

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
BOSTON, MASSACHUSETTS

Issue Date: 09 May 2016

OALJ Case No.: 2016-TLC-00018

ETA Case No.: H-300-15341-419670

In the Matter of:

D & R LIVESTOCK,
Employer.

Certifying Officer: Lynette Wills
Chicago Processing Center

Appearances: Christopher J. Schulte, Esq.
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For the Certifying Officer

Before: TIMOTHY J. McGRATH
Administrative Law Judge

DECISION AND ORDER

I. STATEMENT OF THE CASE

On February 17, 2016, D&R Livestock (“Employer”) filed a request for a de novo hearing reviewing the Certifying Officer’s (“CO”) determination in the above captioned temporary agricultural labor certification matter. *See* 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184 and 1188, and the implementing regulations set forth at 20 C.F.R. Part 655, Subpart B (collectively, H-2A program). On February 24, 2016, I received the appeal file. At the request of Employer and the U.S. Department of Labor Solicitor’s Office, Employment and Training Legal Services (“Solicitor”), I allotted the parties several weeks to engage in settlement

discussions. The parties ultimately indicated they were unable to resolve the matter, and thereafter I set the matter for hearing.

On April 25, 2016, I conducted a telephonic hearing because the witnesses, parties, and counsel were scattered throughout the United States. The parties were represented by counsel and afforded the opportunity to present evidence and oral arguments. The Hearing Transcript is referred to herein as “TR.” Testimony was heard from Gilbert Gonzalez, Housing Inspector for the California Employment Development Department, Workforce Services Division, Agricultural Services, H-2A Program; Lynette Wills, Certifying Officer in the Office of Foreign Labor Certifications, Employment and Training Administration, U.S. Department of Labor; Janet Banos, Senior Immigration Policy Analyst at the Office of Foreign Labor Certifications, Employment and Training Administration, U.S. Department of Labor; Kelly Griffith, Executive Director, Mountain Plains Agricultural Services; and, Luke Detar, Manager at D&R Livestock which is located in Dixon, California.

At hearing, the parties offered documentary evidence which was admitted as Certifying Official’s Exhibits (“CX”) 1-3 and Employer’s Exhibits (“EX”) 1-9. One Joint Exhibit (“JX”) was also admitted into evidence. The parties were provided an opportunity to submit post-hearing briefs; however, only Employer submitted a brief. The record is now closed.

II. STIPULATIONS AND ISSUES PRESENTED

The parties’ sole stipulation provided that the “the appeal file in this case contains the complete record that was before the [CO] when she made her decision.” JX-1 at 4.

The issues remaining to be adjudicated are: 1) Whether the employer has met the requirements of the new Herder provisions of the Temporary Agricultural Employment of H-2A Foreign Workers in the Herding or Production of Livestock on the Range (H-2A Herder Final Rule) found at 20 C.F.R. §§ 655.200-.235 and 80 Fed. Reg. 629958 (Oct. 16, 2015)?; 2) Pursuant to 20 C.F.R. § 655.200(a), whether the employer’s application to hire temporary agricultural foreign workers for his ranch constitutes the “herding or production of livestock on the range, as defined in § 655.201?”; and 3) Whether the employer’s herding activities occur on the “range” as defined in 20 C.F.R. § 655.201 and has the employer demonstrated that the regulatory factors cited in the rule and noted below demonstrate that these activities occur on the range? *Id.*

III. FINDINGS OF FACT

A. Testimony of Gilbert Gonzalez

Gilbert Gonzalez is a housing inspector for the State of California. TR 12. In that capacity, he completes housing inspections for the H-2A program. TR 12. More specifically, he travels out to locations and inspects “housing and make[s] sure it’s livable, make[s] sure it’s up to standards. [He] measure[s] all the living areas, make[s] sure they have the 350-square foot per

person for the sleeping areas, rather. If it's permanent housing, [he] make[s] sure that it has the space for all occupants.”¹ TR 12-13.

Gonzalez confirmed he inspected the Employer's five housing units. TR 13. All five houses passed his inspection. TR 14. He testified it was not difficult to travel to Employer's houses because each house is located on a gravel road that is connected to a paved, county road. TR 14. The distance of the houses from the paved road varies—“some are within fifty yards” whereas others are “several hundred yards away from the main road.” TR 14. The houses are located about fifteen to twenty miles outside the nearest town.² TR 16.

