

**U.S. Department of Labor**

Office of Administrative Law Judges  
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**Issue Date: 17 March 2016**

**BALCA Case No.: 2016-TLC-00028**  
**ETA Case No.: H-300-16016-980615**

*In the Matter of*

**Anderson Ranch, LLC,**  
*Employer*

APPEARANCES: Rebecca J. Trent  
Attorney for the Solicitor

James Estill  
Employer

BEFORE: DANA ROSEN  
Administrative Law Judge

**DECISION AND ORDER**

This matter arises under the temporary agricultural employment provisions of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184(c)(1) and 1188, and the implementing regulations set forth at 20 C.F.R. Part 655, Subpart B. The H-2A program permits employers to hire foreign workers to perform agricultural work within the United States on a temporary basis.

This Decision and Order is based on the written record, consisting of the Administrative File (“AF”) forwarded by the Employment and Training Administration (“ETA”), and the written submissions of the parties (“Stat. of Pos.”).

**BACKGROUND**

Employers who seek to bring foreign agricultural workers into the United States under the H-2A program must apply to the Secretary of Labor for a certification that—

- (A) there are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services involved in the petition, and
- (B) the employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed.

8 U.S.C. § 1188(a)(1).<sup>1</sup> The implementing regulations at 20 C.F.R. Part 655, Subpart B set forth a multi-step process by which this certification—known as a “temporary labor certification”—may be applied for and granted or denied. First, the petitioning employer must file a job order with the State Workforce Agency (SWA) serving the area of intended employment. 20 C.F.R. § 655.121. The SWA will review the job order for compliance with the regulations and, if it finds the job order acceptable, post the job order on its intrastate clearance system and begin the recruitment. 20 C.F.R. § 655.121(b), (c). If the SWA does not locate able, willing, and qualified workers to fill the positions for which the employer seeks certification, the employer may file an Application for Temporary Employment Certification (ETA Form 9142A) with the U.S. Department of Labor (Department), Employment and Training Administration (ETA), Office of Foreign Labor Certification (OFLC). A Certifying Officer in the OFLC will review the application for compliance with the requirements set forth in the regulations. 20 C.F.R. § 655.140. If the application is incomplete, contains errors or inaccuracies, or does not meet the requirements set forth in the regulations, the Certifying Officer will notify the employer within seven calendar days. 20 C.F.R. § 655.141(a).

There are specific regulations that regulate the labor certification process for temporary agricultural employment in range sheep herding, goat herding, and production of livestock occupations. “The purpose of §§ 655.200-655.235 is to establish certain procedures for employers who apply to the Department of Labor to obtain labor certifications to hire temporary agricultural foreign workers to perform herding or production of livestock on the range, as defined in § 655.201.” 20 C.F.R. § 655.200(a).

These procedures apply to job opportunities with the following unique characteristics:

- (1) The work activities involve the herding or production of livestock (which includes work that is closely and directly related to herding and/or the production of livestock), as defined under § 655.201;
  - (2) The work is performed on the range for the majority (meaning more than 50 percent) of the workdays in the work contract period. Any additional work performed at a place other than the range must constitute the production of livestock (which includes work that is closely and directly related to herding and/or the production of livestock); and
  - (3) The work activities generally require the workers to be on call 24 hours per day, 7 days a week.
- 20 C.F.R. § 655.200(b).

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<sup>1</sup> The Secretary of Labor delegated the authority to make this determination to the Assistant Secretary for the Employment and Training Administration, who in turn delegated it to the Office of Foreign Labor Certification. 20 C.F.R. § 655.101.

## **JURISDICTION AND STANDARD OF REVIEW**

The undersigned has jurisdiction pursuant to 20 C.F.R. §§ 655.141(c), 655.171. The burden of proof to establish eligibility for a labor certification is on a petitioning employer. 8 U.S.C. § 1361; 20 C.F.R. § 656.2(b). An employer, therefore, must demonstrate that the Certifying Officer's determination was based on facts that are materially inaccurate, inconsistent, unreliable, or invalid, or based on conclusions that are inconsistent with the underlying established facts and/or legally impermissible.

