



February 12, 1990

In the Matter of

Case No. 90-TLC-10

MOUNTAIN PLAINS AGRICULTURAL SERVICE  
Employer

Before: JEFFREY TURECK  
Administrative Law Judge

DECISION AND ORDER

The above-captioned employer requested expedited administrative review under 20 C.F.R. §655.112 from the denial by Regional Administrator ("RA") Luis Sepulveda of applications for temporary labor certification dated December 31, 1989, and January 3, January 11, and January 12, 1990 for 79 sheepherder positions and applications for temporary labor certification dated January 3, 1990 for six range cattle hand positions. The RA denied the certifications in determinations dated January 16 and 17, 1990. Counsel for the RA filed a short letter in support of his position on January 30, 1990; the Employer filed what it termed a "rebuttal" to the denials of certification addressed solely to the sheepherder applications on January 31, 1990. A separate response to the denial of the range cattle hand applications was filed on February 5, 1990.

In response to the range cattle hand positions, certification was denied, inter alia, due to the fact that employer has not established a need for temporary, as opposed to permanent; workers for these positions, all six of which are to last for a period of one year less one day. Employer has failed to address this point in its argument on review, and accordingly the RA's denial of the range cattle hand certifications is affirmed.

In regard to the 79 sheepherder positions, certification was denied for several reasons, including that: (1) the Employer's description of the job duties "far exceeds" the description of these jobs contained in the Dictionary of Occupational Titles ("D.O.T."); and (2) that Employer failed to offer advance transportation costs from the place of recruitment to the place of employment.

In regard to the first issue, the RA's determination that the duties of these jobs exceeds the duties for a sheepherder ' set out in the D.O.T. and adopted by Field Memorandum No. 74-89

(May 31, 1989) ("FM 74-89")<sup>1</sup> is supported by the record. Although Employer argues that the D.O.T. description may be supplemented by additional duties "which are required due to business necessity . . ." (FM 74-89 at 2), the burden clearly is on an employer to justify these additional duties. But the additional duties listed by Employer in its application are all-encompassing - - they seem to include virtually any job which can be performed on a farm or ranch, including attending to cattle and other livestock, and planting, cultivating, irrigating and harvesting crops. Employer's contention that these duties are "incidental to the principle [sic] duties described above" appears far-fetched. In any event, Employer has not established that these additional duties are required by business necessity.

Finally, FM 74-89 requires employers to "offer to provide advance transportation . . . . (Id. at 8). Although employer may in fact provide such transportation, Employer nonetheless is obligated to state this in its application, to assure that potential job applicants are aware that they do not have to incur out-of-pocket expenses if hired for the position. Employer has not contended that it does so. Accordingly, the record supports the BA's denial of the shepherd applications as well as the range cattle hand positions, and the RA's determinations denying these temporary labor certifications are affirmed.

JEFFREY TURECK  
Administrative Law Judge

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<sup>1</sup> I take official notice of FM 74-89, issued by the Employment and Training Administration of DOL.