Gonzalez testified that the only other businesses or houses near Employer's houses are “other ranches” that raise “cattle [and] sheep” because “that's about it in that area. It's all—that whole area's uncultivated.” TR 15. The CO's attorney further inquired about Gonzalez's characterization of uncultivated. TR 15. Gonzalez explained there are no crops; it's used for grazing and ranching horses, cows, and goats. TR 15. Notwithstanding the uncultivated nature of the land, Gonzalez acknowledged there are electrical lines and utilities on these roads, and at least some of the houses have mailboxes and mail service. TR 15.

CO's attorney asked Gonzalez to review a series of photographs. TR 17-22. Gonzalez confirmed that the images showed accurate portrayals of some of Employer's housing units and surrounding areas.³ TR 17-22. There were no images of goats in the pens because goats are only stored in the pen for loading, holding, kidding, or lambing; outside of those temporary instances, the goats are “out in the grazing lands.” TR 25.

Gonzalez was asked to review an image of the Liberty Island Road location and asked if he considered it a remote and isolated area. TR 21-22; CX-3 at 16. Gonzalez replied, “They're a rural and remote area, but I don't believe they're isolated.” TR 22. Gonzalez explained that he defined isolated as “wilderness areas that we have that we can't use any motorized vehicles; that you either have to hike back or go back on horseback. I don't have any inspections that I cannot get to with my vehicle.” TR 23. Upon a closer inspection during cross examination, however, Gonzalez admitted that the alleged pictures of the Liberty Island Road location are images of a completely different ranch. TR 22-23.

B. Lynette Wills

Lynette Wills is a supervisory immigration program specialist at the Office of Foreign Labor Certification, Chicago National Processing Center. TR 35. She was the CO in this matter. TR 35, 43. As CO, her responsibilities include “the processing of H-2A applications” and

¹ Gonzalez explained that some employers use fixed-site housing, “but probably the large percentage of them use the campers.” TR 27. When asked to compare the two, he testified that “the fixed-site housing is more comfortable. You have running water[;] you have toilet facilities that are there, showers. You have the comfort of walking around inside the house.” TR 27.

² The closest developed areas to Employer's location are Dixon and Davis. TR 29. Gonzalez confirmed he has inspected housing for other H-2A employers that have been as close as twelve miles and as far as eighty miles from these towns. TR 31-32.

³ The CO was unable to acquire a photograph of the Hastings area, because of a no trespassing sign. TR 19-20; CX-3 at 8.

“review[ing] and provid[ing] assistance to . . . case processing analysts as well as providing policy guidance and direction in the processing of cases.” TR 35. She also contributes to the administration and implementation of the new regulations dealing with herding of livestock. TR 35. In fact, she “was given the responsibility of the processing and moving [her office’s] analysts into a comfort zone in processing these applications under this new regulation.” TR 35.

Wills testified at length about how livestock herders are treated differently than other H-2A employers under the new regulations. TR 35-40. She explained that due to the nature of livestock herding—working “24/7” in remote, mountainous and desert areas with no interaction with employers for sometimes over a week or more—employers are exempt from record keeping requirements. TR 36-37. Employers are also exempt from having to advertise employment opportunities in newspapers and are permitted to employ their workers for up to 364 days a year and rely on different criteria in calculating wage rates.⁴ TR 38-40.

In order to qualify for the benefits promulgated under the new herding regulations, Wills explained that an employer “must include a statement that the workers are on call for up to 24 hours a day, seven days a week” and “spend the majority of the work days”—i.e., more than 50% of their time—“during the contract period in the herding or production of livestock on the range.” TR 40; 20 C.F.R. § 655.210(b). An employer’s “range” must satisfy the requirements of 20 C.F.R. § 655.201:

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 ranchhouse, 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; *see* TR 40-41.

⁴ During cross-examination, Wills acknowledged that she misspoke when she attempted to explain the changes made to the pertinent livestock H-2A regulations. TR 59-65. She admitted that even under previous iterations of the now official regulation, employers were exempt from the newspaper advertising requirement. TR 59. Also, the earlier versions also do not contemplate livestock herders working in mountainous or desert conditions. TR 60-65. In contrast, it discussed grazing on the range and pastures. TR 62. Neither pasture nor range were defined in the past versions; in fact, pasture was expunged from the now final regulation all together. TR 62. Wills interpreted the deletion of pasture to mean that a plot of land that is “fenced and/or cross-fenced” could no longer qualify because it is not remote and isolated. TR 64-65.