When considering a request for administrative review pursuant to 20 C.F.R. § 655.171, the presiding Administrative Law Judge ("ALJ") may only render a decision "on the basis of the written record and after due consideration of any written submissions (which may not include new evidence) from the parties involved or the amici curiae."<sup>2</sup> 20 C.F.R. § 655.171(a). Accordingly, an employer may not refer to any evidence that was not a part of the record as it appeared before the CO. "The ALJ's decision is the final decision of the Secretary." 20 C.F.R. § 655.171.

## **PROCEDURAL HISTORY**

On January 16, 2016, the Office of Foreign Labor Certification ("OFLC") received for consideration the application of Employer Anderson Ranch, LLC ("Employer") requesting temporary labor certification for one Farmworker, Farm, Ranch, and Aqua cultural Animal job opportunity under the Temporary Agricultural Employment of H-2A Foreign Workers in the Herding or Production of Livestock on the Range per the H-2A Herder Final Rule, 20 CFR 655 Subpart B, for the period from February 1, 2016 to November 30, 2016. (AF 30-39). The title of the job was Goat herder. (AF 30).

Employer described the requirements of the goat herder job opportunity as follows:

Required to be available 24 hours per day, 7 days a week and spend the majority of workdays on the range. All job duties are closely and directly related to the production of goats.

Perform any combination of the following tasks to attend goats on the range: feed and water goats or ensure adequate provision of both; herd flock to appropriate grazing area; round up strays using dogs and/or fence; make certain animals have access to fresh water; bed down goats near evening site; guard goats from predatory animals and from eating poisonous and/or noxious plants; administer medication to goats as needed; assist in kidding; brand, tag, clip or otherwise mark goats for identification purposes; assist with sorting and culling of cull goats; feed supplemental rations to goats. May build and/or maintain fence to ensure the safety and health of grazing goats and forage. May attend goats

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<sup>2</sup> Section 655.171 affords ALJs the ability to "either affirm, reverse, or modify the CO's decision, or remand to the CO for further action."

and kids in barns during kidding season. May be required to ride and handle horses in a manner to assure the safety of the worker, co-workers, and livestock. Employee must be willing and able to: perform tasks capably and efficiently without close supervision, live and work singly or in small groups of workers in isolated areas for extended periods of time and maintain and manage remote housing locations in a safe and responsible manner. The job may entail working with and around farm machinery such as tractors for supplemental feeding purposes and ATVs for movement of livestock, periodically. Employee will work outdoors in all types of weather and may experience occasional exposure to herding hazards such as poisonous snakes and predators. 50 lb lifting and driving requirement is needed.  
(AF 32, AF 39).

On January 22, 2016, the Certifying Officer (“CO”) issued a Notice of Deficiency (“NOD”). (AF 18-21). The first deficiency dealt with the definition of a range under 20 C.F.R. § 655.201<sup>3</sup> (AF 20). It also dealt with range housing under 20 C.F.R. § 655.230. The CO stated that the following modifications were required:

As your application does not utilize range housing, you must explain the extent to which your operation satisfies each of the factors in the definition [of range under 20 C.F.R. § 655.201] for at least 50 percent of the workdays in the contract period [as required by 20 C.F.R. 655.200(b)(2)]. You must specifically address how while in the fixed-site housing provided the herder will be altered to situations requiring the herder’s immediate attention (e.g., predator attack) and how long it will take the herder to reach the herd to address the situation.  
(AF 20).

The second deficiency dealt with workers’ compensation under 20 C.F.R. § 655.122(e)(1)-(2). The CO required that Employer submit a valid workers’ compensation certificate.

On January 28, 2016, Employer submitted its response to the Notice of Deficiency. Employer complied with the second deficiency by submitting its Certificate of Liability Insurance. (AF 15). Therefore, only the deficiency regarding the definition of a range is the subject of this appeal to the Office of Administrative Law Judges.

