

**U.S. Department of Labor**

Office of Administrative Law Judges  
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**Issue Date: 05 December 2013**

**OALJ Case No.: 2014-TLC-00002**

**ETA Case No.: H-300-13294-415090**

*In the Matter of*

**Vermillion Ranch Limited Partnership,**

*Employer*

Certifying Officer: William L. Carlson  
Chicago Processing Center

Appearances: Jeanne M. Malitz  
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600 W. Broadway, 4<sup>th</sup> Floor  
San Diego, CA 92101  
*For the Employer*

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Legal Services  
Washington, D.C.  
*For the Certifying Officer*

Before: KENNETH A. KRANTZ  
Administrative Law Judge

**DECISION AND ORDER**

On November 13, 2013, Employer filed a request for a de novo hearing reviewing the Certifying Officer's determination in the above captioned temporary agricultural labor certification matter. *See* 8 USC §§ 1101(a)(15)(H)(ii)(a), 1184 (c)(1); 20 CFR § 655.115(a)(2)(2009). On November 18, 2013, the Office of Administrative Law Judges received the file. When a party requests a de novo hearing, the administrative law judge has five calendar days to schedule a hearing after receipt of the appeal file, and ten calendar days after the hearing to render a decision. 20 CFR § 655.115(a). The telephonic hearing was held on November 25, 2013 in Newport News, Virginia.

## STATEMENT OF THE CASE

On October 2, 2013, the United States Department of Labor Employment and Training Division (ETA) received an application from Vermillion Ranch Limited Partnership for temporary agricultural labor certification. (AF 257). The Employer requested certification for five “Open Range Winter Cattle Herder” positions. (AF 241). These positions had a SOC code of 45-2093 and an SOC occupation title of “Farmworkers, Farm, Ranch, and Aquacultural Animals.” (AF 241). Employer stated that period of intended employment was December 1, 2013 to March 30, 2014 and the workers would fill a seasonal need. (AF 241). For experience requirements, Employer stated that an applicant must have worked as an open range winter cattle herder for at least six months. (AF 244). In addition, Employer stated that the applicant must be capable of performing physical tasks and willing to work in remote areas under climatic conditions common in southwest Wyoming and northwest Colorado. (AF 244). Employer noted that the cattle herders will be constantly on call, and will be living in mobile camps in harsh winter conditions. (AF 245). Employer listed the following as tasks of the job; trailing groups of pregnant cows to area designated by rancher, ensuring cows receive ample water and forage, riding horses, and working outside in blizzards and extreme cold. (AF 251).

On October 29, 2013, the Certifying Officer (CO) issued a Notice of Deficiency. (AF 219). The CO gave the following five reasons for denial; temporary need, transportation and subsistence, earnings records, workers’ compensation insurance, and primary worksite address. (AF 225). Regarding temporary need, the CO directed Employer to submit summarized payroll reports to substantiate the temporary need for workers. (AF 221).

On November 4, 2013, Employer filed its Response to the Notice of Deficiency. (AF 132). Employer argued that the position of open range winter cattle herder is clearly seasonal “in that it is tied to the winter months and involves job duties that are completely different from spring, summer and fall positions.” (AF 132). Employer did not provide payroll records in its response. In the Request for De Novo Hearing, Employer stated that it did not provide the payroll records because it relied on family members to fill the positions for the past five years. It stated that relying on family members was no longer feasible based on climatic and grazing challenges. Employer argued that payroll records are a discretionary form of evidence.

On November 8, 2013, the CO denied Employer’s application. The CO gave two reasons for denial. (AF 186). First, the CO stated that the open range cattle herder position was not seasonal in nature as defined by 20 CFR § 655.103(d). (AF 186). The CO noted that Employer had two previous certifications for the period from March 1, 2013 to November 30, 2013. (AF 186). Therefore, the CO stated that “[b]ased on the current employer’s requested dates of need and its previously established dates of need, it is unclear how this job opportunity is temporary or seasonal in nature.” (AF 186).