Wills testified that in applying the regulations to Employer's application, she concluded the Employer failed to satisfy several prerequisites. TR 41-42. First, Wills stated she "looked at the fact that we did not feel that the Employer's operation was either remote or isolated, and did not provide any range housing." TR 42. Neither the current regulations, nor past iterations, define the terms "remote" or "isolated." TR 75. Wills provided her "personal view" at the hearing. TR 64. In contrast to a pasture, that is generally "looked at as being fenced and/or crossed fenced," a remote and isolated location "would be a location that is way out, that you don't normally have human predators, you don't have running water, you don't have the electricity, you don't have the easy access in and out necessarily to the grazing areas via state maintained roads." TR 64-65.

Based on the information provided by Employer in the ETA Forms 9142 and 790, "in addition to Google mapping of the housing" and worksites,⁵ Wills concluded "they just appeared to be in relative close proximity and did not appear to be what we could consider to be remote or isolated." TR 44-45. Despite the fact that Employer's land consisted of approximately 6,500 acres of land, Wills maintained the Employer's application was devoid of information to demonstrate that the location of the grazing area was remote and isolated from the fixed-site housing. TR 47. "To the best of my recollection," she explained, "the Employer and/or agent indicated that the herd's ranges are located in various locations about 20 miles from their office in Dixon, which is about the same distance to the housing locations in and around Dixon." TR 47.

Secondly, Wills was unconvinced that "the workers would be in constant attendance to the herd or flock." TR 42, 44. She provided her understanding that herding goats requires "24/7 service" because goats are susceptible to predators such as coyotes, mountain lions, bears, wolves, in remote isolated areas of the Midwest and upper Northwest California, New Mexico, et cetera." TR 51-52. In this particular case, however, Wills understood "that because of location of this Employer's operation, which we've identified state-maintained roads, et cetera, that rather than encountering a large number of animal predators, that their biggest predators are humans that come in and steal the livestock or do them harm." TR 51. Wills admitted that this information was not proffered within Employer's application; the issue was discussed sometime after the denial. TR 70.

Employer was granted numerous opportunities to amend what Wills believed was an insufficient application; however, they never provided sufficient evidence to satisfy the standard. TR 44. Wills explained:

In attempting to determine, or to obtain more information about this Employer's operation, we did go back to them multiple times asking questions in our attempt

⁵ Wills discussed the reason for utilizing Google maps in their consideration:

And our purpose for Google mapping these was basically just to kind of get an understanding of where the housing units were, and where the grazing areas were around them. And the thing that kind of was immediately noticed is that there are a variety of other buildings close by and further out from this location on Delhi Road, and it did not appear to be either remote or isolated.

TR 48.

to learn more about the Employer's operation. And in doing so, we asked several times for information regarding their operation, about the remote, isolated areas, how workers would be able to be in constant attendance to the herd or flock if it was located some distance from the housing, and at no point did we feel like we received sufficient information that led us to believe that the operation was remote and isolated, or, in fact, that the workers would be in constant attendance if the herd or flock were located some distance from the housing.

TR 44.

Wills clarified, however, that the use of fixed-site housing was not inherently violative of the H-2A standard. The CO's counsel asked, "In regards to the fact that they're not using range housing here, that they have fixed-site housing, is that a determinant factor in your decision not to certify here?" TR 41. Wills answered, "No, it was not the determinant factor." TR 41. In fact, she testified that even if the workers brought the goats back to the fixed-site housing at night, that is not inherently problematic:

Certainly if the stock were bedded closer to the fixed-site housing units, the herder would have much more opportunity to hear if the herd or flock was calling out in distress for some reason. I don't know that this particular operation uses dogs. I don't believe that that came out in any of the questioning that went back and forth between the Employer or their agent and the Processing Center. In a lot of cases, employers use dogs to also help in the protection of the flock or the herd. But if the Employer were to bring the flock or herd back to—or very close proximity to the housing every night, that calls into question, once again, whether this operation is remote and isolated if they would be able to return them to that kind of close proximity to the housing every single night.⁶

TR 52. It is for this reason that most herding operations utilize mobile housing; it "allows the herder to stay with [the] herd as they move them from one grazing area to the other."⁷ TR 52.