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<sup>3</sup> Range. The range is any area located away from the ranch headquarters used by the employer. The following factors are indicative of the range: it involves land that is uncultivated; it involves wide expanses of land, such as thousands of acres; it is located in a remote, isolated area; and typically range housing is required so that the herder can be in constant attendance to the herd. No one factor is controlling and the totality of the circumstances is considered in determining what should be considered range. The range does not include feedlots, corrals, or any area where the stock involved would be near ranch headquarters. Ranch headquarters, which is a place where the business of the ranch occurs and is often where the owner resides, is limited and does not embrace large acreage; it only includes the ranch house, barns, sheds, pen, bunkhouse, cookhouse, and other buildings in the vicinity. The range also does not include any area where a herder is not required to be available constantly to attend to the livestock and to perform tasks, including but not limited to, ensuring the livestock do not stray, protecting them from predators, and monitoring their health. 20 C.F.R. § 655.201.

In response to the first deficiency, Employer stated:

Our worker will live in fix[ed] housing only 50 feet from our range land. He will spend over 60-70% of his time on the range working on fencing around water sources and herding the cattle.

Recently we had a message in the night about a cow hit on the road and another time a cow having trouble calving. He will be able to respond immediately to these emergencies.

There is no reason he should live in a tent a few feet away from the existing house.

(AF 13).

On March 2, 2016, the CO denied Employer's application. (AF 3-7). The CO stated that Employer "failed to provide sufficient information to establish that its job opportunities involve the herding or production of livestock work performed on the 'range' for the majority of the workdays in the contract period, as is necessary for processing under the provisions of the H-2A Herder Final Rule." (AF 5).

On March 5, 2016, Employer filed a request for expedited administrative review. (AF 1-2). Although Employer submitted new evidence/arguments in its appeal letter, these cannot be considered by an Administrative Law Judge on appeal because they were not considered by the CO. See 20 C.F.R. § 655.171. The undersigned issued a Notice of Docketing and Order Setting Briefing Scheduled on March 10, 2016, setting March 15, 2016 as the deadline for the submission of briefs. On March 15, 2016, this office received the Solicitor's brief on behalf of the CO. Employer did not submit a brief.

## DISCUSSION

In its Notice of Denial, the Certifying Officer stated that it could not determine whether the employee would be working on a range, as defined by the applicable regulations. (AF 7). However, per the regulations, there are several factors regarding what constitutes a range.

1. "[I]t involves land that is uncultivated."
2. "[I]t involves wide expanses of land, such as thousands of acres."
3. "[I]t is located in a remote, isolated area."
4. "[T]ypically range housing is required so that the herder can be in constant attendance to the herd."
5. "[A]ny area where a herder is required to be available constantly to attend to the livestock and to perform tasks, including ensuring the livestock do not stray, protecting them from predators, and monitoring their health."

See 20 C.F.R. § 655.201.

Per the regulations, "[n]o one factor is controlling and the totality of the circumstances is considered in determining what should be considered range." 20 C.F.R. § 655.201. Under the totality of the circumstances described below, Employer has established that the work that the employee will be performing as a goat herder meets the requirements of range work.

In its response to the CO's Notice of Deficiency, Employer stated that the employee "will spend over 60-70% of his time on the range working on fencing around water sources and herding the cattle." (AF 13). Pursuant to the applicable regulations, "repairing fences used to contain the herd" is an "example of ranch work that is closely and directly related" "to herding and/or the production of livestock." 20 C.F.R. § 655.201. Employer's job description states that the employee will "herd flock to appropriate grazing area," "bed down goats near evening site," and "round up strays using dogs and/or fence." (AF 32). Employer's job description also states that employee will be living in "isolated areas for extended periods of time." (AF 39). Employer's job description also states the employee "will administer medication to goats" and will "assist with kidding." Employer stated in its response to the Notice of Deficiency, examples of maintaining the health of the herd. "Recently we had a message in the night about a cow hit on the road and another time a cow having trouble calving. He will be able to respond immediately to these [health] emergencies." These activities are indicative of activities that occur on a vast range, i.e. land that includes "wide expanses of land" and is "uncultivated," "remote," and "isolated." These activities are indicative of activities that occur when a goat herder is on the move on the range. These activities are indicative of activities "necessary to monitoring their health." 20 C.F.R. § 655.201. The act of herding would not be necessary in a small, cultivated, or penned area. The undersigned finds that "[n]o one factor is controlling and the totality of the circumstances is considered in determining what should be considered range." Therefore, Employer meets the first, second, and third indicia of range work listed above.