## DISCUSSION OF RELEVANT EVIDENCE

### Dr. Burkhardt's Affidavit

Dr. J. Wayne Burkhardt submitted an affidavit addressing the seasonality of the position. (EX 3 at 1). Dr. Burkhardt opined that Employer has “three distinctly different seasonal livestock positions that involve substantially different job duties.” (EX 3 at 1). Specifically, he explained that an open range winter cattle herder must know how to protect himself, his horses, and the pregnant cows from harsh winter conditions. (EX 3 at 2). In addition, he explained that the winter herders must know how to prevent animal drift on unfenced winter ranges. Dr. Burkhardt stated that winter herders must also distribute emergency supplemental feed.

Dr. Burkhardt described how the range calver position differs from the open range winter cattle herder. He stated that a range calver is primarily responsible for the well-being of pregnant cows during the birthing process and of newborn calves during the calving season. (EX 3 at 3). He explained that the range calver must know how to monitor cattle for birthing problems by observing the signs of struggle. Dr. Burkhardt noted that calvers need to know when to intervene in the birthing process. (EX 3 at 3). The range calvers must “assure safe delivery, immediate nursing and proper mothering when calves arrive.” (EX 3 at 3).

Finally, Dr. Burkhardt stated that open range livestock workers attend to cow-calf pairs and grazing on the open range in the summer and fall. (EX 3 at 4). The livestock workers also assist with the growing and processing of winter feed. (EX 3 at 4). In addition, the livestock workers operate and repair machinery and fences. (EX 3 at 4).

Dr. Burkhardt attended the University of Idaho, where he obtained his B.S. in Forestry, his M.S. in Range Management, and his Ph.D. in Range Ecology. (EX 3.A at 2). Dr. Burkhardt served as a professor at the University of Nevada, Reno. (EX 3.A at 2). Dr. Burkhardt has published refereed articles in the field.

### Dr. Burkhardt's Testimony

Employer's counsel reviewed Dr. Burkhardt's credentials as found on his CV. (TR 59). Employer's counsel asked whether Dr. Burkhardt has addressed the seasonal needs of ranch animals and grazing availability and limitations. (TR 59). Dr. Burkhardt testified that he has done considerable research on cattle winter ranges, food habits on the winter range, and types of vegetation. (TR 59). Regarding Employer specifically, he testified that he has served as the range management consultant to Employer for the past 21 years. (TR 60). Dr. Burkhardt described Employer as a family-operated commercial range livestock operation with grazing on public and private land. (TR 61).

Dr. Burkhardt testified that the different seasons bring different problems on the range. (TR 61). Specifically, Dr. Burkhardt testified that winter grazing carries increased hazard due to extreme weather conditions. (TR 61).

Dr. Burkhardt testified regarding seasonal changes on the range:

Certainly, raising livestock is a year round business. Cows have to eat every day of the year, but where that can be done is very different on a range operation based on the seasons of the year. . . [N]utritional requirements of range cattle vary with the stage of pregnancy or re-breeding. . . You try to match the animal need during each of the seasons a year with the available forage. . .

TR 62-63.

Dr. Burkhardt characterized the livestock position that cares for workers during the summer and fall as the easiest and most entry level position. (TR 64). Dr. Burkhardt noted that the environment is friendly and the forage is suitable. He testified that the position is also easier because the calves are older and more established on their mother. (TR 73). Dr. Burkhardt testified that the livestock position is a generalist, and that the “specialists come with the winter season and the calving season.” (TR 74).

Regarding the range calver position, Dr. Burkhardt testified that this position involves “an entirely different set of skills and abilities.” (TR 64). He testified that the position requires “almost a degree of veterinary skills.” (TR 65). He also noted that it begins to get cold during this time, and that range calvers must protect against newborn calves getting isolated and freezing. (TR 65).

Regarding the three positions, Dr. Burkhardt testified that the winter cattle herder position is the most difficult. (TR 66). He testified that the winter herder must “be able to identify approaching storm periods [and] make precautions to prevent the cow herd from drifting in front of the storms. . .” (TR 66). Dr. Burkhardt explained that cattle may drift to a fence line where they pile up and get drifted over with snow and freeze to death. Therefore, Dr. Burkhardt opined that the winter herder position is beyond the entry level skills of an open range herder.