Similarly, Wills testified the use of fencing is also not a direct violation of the statute: "There's nothing to prevent an employer from grazing or holding their stock in a fenced area, keeping in mind that the majority of their time must be spent on the range, and generally

⁶ Wills further elaborated on this point during cross examination:

[I]f they're grazing in remote, isolated areas, it would appear that if they were bringing them back to very close proximity to the fixed-place housing every day, then they wouldn't necessarily be traveling that great a distance, considering the fact that the flock or the herd would be wanting to graze along the way to get back out to the primary grazing area. And it just doesn't make a lot of sense to me to be bringing the herd or flock back every night, traveling over the same area that they're trampled down and could conceivably be ruining the pasture or grasslands that they're coming back and forth over every single day, unless it were a herding trail.

TR 75-76.

⁷ If the workers remained overnight with the goats in mobile units or a tent, Wills indicated that situation would be closer aligned with her understanding of herding in remote and isolated areas. See TR 77. She clarified, however, that she "received no indication that [that] occurs in this [Employer's] operation at all." TR 77.

speaking the range is remote and isolated, uncultivated, and exists of thousands of acres of land.” TR 50.

During cross examination, Employer’s attorney’s questions shed light on a number of topics that Wills summarily commented upon during her direct examination. TR 56-84. Wills was asked to recite an excerpt of 20 C.F.R. § 655.235: “An employer employing workers under 655.200 through 655.235 may use a mobile unit, camper or other similar mobile housing vehicle and remotely-located stationary structures along herding trails which meet the following standards.” TR 57; 20 C.F.R. § 655.235. Despite Wills’s earlier testimony, which “gave the impression that range housing equaled mobile housing only,” she admitted that the regulation “does allow remotely-located stationary structures along herding trails.” TR 58.

Next, Wills was asked to compare her understanding of remote and isolated to the testimony elicited from Gonzalez. TR 64-65. As previously discussed, Wills’s definition of remote and isolated consisted of a “location that is way out, that you don’t normally have human predators, you don’t have running water, you don’t have the electricity, you don’t have the easy access in and out necessarily to the grazing areas via state maintained roads.” TR 64. Gonzalez testified earlier in the hearing that the housing he inspects—whether mobile or fixed-site—is all reachable by car. TR 65-66. Wills could not explain the contradiction between her concept of remote and isolated with the reality of Gonzalez’s practical experience of driving to these locations. TR 66.

Employer’s attorney then explored Wills’s understanding of the permissible distance between a worker and the herd the worker is caring for. TR 66. She could not specify precisely how far a worker could be from a herd without endangering the goats. TR 67. Wills ultimately concluded that if a worker is “out of earshot” of a herd, that would be too far. TR 67-68. This concern for being able to hear the flock weighed heavily in Wills’s determination that Employer’s fixed-site housing was problematic. *See* TR 67. She testified, “[T]he herder who’s in the fixed-site housing, how would they know that the flock was in peril from any sort of predator. . . . [I]f a herder is asleep inside a fixed-site housing unit, you know, there’s a concern about whether or not that herder can actually hear what’s going on.” TR 67-68. Wills ultimately confirmed that a herder is satisfying his obligation of being on duty “24/7” and protecting the herd so long as the worker can hear the herd and get to the goats to resolve any issues “in short order.” TR 72.

Another variable that persuaded her to conclude that Employer’s circumstances did not warrant certification was Employer’s concern for human predators. TR 70. Wills confirmed that livestock theft occurs in other parts of the country. TR 70. Employer’s counsel asked if she believed that livestock theft occurs in areas that are “less isolated or less remote.” TR 70. Wills replied:

In some instances it may be. You know, I guess that there could be circumstances where somebody was out big game hunting and they didn't, you know, find what they were looking for and they came upon some other sort of livestock that they might take advantage of the situation, but I think you primarily see that in areas that are not necessarily remote and isolated.

TR 70.

Lastly, Employer's counsel sought clarification as to which of the four factors Employer failed to satisfy. TR 73. First, Wills clarified that she did not know whether the 6,500 acres of land was cultivated. TR 73. If Employer elicited testimony that indicated the grasslands were "naturally occurring and self-seeding native grasslands," she would agree that it's uncultivated. TR 74. Within that discussion, she made it clear that of regulation's four factors, the only unsubstantiated factor was the remote or isolated component. TR 74.