In response to the CO's Notice of Deficiency, Employer stated that employee "will live in fix[ed] housing only 50 feet from our range land." (AF 13). "He will be able to respond immediately to emergencies." Although the employee will not be living in range housing, the undersigned finds that by living a mere 50 feet from the range, Employer has established that employee will be able to respond to any emergencies that occur regarding the herd on the range land. As the CO correctly noted, the use of range housing is not dispositive to the definition of a range under 20 C.F.R. § 655.201.

In its H-2A Application for Temporary Employment Certification, Employer stated that the employee would be "[r]equired to be available 24 hours per day, 7 days a week and spend the majority of workdays on the range." (AF 32). In its response to the CO's Notice of Deficiency, Employer stated that the employee "will spend over 60-70% of his time on the range working on fencing around water sources and herding the cattle." (AF 13). Employer stated that the employee would "guard flock from predatory animals," "move livestock," "round up strays using dogs and/or fence," "administer medication to goats as needed," and "assist in kidding." (AF 32, AF 39). Employer also stated that employee "will be able to respond immediately to emergencies." (AF 13). Therefore, based on the "totality of the circumstances" and the job description submitted by Employer, the undersigned finds that Employer meets the fifth indicia of range work listed above.

Under the totality of the circumstances, the undersigned finds that Employer has established that the employee will be involved in herding or production of livestock work performed on the range for the majority of the workdays in the contract period, as required pursuant to 20 C.F.R. §§ 655.200-655.201.

## CONCLUSION

Based on the evidence in the record, the job description, and the regulations, the undersigned finds that Employer has established that the work to be performed by the employee qualifies as herding or production of livestock on the range, as defined in 20 C.F.R. § 655.201. Therefore, the undersigned reverses the Certifying Officer's decision. The undersigned approves the temporary labor certification for one Farmworker, Farm, Ranch, and Aqua cultural Animal job opportunity under the Temporary Agricultural Employment of H-2A Foreign Workers in the Herding or Production of Livestock on the Range per the H-2A Herder Final Rule, 20 CFR 655 Subpart B, for the period from February 1, 2016 to November 30, 2016.

## ORDER

In light of the foregoing discussion and based on the evidence in the administrative file, it is hereby **ORDERED** that:

1. The Certifying Officer's Denial of the temporary labor certification for one Farmworker, Farm, Ranch, and Aqua cultural Animal job opportunity under the Temporary Agricultural Employment of H-2A Foreign Workers in the Herding or Production of Livestock on the Range per the H-2A Herder Final Rule, 20 CFR 655 Subpart B, for the period from February 1, 2016 to November 30, 2016 is **REVERSED**.
2. Employer's request for a temporary labor certification for one Farmworker, Farm, Ranch, and Aqua cultural Animal job opportunity under the Temporary Agricultural Employment of H-2A Foreign Workers in the Herding or Production of Livestock on the Range per the H-2A Herder Final Rule, 20 CFR 655 Subpart B, for the period from February 1, 2016 to November 30, 2016 is **GRANTED**.
3. This matter is **REMANDED** to the Certifying Officer for further processing consistent with this Decision and Order.

**SO ORDERED.**

DANA ROSEN  
Administrative Law Judge

DR/ERH/mja  
Newport News, VA