



August 3, 1993

Case No.: 93-TLC-10

In the Matter of

ORME RANCH
Complainant

v.

U.S. DEPARTMENT OF LABOR
Respondent

Lisa Perez Bray, representative
For the Complainant

Michele W. Curran, Esq.
For the Respondent

Before: ROBERT S. AMERY
Administrative Law Judge

DECISION AND ORDER

This proceeding was initiated by a telegram from the Complainant dated July 21, 1993 requesting an expedited administrative judicial review under 20 CFR 655.112(a), a regulation implementing the Immigration and Naturalization Act (INA), 8 USC 1101 et seq. as amended.

On April 30, 1993 the Complainant filed an Application for Alien Employment Certification (ETA Form 750) requesting certification by the Secretary of Labor to import an alien, Jose de Jesus Duarte-Higuera, to the Orme Ranch at Mayer, Arizona, and employ him as a H-2A Goat Herder from July 15, 1993 to June 15, 1994. The application was denied by the Certifying Officer on May 7, 1993 and on numerous other occasions thereafter despite the Complainant's attempt to correct all the alleged defects specified by the Certifying Officer and meet his requests for changes and modifications of the application and for supporting documentation.

The Certifying Officer's most recent denial was dated July 14, 1993. His reason was that he was not persuaded that the goat herder's job under consideration constituted "range work", as described in the regulations, 29 CFR 780.300; 780.323-780.329, which exempt certain agricultural

work that is principally engaged in the range production of livestock from the minimum wage and overtime provisions of the Fair Labor Standards Act (FLSA), 29 USC 201 *et seq.* The Certifying officer felt that the goat herder job was not range work because the goats were penned nightly on the ranch, therefore the Complainant would not be eligible for the minimum wage exemption and would have to pay a salary of \$5.37 per hour for the position instead of the monthly adverse effect wage rate of \$600.00 per month as contended by the Complainant. Apparently the Complainant had corrected all the other discrepancies specified by the Certifying Officer and complied with all his requests for documentation and information.

In response, the Complainant asserted that penning the goats at night was necessary to protect them from predators, such as mountain lions, bears and coyotes. The Complainant produced documentation in the form of letters from other ranchers verifying that, if goat herds are not penned up at night with guard dogs, the rancher would soon be out of business because of extensive losses due to predators. The Complainant noted that the job description allows for the penning of goats and refers to "Herds goats from corral to fresh pastures."

As to the Certifying Officer's statement that he was not persuaded that the goat herder job is range work, the Complainant points out that the regulatory definition of "range" is defined generally as "land that is not cultivated" and "by its nature range production of livestock is most typically conducted over wide expanses of land, such as thousands of acres." 29 CFR 780.326¹

The Complainant has presented documentation in the form of a letter from a U.S. Dept. of Agriculture Forest Service District Ranger verifying that Orme Ranch consists of private, Arizona State and National Forest lands. It is the permittee on the 20,649 acre V-bar allotment of the Verde Ranger District, Prescott National Forest, and this year Orme Ranch has 600 Angora goats that will graze on the private and Forest lands. The goats require constant attention and are penned at night to reduce predation. According to District Ranger Bonomo, "The range is those lands designated by the Forest Service for grazing livestock (in the case of Orme Ranch, goats), and classified as open range with hilly mountainous topography and is generally isolated." The Complainant presented other documentation showing the number of acres of private, State and National Forest Service land owned and/or used by

¹ 29 CFR 780.326 provides as follows:

"(a) For purposes of this exemption 'range' is defined generally as land that is not cultivated. It is land that produces native forage for animal consumption and includes land that is revegetated naturally or artificially to provide a forage cover that is managed like range vegetation. 'Forage' as used here means 'browse' or herbaceous food that is available to livestock or game animals.

(b) 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. Typically, also, many acres of range land are required to graze one animal unit (five sheep or one cow) for one month. By its nature, range production of livestock is most typically conducted over wide expanses of land, such as thousands of acres."

Orme Ranch which consists of a total of 26,651 acres. In my opinion the job under consideration constitutes "range work."

The requirements for an exemption from the minimum wage and overtime requirements of the FLSA are set forth in 29 CFR 780.324. The employee must be: (1) engaged in agriculture (2) be principally engaged, (3) on the range, and (4) in the production of livestock. 29 CFR 780.324(a). The raising of livestock is included in the definition of agriculture, so the range production of livestock would normally be deemed agricultural work and thus, while an employee is engaged in these activities he would meet the basic requirement of being employed in agriculture. 29 CFR 780.324(b). Under Section 780.325 an employee who spends more than 50% of his time during the year in range production of livestock would be exempt. According to the Complainant, the goat herder's primary responsibility will be grazing and the care and protection of the goats, attending to herds of goats on the range and herding them from corrals to fresh pastures. Such duties encompass 90% of the goat herder's job description. Section 780.327 provides that "for an employee to be engaged in the production of livestock, he must be actively taking care of the animals or standing by in readiness for that purpose. Thus, such activities as herding, handling, transporting, feeding, watering, caring for, branding, tagging, protecting, or otherwise assisting in the raising of livestock and in such immediately incidental duties as inspecting and repairing fences, wells and windmills would be considered as the production of livestock." The Complainant states that the Orme Ranch goat herder's job description meets this criteria and provides that the herder and his dogs are with the goats at all times and he is on call 24 hours a day. It includes: "Attends herds of goats grazing on the range. Herds goats from corrals to fresh pastures. Herds goats and rounds up strays using trained dogs. Guards flock from predatory animals and from eating poisonous plants. Drenches goats. May assist in kidding, castrating and shearing. May feed goats supplementary feed."

"Section 780.329 provides in part: "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 ... "and" ... exempt work must be performed away from the 'headquarters'." The Complainant has explained that the goats are penned up at night on the range and that, according to Section 780.329(b), the "headquarters" is the administrative center where business of the ranch is transacted and the balance of the "headquarters ranch" is the "range."

For these reasons I find that the Complainant's job description for a goat herder meets the requirements for exemption from minimum wage and overtime provisions of the FLSA and that an appropriate wage for that position can be \$600.00 per month instead of \$5.37 per hour. Moreover, I find that the Complainant has met the requirements for an alien employment certification for a goat herder position for which U.S. workers are not available and that its application should be granted.

ORDER

For the foregoing reasons, the action of the Certifying Officer and the Regional Administrator in denying the Complainant's Application for Alien Employment Certification for a goat herder's position at Orme Ranch from July 15, 1993 to June 15, 1994 is hereby reversed and the certification is granted by authority of 20 CFR 655.112(a).

ROBERT S. AMERY
Administrative Law Judge

RSA/yj