C. Janet Banos

Janet Banos is a senior immigration policy analyst at the Office of Foreign Labor Certification, Chicago National Processing Center. TR 91. She serves as the liaison on policy matters between the national office and the COs. TR 92. She did not make the final determination in this matter; however, she participated in the discussion about "the maps, the Employer's responses and the regulation, and tried to fit it into the definition of range." TR 92.

She testified that on return trip from visiting her mother in California, Banos attempted to take pictures of Employer's fixed-site housing locations on Delhi Road, Hastings Road, and Liberty Island Road.⁸ TR 92-93; *See* CX-3. She clarified that her agency did not assign this task to her; it was an opportunity she took advantage of simply because she was in the area. TR 93. She explained that firsthand knowledge of an Employer's site is rare: "It would be nice if we could have firsthand information about every case. We rely on the [State Workforce Agencies] for that. They're the ones who know the area. So in most cases, we would be relying on the SWA to tell us what the area's like." TR 112. In order to be certified, a State Workforce Agent, like Gonzalez, must be able to certify the housing is permissible—"every location has to be accessible in some way." *See* TR 112.

In the general area surrounding the housing locations, she observed "farm houses, cows, goats, [and] sheep," as well as "houses, . . . barns and farming operations, businesses, in the way you think in a subdivision" and a "silo that was about, less than a mile, a minute away from the Liberty Island Road." TR 94. Banos did not consider this area to be remote and isolated; rather, she testified that it was a rural community. TR 94.

Despite her best efforts, Banos was only able to take photos of the Delhi location because the other locations were not visible from the public road and, in one instance, she mistakenly took pictures of a neighboring property not operated by Employer. TR 108. She affirmed that she saw a ranch dog and only about a dozen goats; nowhere near the hundreds of goats Employer's herds would contain. TR 109. Also, it is important to note these pictures were taken on Tuesday, March 15, 2016; therefore, these pictures were not relied upon during the initial determination. TR 93.

⁸ To the best of her knowledge, Banos estimated that the Delhi and Liberty Island locations were fifteen minutes from Davis, California and Hastings "was more like twenty-five minutes further." TR 106.

D. Kelly Griffith

Kelly Griffith is the executive director of Mountain Plains Ag Service (“Mountain Plains”)—an agent association that assists ranchers in need of herders through the H-2A program. TR 114. She explained that Mountain Plains “serve[s] as agents only” and assists employers by helping them “complet[e] the paperwork based on the information they provide” and “providing information and disseminating the different guidance from DOL concerning regulations.” TR 114. Griffith testified she is very familiar with herding because she has “been participating in the sheeping industry since [she] was a very small child” because her family was in the herding business. TR 115. She, along with her staff, assisted Employer in completing the H-2A herding application. TR 115.

As a result of her working with Employer to complete the application, Griffith was familiar with Employer’s concerns about predators. TR 117-18. She believed the Employer was concerned about coyote, wild dogs, and the danger of human theft. TR 117. Employer’s attorney asked Griffith to comment on the prevalence of human theft throughout the country. TR 118. She confirmed that human theft is “absolutely” a threat throughout the seventeen states⁹ in which Mountain Plains operates:

Livestock theft is very widespread, and certainly not limited to proximity to housing or residential areas. In fact, I tend to think that people that are going to steal something don’t stay in populated areas. I’m aware of close to 400 head that went missing last year out of the mountains of Idaho and Utah, and they spent days flying helicopters, because it was a wilderness area. So I would contend that proximity to people does not necessarily eliminate the—or, excuse me, increase the prevalence of human theft.

TR 118. Even in areas that are more developed, Griffith clarified that this does not negate the threat of “four-legged predators”:

What we find that as more areas are developed, those predators are pushed onto open spaces, they’re—you’re really eliminating their hunting grounds. For example, when I managed the CFU BISUP (ph.) unit, we were surrounded on three sides by residential units and we dealt with mountain lion kills on a regular basis, as well as coyote kills. We were no more than 100 feet from the suburbs.

TR 118. Griffith commented that the CO’s concern about potential predators was not an issue raised during the initial application and denial; the CO’s “request for information centered around housing and from a mobile versus fixed-site and range standpoint.” TR 120.