Dr. Burkhardt testified that, due to drought, the ranch agreed to move the cattle into different areas for grazing. He testified that leading the cattle to new ranges will involve extra work, herding, and attention. (TR 69). Dr. Burkhardt testified that the three positions involve different skill sets and requirements. (TR 83).

#### Certifying Officer Gonzalez’s Testimony

Ms. Gonzalez testified at the hearing. She testified that she was familiar with the application in question. (TR 9). She testified that Employer filed the application under the special procedures for the open range production of livestock. (TR 19). Ms. Gonzalez testified that Ms. Teague performed the initial review of Employer’s application. (TR 12). She further testified that Ms. Teague ran a case history report on Employer, which is standard operating procedure. (TR 12). Ms. Gonzalez explained that, although Ms. Teague had access to information on previous filings, she could not pull the physical file of previous applications filed under the old case management system. (TR 14). Ms. Gonzalez testified that Ms. Teague was able to pull the full 9142 and job orders for the ranger calver and open range livestock worker applications. (TR 15). Ms. Gonzalez testified that the analysts must review the case files within

seven days of receipt, but that the mandated turnaround was not possible in this case because of the government shutdown.

Ms. Gonzalez testified that, as the certifying officer, she reviews all the files prior to issuing a Notice of Deficiency. (TR 15). She testified that, in the instant case, she did not review the full job descriptions identified in the range calver and open range livestock worker positions. (TR 16). Ms. Gonzalez based her approval of the denial on the identified dates of need for the three applications. (TR 16). Ms. Gonzalez noted that Employer requested five workers on each of the applications. (TR 51). She testified that when she combined the five foreign workers with the listed two permanent employees, she determined that Employer has a year round need for seven permanent workers. (TR 51).

Employer's attorney questioned Ms. Gonzalez as to whether the certifying officer requires summarized payroll records to establish a temporary need for workers. (TR 21). Ms. Gonzalez testified that, although it is not a requirement in the regulations, the certifying officer needs the records to confirm temporary need. Ms. Gonzalez testified that no regulation, frequently asked question, or internal memorandum states the payroll records requirement. (TR 21). During the hearing, Ms. Gonzalez and Employer's attorney reviewed the job descriptions for the range calver, open range livestock, and winter herder positions. (TR 23-33).

Ms. Gonzalez testified:

When we're looking holistically at the need of the employer which is identified to be more than a 12-month need, we're not looking holistically at the job duties, but at the nature of the job itself and the nature of the job itself requires that these workers worked with cattle out on the open range. . .

(TR 38).

She further explained:

It's been determined by the certifying officer that the Employer does not have a temporary need. Rather, he has a permanent need for workers to work with his cattle, to care for his cattle, to feed and herd them on a year long basis and not on a temporary basis.

(TR 39).

Ms. Gonzalez testified that one of the reasons that the application was denied was that all of the workers were required to be on call 24/7. (TR 39). Employer's counsel emphasized that the 24/7 requirement is mandatory to file under the special procedures for open range livestock. (TR 39).

## Ms. Jeanne Dickenson's Testimony

Ms. Dickenson testified that she is a general partner with Vermillion Ranch. (TR 85). She testified that her father, mother, two brothers, and sister are the other partners. She noted that none of the partners are salaried. She testified that Vermillion Ranch no longer employs any non-family full-time employees. (TR 86). Ms. Dickenson testified that Employer began using the H2-A program in 1988.

Regarding previous applications, Ms. Dickenson noted that the Department of Labor raised the seasonality issue on a 2007 application. (TR 90). Ms. Dickenson testified that from 2007 until the most recent application, Employer did not apply for winter cattle herders. (TR 90). She testified she and her brothers, father, and sister performed the winter cattle herder work. She testified that there would be no payroll records for this position. Ms. Dickenson testified that, due to family health issues and changing grazing regulations due to the drought, the family members could no longer perform the work. (TR 91). In addition, Ms. Dickenson stated that Employer decided to file an application because the winter herder position was certified for neighboring ranches. (TR 93).

