, and makes a *de novo* determination. In making my determination in this matter, I have determined that the Employer prevails on either standard, that is, whether I consider only the legal sufficiency of the Certifying Officer's determination, or make a *de novo* determination.

The DOL argues that the Employer's application did not establish that the special procedures of Section 655.93 were applicable, and that all of the information on the ETA 750 indicates that the positions involve a standard work week and general ranch duties, not open range production of livestock. I disagree.

Mr. Stephen Jones, Esq., who represents the Department of Labor in this matter, is correct that Mr. Davis's application indicated a 40 work week, with a work schedule from 8:00 to 5:00. While the description of the duties does not specifically state that they are performed on the "open range," nevertheless they include "moving cattle to and from pasture, and fencing" and

“moving cattle to and from summer pastures and doctoring and shepherding cattle,” as well as maintaining fences and windmills. They are not, as Mr. Myers characterized them, duties that could all be performed in a barn.

But more importantly, Mr. Davis’s ETA 750 was part of a package that included a cover letter from his attorney, Mr. Johnson, in which he advised that the previous year, Mr. Davis’s application had been approved with a monthly wage rate for cattle farm workers spending less than 50% of their time on the open range. The application package also included a letter by Mr. Davis, in which he described his business, including the fact that his ranch consisted of 52,000 acres of grazing land in the Sand Hills of Nebraska. He indicated that there were approximately 2200 cows on the ranch at all times, and he described the seasonal range work duties on the ranch.

In addition, on his ETA 790, Mr. Davis indicated that housing consisted of a two-room bunkhouse, and that range work would frequently keep the ranch hand away from the bunk house over the lunch hour, but they had cooking facilities to prepare a lunch for meals on the range. AF 42.

With all of this information that was before the Certifying Officer – the size of Mr. Davis’s ranch, the number of cattle on his ranch, the fact that the ranch hands had to be able to ride a horse up to eight hours a day, the fact that Mr. Davis had been certified with a monthly wage rate the previous year, and was proposing a monthly wage on this application – I find that the application package clearly indicates that Mr. Davis was requesting certification with a special AEW. R.

I agree that the indication of a 40 hour work week, and a schedule of 8:00 to 5:00, taken in isolation, suggests that the application is for an hourly wage job. But the application package as a whole clearly indicates that Mr. Davis intended to request a special AEW. R, as he thought he had been approved for the previous year.<sup>3</sup> At the very least, it raised the question of whether Mr. Davis was seeking a special AEW. R. Yet in his January 5, 2009 letter, Mr. Myers did not offer Mr. Davis the opportunity to explain whether he was requesting a special AEW. R, or why he felt he qualified for the open range exemption. Rather, assuming that the position was not open range, he instructed Mr. Davis that he must offer an hourly wage of \$9.90 an hour.

At this point, there was e-mail correspondence between Mr. Johnson and Mr. Barbour, the Lead Immigration Program Analyst, in which Mr. Johnson further explained what happened with Mr. Davis’s previous application. Although Mr. Johnson’s January 16, 2009 e-mail discussed the two monthly wages for ranch hands working on the *open range*, one for ranch hands who worked more than 50% on the *open range*, and one for ranch hands who worked less than 50% on the *open range*, Mr. Barbour responded that the special monthly AEW. Rs applied only to open range livestock occupations, and that Mr. Davis’s job opportunity did not qualify for open range. He did not explain why the *open range* positions discussed by Mr. Johnson did not qualify for open range treatment, or provide any opportunity for Mr. Johnson to address this issue.

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<sup>3</sup> There is no support for Mr. Myers’s suggestion that Mr. Davis’s proposed monthly wage of \$1528.00 was an attempt to pay his temporary employees as little as he could get away with.

What should have been apparent at this point was that Mr. Davis was relying on the previous year's determination that his temporary ranch hand positions qualified for a monthly wage. While Mr. Myers is correct that the DOL is not bound by previous determinations, even with respect to the same Employer, nevertheless the circumstances of this case clearly show that Mr. Davis was applying for a special monthly AEW, the same treatment he believed he had received the previous year. Although Mr. Barbour told Mr. Johnson that these open range positions did not qualify for the open range exception, no one bothered to explain why, or to give Mr. Davis the opportunity to address this issue.

Mr. Myers' January 21, 2009 denial letter further confused the issue. Although Mr. Johnson's e-mails clearly reflected that Mr. Davis was seeking a wage rate for the open range production of livestock, Mr. Myers indicated that the "wage determination was researched further because Albert Thane Davis III, d/b/a Olo Ranch could not afford \$9.90 per hour." AF 06. Mr. Myers assumed that Mr. Davis's position was for ranch hands who were not on the open range (despite Mr. Johnson's e-mails), and explained how the hourly rate was calculated.

The regulations do not define the "legal sufficiency" standard, and thus I have used an "arbitrary and capricious" standard. I find that, based on the totality of Mr. Davis's application, including the letters in the application package, and the e-mail correspondence, the denial of his application was arbitrary and capricious, as it did not take into account all of the information provided in the application package and correspondence, and the Certifying Officer did not provide specific guidance in response to Mr. Johnson's request.