Griffith did not believe the Employer’s proximity to the nearest town—about fifteen to twenty miles—was problematic for its H-2A application. TR 119. She has “multiple

⁹ Mountain Plains assists employers with H-2A applications in seventeen different states, including: California, Oregon, Washington, Hawaii, Texas, New Mexico, Wyoming, Colorado, and Utah. TR 127. Griffith clarified that the employers who have received special procedure certifications are not limited to those in mountainous areas. TR 127.

employers” that have been granted certification in similar distances. TR 119. In fact, she is aware of one certified employer—located in the same area as Employer—who is “only 3.2 miles from town.” TR 119.

Employer’s attorney and Griffith discussed how far workers typically camp from where the herd bedded down for the night:

Q. Okay. In your experience, and again, if you know, with herders that would operate out of mobile housing in, say, mountainous areas, in Wyoming, where you are, in Idaho, or Utah, how far would they camp from where they would bed the herd down for the night, on average, or as a range?

A. It certainly depends on where they're at in their grazing rotation, but it is not uncommon to be a mile or even further from where the sheep or—well, not goats in the mountain range, but where the sheep bed down. Animals don't tend to bed down directly beside a camp. They bed down near water, or near a sufficient feed source, or maybe it's a meadow where they feel a little more sheltered. But they are not directly outside the camper door of a mobile unit.

Q. Okay. But a herder sleeping in a unit like that, if they heard that the herd was in some distress, either a dog bark or noise from the sheep, they would be able to respond to that quickly?

A. Yes, they would. Similar to how they'd respond in a fixed-site house.

TR 120-21.

Although Griffith has spent most of her life in the herding industry, she admitted she struggles to define the regulatory language of remote and isolated. TR 121. She confirmed that she is not aware of a definition for those terms and elaborated: “And I've struggled with that. I don't know what the measuring stick is. In my mind, it is relative to where you're located in the country. Remote for me is a lot different than remote for California.” TR 121. In the case at hand, she confirmed that both Employer’s grazing area and the location of the houses qualify as remote and isolated. TR 125-26. She admitted that perhaps in other areas, like Wyoming, Employer’s farm would not satisfy the remote and isolated standard because of its proximity to other ranches, a silo, and downtown Dixon. TR 126. In this part of California, however, Griffith maintained that Employer’s operations qualify as being located in a remote and isolated area. TR 126.

E. Luke Detar

Luke Detar is a manager for the Employer. TR 129. It is a family-owned and operated business that has existed for several generations. TR 130, 142. Detar himself has been working with the H-2A program for twelve years and has always filed under the special procedures program for herders. TR 130. Employer raises about 3,000 to 5,000 goats each year. TR 130. The workers that Employer acquires via the H-2A program are responsible for “trimming feet, moving livestock around, . . . fixing fence, general monitoring of the goats’ health, and . . . keep[ing] them away from predators.” TR 131. Detar confirmed that these workers spend more than fifty percent of their time on the range with the goats. TR 157.

In order to communicate with its workers, Employer typically utilizes cell phones. TR 153. Detar noted, however, that there is “spotty cell service up there” that does not cover the entirety of Employer’s land. TR 153. In addition to cell phones, Detar said that he will physically check in with his workers intermittently; however, he clarified this interaction is not frequent enough to know how many hours they work each day. TR 162.

In contrast to the pictures Banos produced, Detar testified the photographs Employer provided are an accurate depiction of the land on which they herd their goats. TR 131, 133-36; EX-2; EX-3; EX-4; EX-5; EX-6; EX-7; EX-8. In owning somewhere between 6,000 and 6,500 acres of land, Employer is considered a “larger land owner” in the region. TR 136. 148. Detar clarified that the land is uncultivated; Employer does not “sow seeds” or “plant anything.” TR 136. Instead, Employer uses the goats to “address certain grazing needs” such as eradicating invasive species, targeting an area it doesn’t want to spray, or correcting an area with a poor composition of the grasses on the range. TR 135-36. Sometimes, Employer helps its neighbors by having the goats graze on their land. TR 137.