Ms. Dickenson addressed the experience issue:

[T]he denial by the Department incorrectly states that each of these positions requires six months of experience as an open range livestock worker and this is not true. Each of the three jobs require six months of experiences in the job that is offered as defined in our item 15 of each of the applications under job duties. The range calver certification has a requirement of six months experience as a range calver. The open range livestock worker certification has a requirement of six months experiences as an open range livestock worker and the current open range winter cattle herder certification has a requirement of six months experience as an open range winter cattle herder. . .

TR. 94.

## **DISCUSSION**

### *Positions of the Parties*

Employer submitted a brief on November 27, 2013. Employer argued that the Certifying Officer erred in denying the H2-A application. (Employer's Brief at 2). Employer argued that an employer may have various certified positions that cover the entire year, so long as the individual occupations are seasonal in nature. (Employer's Brief at 3). In addition, Employer argued that, in determining the seasonal or temporary nature of H2-A work, "it is the need for the duties to be performed which determines the temporariness of the job." (Employer's Brief at 10; citing *Altendorf Transport*, 2013-TLC-00026 (Mar. 28, 2013)).

Employer argued that the winter cattle herder position is a seasonal position. (Employer's Brief at 11). Employer outlined the increased obstacles faced by herders in the winter.

Specifically, Employer noted that cattle on the open desert face more serious nutrition and hydration risks. (Employer's Brief at 12). Regarding the weather conditions, Employer highlighted periods of arctic cold with white-out snow blizzards and gale winds. (Employer's Brief at 13). Furthermore, Employer argued that Dr. Burkhardt's testimony demonstrated that the three livestock positions have different job duties tied to the season and lifecycle of cattle. (Employer's Brief at 14). Employer noted that, unlike the winter herder position, the range calver focuses on caring for cows giving birth and the livestock workers care for cow-calf pairs. (Employer's Brief at 15). In addition, Employer emphasized that the three different positions involve different experience requirements. (Employer's Brief at 21). Employer explained that the winter cattle herder position requires six months as a winter cattle herder, the range calver requires six months as a range calver, and the livestock worker requires six months as a livestock worker. (Employer's Brief at 21). Finally, Employer stated that limited weight should be placed on the fact that the three positions contain the same SOC code. Employer noted that the SOC code 45-2093 includes positions involving the care of sheep, goats, horses, finfish, shellfish, and bees. (Employer's Brief at 25).

The CO submitted a brief on November 27, 2013. The CO indicated that the only remaining issue is seasonality. (CO's Brief at 1). The CO argued that it correctly found that Employer does not have a seasonal need for Open Range Winter Cattle Herders. (CO's Brief at 3). Specifically, the CO highlighted Dr. Burkhardt's testimony that raising livestock is a year-round business. (CO's Brief at 3). Furthermore, the CO stated that the "likelihood that the weather conditions will be particularly uncomfortable in winter might make the performance of those common duties more difficult, but it does not constitute a separate seasonal 'need' for the purposes of the H2-A program." (CO's Brief at 3). The CO stated that an employer's ability to manipulate its season to fit the labor certification criteria establishes that the need is not truly seasonal. The CO explained that the employer must demonstrate how the differences in the seasons lead to a differing need for labor. The CO concluded by stating that the information provided during the hearing substantiated its initial decision denying the labor certification.

### ***Seasonal Work***

To qualify for the H-2A program, the employer must have a "need for agricultural services or labor to be performed on a temporary or seasonal basis." 20 CFR § 655.161(a).

The regulations define seasonal work:

[E]mployment is of a seasonal nature where it is tied to a certain time of year by an event or pattern, such as a short annual growing cycle or a specific aspect of a longer cycle, and requires labor levels far above those necessary for ongoing operations. Employment is of a temporary nature where the employer's need to fill the position with a temporary worker will, except in extraordinary circumstances, last no longer than 1 year.

20 CFR § 655.103(d).

In determining whether a job opportunity is temporary, "[i]t is not the nature of the duties of the positions which must be performed which determines the temporariness of the position." *Matter of Artee Corp.*, 18 I. & N. Dec. 366, 367 (1982), 1982 WL 1190706 (BIA Nov. 24, 1982).