In addition, I find that, considering this matter *de novo*, Mr. Davis has met his burden to establish that he qualifies for the special monthly AEW applicable to jobs that involve the range production of livestock. 29 C.F.R. § 780.323 provides as follows:

Section 13(a)(6)(E) which was added to the Act by the Fair Labor Standards Amendments of 1966 provides an exemption from the minimum wage and overtime requirements of the Act for any employee "employed in agriculture" if he is "principally engaged in the range production of livestock." It is apparent from the language of section 13(a)(6)(E) that the application of this exemption depends on the type of work performed by the individual employee for whom exemption is sought and on where the work is done. A determination of whether an employee is exempt therefore requires an examination of that employee's duties and where they are performed. Some employees of the employer may be exempt while others are not.

All of the following requirements must be met for this exemption to apply:

- (1) He must be "engaged in agriculture,"
- (2) Be "principally engaged,";
- (3) On the "range," and
- (4) In the "production of livestock.

29 C.F.R. § 780.324(a). Subsection (b) states that because the raising of livestock is included in the definition of agriculture, the range production of livestock would normally be deemed agriculture work.

Section 780.325 defines “principally engaged,” stating that to qualify for this exemption, “the primary duty and responsibility of a range employee must be to take care of the animals actively or to stand by in readiness for that purpose.” Noting that the amount of time spent in the performance of the range production duties is a useful guide in determining whether range production is the primary duty of the employee, “in the ordinary case it will be considered that the primary duty means the major part, or over 50 percent, of the employee’s time.” Subsection (b) states that:

Under this principle, an employee who spends more than 50 percent of his time during the year on the range in the duties designated as range production would be exempt. This is true even though the employee may perform some activities not directly related to the range production of livestock, such as putting up hay or constructing dams or digging irrigation ditches.

The term “on the range” is defined at Section 780.326 as land that is not cultivated. “Production of livestock” is defined at Section 780.327 as “actively taking care of the animals or standing by in readiness for that purpose.”

Finally, 29 C.F.R. § 780.329 defines “exempt work,” stating at (a):

The standard that must be used to determine whether the individual employee is exempt is that his primary duty must be the range production of livestock and that this duty necessitates his constant attendance on the range, on a standby basis, for such periods of time so as to make the computation of hours worked extremely difficult. The fact that an employee generally returns to his place of residence at the end of each day would not affect the application of the exemption.

Subsection (c) discusses the legislative history of the exemption, noting that the sponsors stated that “the exemption would apply only to those employees principally engaged in activities which require constant attendance on a standby basis, away from headquarters, such as herding, where the computation of hours worked would be extremely difficult.”

TEGL 15-06, issued on February 9, 2007, sets out the special procedures for processing H-2A applications for occupations involved in the open range production of livestock.

Again, Mr. Davis’s application package shows that he meets many of the requirements of the exemption. His temporary employees, like his permanent employees, will be principally engaged in agriculture and the production of livestock. The only possible point of contention is whether these workers will be working on the “range.” I note that the term “open range” does not appear anywhere in the regulations, other than in 29 C.F.R. § 780.326(b), which specifies that the range need not be open. This requirement appears to have been grafted onto TEGL 15-

06, where it is not further defined.<sup>4</sup> Indeed, the addition of “open” appears to have caused much confusion, at least in this case.

Mr. Myers apparently uses a somewhat fluid interpretation of the phrase “open range” as set out in TEGL 15-06, defining it as “a lot of land,” which is not fenced, or if it is fenced, is really a lot of land. It seems that he knows it when he sees it. Mr. Davis, in his previous application, was faced with two monthly wage determinations from Wyoming, one for workers who spent more than 50% of their time on the open range, and one for workers who spent less than 50% of their time on the open range. As he explained, he interpreted the term “open” to refer to a range with common or shared pastures, which he does not have, and thus he indicated on his application that his ranch hands worked less than 50% of their time on the “open” range.

Mr. Davis testified that his ranch hands spend the majority of their working days on the “range,” attending to the thousands of cattle that are grazing or calving on his 52,000 acre ranch in the Sand Hills of Nebraska, an area that is not suitable for cultivation. Although they do not routinely stay out on the range overnight, his ranch hands are on call 24 hours a day.

Based on the information provided in his application package, as well as Mr. Davis’s testimony, I find that the temporary positions for which Mr. Davis sought certification meet the requirements for exemption from the minimum wage and overtime requirements of the FLSA for employees employed in agriculture and principally engaged in the range production of livestock. As such, I find that Mr. Albert Thane Davis III, d/b/a Olo Ranch, should be granted certification for the three ranch hand positions set out in his application. Mr. Johnson stated that Mr. Davis used the \$1520.00 monthly rate because that was the rate provided by the DOL, and they presumed that it was the appropriate rate this time. He acknowledged that the monthly wage rate should be consistent with the special AEWL applicable to Wyoming, which is \$1,600.00 a month, which Mr. Davis was willing to pay.

## **ORDER**

Based on the foregoing, IT IS HEREBY ORDERED that the decision of the Certifying Officer denying temporary agricultural labor certification for the three positions in Mr. Davis’s application be, and it hereby is, reversed.

SO ORDERED.

**A**

LINDA S. CHAPMAN

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<sup>4</sup> 29 C.F.R. § 780.326(b) states that the range may be on private or Federal or State land, and need not be open. Typically it is not only noncultivated land, but land that is not suitable for cultivation because it is rocky, thin, semiarid, or otherwise poor.

Administrative Law Judge