In terms of predators, Detar testified that “coyotes and wild dogs would be probably [the] one and two” biggest concerns. TR 138. He estimated Employer “probably lose[s] between 40 and 50 head to predators a year.” TR 138. Workers are not armed with weapons. TR 138. Employer utilizes guard dogs and border collies and, if there was a problem, they contact the county trapper to help catch and dispose of the vermin.¹⁰ TR 139. Human predators, Detar testified, are intermittently an issue:

You know, certain times of year, on rare occasions, you know, we will have people come to our ranch look to steal things, looking to steal livestock, looking to steal things, and the presence of herder on-site discourages that. You know, people aren't as likely to enter the ranch when people are there. We had nobody there, you know, and typically when they want to do things like that, it's in the middle of the night, it's on a weekend, you know, it's on a holiday, it's just a problem that we have, and need to address it. I mean, I can think of an example of we just had, you know, 60 goats stolen off our ground down there, and we filed it with the sheriff and they're looking to find it but, you know, this, in this particular case, that happened three months ago.

TR 139. It’s not uncommon for people to steal goats and sheep in Employer’s area because it’s easy to shoot a goat and toss it in a pickup. TR 140.

Employer’s attorney asked Detar to explain how far workers position themselves away from the herd at night:

Q. Okay. Another topic that had come up before was the distance, how far away would the—when the herders will bed the herd down for the night and then go to these fixed-site houses that we talked about, either at the Hastings, or the

¹⁰ More often than not, workers can ride their motorcycles toward the problem and any predators will run off. TR 155.

Delhi, or the Liberty Road location, about how far would the herd bed down at night compared to where the herder would be?

A. Well, it varies, Chris. I mean, like I said, a lot of it depends on the forage and water on those particular sectors and likelihood of a problem. I mean, if we know we're having more predator problems, we're more likely to move them closer where they can, you know, hear or see a problem that may happen. If everything's going good—but, in general, with the way the housing is located, you know, with the two locations, one's on one half of the ranch and the other one's on the other half of the ranch, and within those housing locations, they can pretty much cover their half of the ranch by either seeing or hearing, and, you know, there's not a lot of background noise out there either. So, I don't know who brought it up earlier, but it was accurately described. When goats are in distress, you should know it if you're within, you know, earshot or eyesight of it, because they, you know, they're getting attacked for their life; they're not quiet.

Q. Okay. So even if they're in these fixed-site houses, the herders are still going to know if something's going on, if there's a predator, they'll know about it?

A. Correct.

TR 142-43.

During cross examination, the CO's counsel further inquired about the surrounding area in relation to its operations:

Q. Now, we've had some testimony—have you been listening to it?

A. Yes, I have. Yes.

Q. Okay. Basically we talk about the fact that there's a number of paved roads, there's electrical utilities there, there is mailbox service, there's homes, as well as ranches and things like silos on that road. So there is a fairly substantial amount of folks in that area that either live or work in that area. You would agree with that, correct?

A. No. I don't think so. You know, like I said, I would stay in that area and I'm very familiar with it, grew up there my whole life, you know. If you were to draw a map between Davis, Dixon, that area that I'm talking about, the average occupancy is probably one person per 2,000 acres or 3,000 acres.

Now, typically, they tend to be in bunches, like you guys showed, you know, where we have the Hickmans (ph.) live there on the corner; we have Marx (ph.) that live on the other corner. Then we have Liberty Island warehouse; that hasn't been in production for 35 years. And then if you look to the south, you don't see another house for two miles. And if you go another south, you don't see it for five.

And if you get out to the Rio Vista location, it's very common that you'll, you know, it'll get wider. You may not see houses for five or ten miles, just based on the situation. And the majority of the houses that are in those locations are used for, you know, ranch housing.

TR 151-52. CO's attorney then turned his focus more narrowly to Employer's grazing land:

Q. Okay. But in terms of your grazing fields where you actually have the workers working, you're not looking at five or ten miles in one direction. You may be looking at a few miles in one direction, correct?

A. The land that we graze, well, I mean, I'd have to sit down and look at it but, you know, if I took the north end of the ranch fence and went to the south—

Q. Right.

A. —you know, as far as I graze—and the best one to probably look at is there's one picture there of the levee, I think we referenced it earlier. Let me pull it up, Vince, there might be viewable.

THE WITNESS: I believe it's the fourth picture you took, Chris. What exhibit are we calling that?

MR. SCHULTE: That'll be EX-5. It's the one immediately after the one of the nannies and kids.

THE WITNESS: Okay. You know, if you take a look down that levee, that levee probably runs 12 miles. Well, we graze that levee. And, you know, if you go that way, that's—it's 10, 12 miles down that way, and there's no housing or anything. That's just an area that the only thing that can graze that is goats, which is what's made us successful is being able to graze opportunities like that in conjunction with the county, another parties, because it's the best way to handle that range.