The administrative law judge must determine “if the employer’s needs are seasonal, not whether the duties are seasonal.” *Sneed Farm*, 1999-TLC-00007, slip op. at 4 (Sept. 27, 1999). It is necessary to establish when the season occurs and how the need for labor or services during this time of the year differs from other times of the year. Employers seeking temporary labor certification should explain how seasonal differences lead to a differing seasonal need for labor. *The Fingerling Co.*, 2013-TLC-00017, slip op. at 5 (Jan. 18, 2013).

Employer is utilizing the H2-A program to fill employment in three positions, which it designates as livestock worker, open range cattle herder, and range calver. (AF 136-139). All three positions involve the care of cattle. Employer stated that the livestock worker performs duties involved in the open range production of commercial livestock. (AF 136). The following is a non-exhaustive list of livestock worker duties; attend to cow-calf pairs on vast rugged spring, summer, and fall ranges, assist with monitoring/maintenance of water sources, assist with calving, care for horses, report observations of livestock, and live in mobile camps or other housing. (AF 136-7). The following is a non-exhaustive summary of Employer’s list of open range winter cattle herder duties; live in isolated mobile camps, trail groups of pregnant cows, move cows at a pace/distance sufficient to ensure they receive ample water/forage, handle horses, and work outdoors in all types of weather. (AF 136). The following is a non-exhaustive summary of Employer’s range calver listed duties; attend to cows during calving, care for cows, may restrain cow during birthing process, rides horses, report to rancher on conditions and types of sources/area of water and forage, and live in mobile camps or other housing. (AF 138).

In its denial, the CO stated that “all three positions require six months of experience as an open range livestock worker.” (AF 7). The CO concluded that all three positions contained the same experience requirement and could be performed by the same worker. (AF 7). During the hearing, Ms. Dickenson explained that none of the positions contained a requirement of six months of experience as an open range livestock worker. (TR 94). She explained that each position contained a requirement of six months in that particular position. Therefore, a worker applying for the open range winter cattle herder would need to demonstrate six months experience as an open range winter cattle herder. Dr. Burkhardt’s testimony emphasized that Employer needs workers with experience beyond that of an open range livestock worker for the calver and winter herder positions. Dr. Burkhardt explained that the winter herder position was the most difficult of the three positions. (TR 66).

When asked whether six months in the specific job would be acceptable in the industry, Dr. Burkhardt testified:

Well, I think there is additional experience needed to be able to deal with the winter herder position beyond what is required. As I said earlier, I think the open range summer cattle herder is an entry level job. These others are more advanced, more difficult and require greater skills and more intuition. . .

(TR 68).

Based on Dr. Burkhardt and Ms. Dickenson’s testimony, I find that the CO was incorrect in determining that each of the positions contained an experience requirement of six months as a generic open range livestock worker.

The CO also argued that Employer is manipulating its season to fit the criteria of the temporary labor certification. The CO noted that the ability to manipulate its season “reveals

that its need for labor is not, in fact, tied to the weather or any particular annual pattern.” (CO’s Brief at 3, *citing Salt Wells Cattle Co. LLC.*, 2011-TLC-00185 (Feb. 8, 2011)). The CO noted that, if the need for labor is not tied to the weather or an annual pattern, it does not qualify as seasonal under 20 CFR § 655.103(d). Specifically, the CO argued that Employer manipulates its season by ensuring that all cows are pregnant before they move out to the pasture. (CO’s Brief at 4). Furthermore, the CO noted that Employer based its application on the challenges employer faces in caring for pregnant cows on the open range in the winter. The practice of testing cows for pregnancy before moving them to pasture does not suggest any manipulation of the season on the part of the Employer. Winter in the region is harsh and if there were a non-pregnant cow in the herd she would face the same risks to survival as the pregnant cows do. Testing beef cattle for pregnancy is a step to ensure efficient production, unrelated to the issue of the skills necessary to herd them safely during the winter.

To support its argument, the CO references the decision in *Salt Wells Cattle Co.* 2011-TLC-00185, (Feb. 8, 2011). In that case, the employer filed an application for ranch workers. *Id.* at 2. In its application, the employer stated that it generally performed fence repair work in December, but would perform the work in July and August to accommodate the application. *Id.* at 4. The administrative law judge determined that employer could manipulate its busy season by changing when it performed fencing work. The CO also referenced *J-Six Enterprises*, 2012-TLC-00098, slip op. at 3, (Oct. 11, 2012). In that case, two nearby operations owned by the same individual filed applications spanning over a year and a half for workers performing identical duties. *Id.*

The instant case is distinguishable from *Salt Wells Cattle Co.* and *J-Six Enterprises*. Employer is not manipulating the season. Dr. Burkhardt testified that the winter herder position is the most difficult position because in the winter, the herder “has to be able to first and foremost successfully [survive] in these extreme winter conditions. . . has to have the ability to protect himself, his dogs, herding dogs, and his horses. . .” (TR 66). He further emphasized that a winter herder must be able to identifying approaching storms.

Employer has successfully demonstrated how seasonal changes lead to a differing seasonal need for labor. Dr. Burkhardt explained that Employer has three “distinctly different seasonal livestock positions that involve substantially different job duties.” (EX 3 at 2). In the winter, Employer needs workers with skills in blizzard and arctic survival, locating natural shelters, and protecting against predators. (EX 3 at 3). Dr. Burkhardt testified that grazing in the winter is more complex. By contrast, Dr. Burkhardt explained that the range calver position involves caring for cows and newborn calves during and shortly after the birthing process. Dr. Burkhardt testified that range calvers need additional skills, and need “almost a degree of vet skills.” The calvers need to know how to recognize the signs of struggle during birthing. (EX 3 at 3). In the summer and fall, Employer needs livestock workers, a position which is more entry level. These workers attend to cow-calf pairs on the open range. The livestock workers assist with “the administration of medication, gathering, sorting, weaning, and shipment of range livestock.” (EX 3 at 4).

Through Dr. Burkhardt’s testimony, Employer has established a need for agricultural services to be performed on a seasonal basis. *See* 20 CFR § 655.161(a). Employers seeking

temporary labor certification must explain how seasonal differences lead to a differing seasonal need for labor. *The Fingerling Co.*, 2013-TLC-00017, slip op. at 5 (Jan. 18, 2013). Employer has demonstrated that, during the winter months, it has a seasonal need for workers with experience in protecting against blizzard conditions, predators, and the hazard of drifting into and piling up against fence lines. Dr. Burkhardt testified that the herder position is more difficult than the livestock and calver positions. He explained that it is difficult to foresee and protect against cows getting stuck to a fence and blanketed with snow. Employer explained that it would only hire an employee who had six months experience working in a specific *winter herder* position. Employer has established that it has a seasonal need for experienced winter herders, a seasonal need for calvers with a degree of veterinary experience, and a seasonal need for livestock workers.

Employer has shown how the seasonal changes of the weather and the gestational cycle result in differing seasonal labor needs. The testimony of Dr. Burkhardt and Ms. Dickenson made clear that the skills needed for the winter herder and range calver were substantially different from each other, and that both were greater than that required for the livestock worker position. Dr. Burkhardt described the latter position as “generalist” and “more entry level.” In this Employer’s hiring practices it is not literally entry level, requiring as it does six months of experience, but that experience is in the less demanding duties of herding the cow-calf pairs during the summer and fall seasons. In light of this evidence it may be argued that that position involves only skills necessary for “ongoing operations” as that term is used in 20 CFR § 655.103(d). However, the issue of the summer-fall livestock worker is not before me. The Employer has demonstrated a need for experienced winter herders at labor levels far above those necessary for ongoing operations. *See* 20 CFR § 655.103(d). Accordingly, Employer has demonstrated a seasonal need for open range winter cattle herders.

### **ORDER**

Accordingly, the CO’s decision is **REVERSED**, and the application for temporary labor certification is remanded for processing in accordance with the H2-A regulations.

KENNETH A. KRANTZ  
Administrative Law Judge

KAK/ecd/mrc