TR 152-53; *see* EX-5.

IV. DISCUSSION

As previously discussed, the H-2A regulations utilize a four factor test to determine whether a piece of land qualifies as “range”:

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 ranchhouse, 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.

Range housing. Range housing is housing located on the range that meets the standards articulated under Sec. 655.235.

20 C.F.R. § 655.201.

The referenced section providing the standards for range housing provides, in pertinent part: “An employer employing workers under 655.200 through 655.235 may use a mobile unit, camper or other similar mobile housing vehicle and remotely-located stationary structures along herding trails which meet the following standards.” 20 C.F.R. § 655.235.

The CO does not allege that the Employer’s operations fail to utilize wide expanses of uncultivated land and range housing. The CO maintains, however, that Employer’s application must be denied because it cannot satisfy the one remaining factor of the four: remote and isolated. Based upon my review of the testimony at the hearing and exhibits submitted therein, I am unpersuaded by the arguments proffered by the CO and find that Employer’s land is remote and isolated. In the alternative, even if Employer’s land is not remote and isolated, the H-2A regulations establish that no one factor is controlling and a totality of the circumstances analysis must be used. Therefore, I find that the CO’s denial should be reversed.

The testimony proffered by Wills, the CO in this matter, was rife with disjointed and unsubstantiated arguments. In an effort to validate the decision to deny Employer’s application, she provided her own definition of remote and isolated. She averred it would consist of “a location that is way out, that you don’t normally have human predators, you don’t have running water, you don’t have the electricity, you don’t have the easy access in and out necessarily to the grazing areas via state maintained roads.” The CO did not cite any statutes, regulations, case law, or excerpts from a notice and comment period to justify this point of view. Rather, the CO relied upon barely comprehensible Google maps and tangentially relevant photographs—acquired after the denial—to justify her position. *See supra* pp. 4-5.

Even more problematic is that the CO could not resolve the rift between her wilderness abstract and the fact that all of the housing locations Gonzalez inspects in California are accessible by car. There is no evidence to suggest that the new regulations were drafted with the intent to vastly reduce the amount of lands eligible under the H-2A herder provisions and reject areas like Employer’s throughout California and the country. Under such a policy, only a minute fraction of the lands across the country would qualify. If the drafters intended such a drastic change, then they would have provided much more explicit instruction to remove any uncertainty about their intentions. *See supra* pp. 4-5, 7.

During cross examination, Employer’s attorney discredited the CO’s testimony. Wills admitted that the regulations explicitly provide fixed-site housing is permissible “range housing” and could not explain why a worker in fixed-site housing would be any less capable of reacting to a problem with the herd than a worker in mobile housing. The CO acknowledged that so long as a herder is within earshot of the herd, the worker is satisfying his obligation of being on duty “24/7.” Lastly, I found her speculative testimony about big game hunters and the prevalence of human theft in less remote and isolated areas to be unreasonable. Such testimony did not appear

to be based on any sort of personal knowledge. Such testimony appeared to be offered as a justification for the rejection of Employer's application. *See supra* pp. 6-7.

In contrast to Wills, I found the testimony of Griffith and Detar to be credible and forthcoming. Griffith's years in the herding industry provided a lens through which I could analyze Employer's application. Her definition of remote and isolated was much more practical and in closer alignment with the objectives of the H-2A program than Wills's understanding. Additionally, her testimony about the proximity of other certified employers to towns, the permissible distance between herders and goats, human predators, and the impact, or lack thereof, on a herder's response time when they reside in fixed-site housing was very persuasive. Likewise, Detar's testimony further convinced me that their vast acreage of uncultivated land is situated in a remote and isolated area. It is apparent Employer's thousands of acres of uncultivated land, situated fifteen to twenty miles away from the closest town and surrounded by similarly large tracts of rural land, have no utility other than herding. *See supra* at pp. 9-13.

For the reasons discussed herein, I find Employer has demonstrated that its herding business operates on a remote and isolated range. In the alternative that Employer's land is not remote and isolated, I still find that the land qualifies as a range by weighing the totality of the circumstances presented in the record.

ORDER

Accordingly, the CO's decision denying labor certification is **REVERSED**, and the application for temporary labor certification is remanded for processing in accordance with the H-2A regulations.

SO ORDERED.

TIMOTHY J. McGRATH
Administrative Law Judge

Boston, Massachusetts