U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 30 June 2020

BALCA Case No.: 2020-TLC-00083
ETA Case No.: H-300-20127-546806

In the Matter of

BROWARD BEEKEEPING AND HONEY CO., LLC,
Employer.

Appearances: Renee' Hoover
Davie, Florida
Pro Se

Nicole Schroeder, Esquire
Office of the Solicitor
U.S. Department of Labor
Washington, D.C.
For the Certifying Officer

DECISION AND ORDER

This matter arises under the temporary agricultural labor or services provision of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1188 and its implementing regulations at 20 C.F.R. Part 655, Subpart B. The temporary alien agricultural labor certification ("H-2A") program permits employers to hire foreign workers to perform agricultural work within the United States on a temporary basis. Employers who seek to hire foreign workers under this program must apply for and receive labor certification from the U.S. Department of Labor (DOL).[1] Such applications are reviewed by a Certifying Officer ("CO") in the Office of Foreign Labor Certification of the Employment and Training Administration (ETA).

On June 15, 2020, Broward Beekeeping and Honey Co., LLC ("the Employer") filed a request for expedited administrative review of the Final Determination issued by the CO in the above-captioned H-2A temporary alien labor certification application. I received the Administrative File ("AF") from the Employment and Training Administration ("ETA") on June 23, 2020. The CO thereafter submitted a brief on June 26, 2020. Pursuant to 20 C.F.R. § 655.171(a), this decision and order is based on the written record and is issued within five business days of the receipt of the AF.

[1] 8 C.F.R. § 214.2(h)(6)(iii).

STATEMENT OF THE CASE

The Administrative File

On May 6, 2020, the Employer filed an *H-2A Application for Temporary Employment Certification* on ETA Form 9142A ("Application"). (AF 57). The Employer's Application requested certification for one Sheepherder for the period beginning September 1, 2020, and ending August 30, 2021. (AF 63) The Employer sought to employ the worker under the job title "Range Sheep Herding and Production." (AF 67). The temporary need was due to her father's current inability to assist with farm operations. (AF 79). The Employer stated that an applicant must have a minimum of six months experience in performing work related to range sheep herding and production. (AF 67–68). Additionally, the Employer stated that the applicant must be familiar and experienced in using hoof trimming clippers and a horn trimming saw." (AF 68). The Employer listed the following as tasks of the job:

> A.M. morning walkabout to verify Mother Ewes and Baby Lambs well being, after the night (when the coyotes come out). Check Coyote snares, dispatch coyotes as needed. One walkabout in the P.M. evening to check Mother Ewes and Baby Lambs well being. Various other sheep maintenance chores throughout the day such as Trimming Hooves, Trimming Horns, worming, etc. Then, "on call" at night, during emergency time of predations, when alerted by the sheep's frantic calling. There is also periodic round up for market sales. 35 Hours per week minimum Hours 24/7 on call[.]

(AF 67).

On May 8, 2020, the Certifying Officer ("CO") issued a Notice of Deficiency ("NOD"). (AF 146). The CO found nine areas where the Employer's application was deficient and stated the required modifications for each. (AF 44–51). Importantly, the CO noted that the work to be performed did not qualify as "herding or livestock production on the range for more than 50 percent of workdays in the contract period as required by 20 C.F.R. 655.200(b)(2)." (AF 49). The CO noted that under the definition of range at 20 C.F.R. 655.201, four factors, with no one factor controlling, tend to show whether range work is taking place: "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." (AF 48). The CO further noted that "[t]he 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." (AF 49); 20 C.F.R. 655.201.

The CO stated that the Employer's application did not describe range housing. (AF 49). Therefore, the Employer was asked to "explain the extent to which the work to be performed for your operation qualifies as herding or livestock production on the range." *Id.* Furthermore, the applicant needed to specifically address how the work satisfied each of the four listed factors for more than 50 percent of the workdays in the contract period, how the worker would be alerted to situations requiring the worker's immediate attention while in the fixed site housing, and how

long it would take the herder to reach the herd in such a situation. *Id.* Lastly, the Employer was required to address in its response how much of the work will be performed in areas within the operation's structures, "such as feedlots and corrals, or any area near ranch headquarters." *Id.*

Subsequently, the Employer responded to the NOD, addressing the different reasons for the denial. (AF 32-36). She specifically addressed the issue of eligibility for range herding and livestock procedures, writing:

> At night, the herd instinctively seeks the presence of the Sheepherder and a well lit area for their protection. I use a 12 Volt Mobile LED light system to provide lighting as a deterent [sic] to Coyotes, but it is not a complete repellant. I have used this system and proven it's [sic] effectiveness over time. The Sheep will bed down and sleep in the immediate vicinity of the Sheepherders Camper site located towards the mid section of the Range. Any unwanted visitations by predators is immediately made known to the Sheepherder, by the commotion of the Sheep. Under normal circumstances the issue is resolved with a periodic look about through the night.
>
> During the day, the Sheepherder will constantly monitor the herd visually for any major mishaps, including separations, scattered, lost and 'at risk' animals, injuries, hardware disease, etc.
>
> As to your question as to what the Sheepherder will do during the day, pertaining to the Sheep on the Range. There are noxious weeds and bushes that require maintenance throughout the Range Pasture and the blockage of holes dug under the fence, by the Coyotes. There is minimal work for the Sheepherder to do around the Ranch headquarters. Specifically, 70% of the work will be on the Range and 30% will be around the Ranch headquarters.

(AF 35).

On June 10, 2020, the CO issued a second NOD, focusing solely on the issue of eligibility for processing under the range herding and production category. (AF 6–8). Explaining once again that, *inter alia*, vast acreage, remoteness, and isolation are indicative of whether land is "range," the CO noted that "the [E]mployer lists 3000 SW 154 Davie, Florida as the place of employment. The [E]mployer's housing is also at this location." (AF 6–7). The CO further noted that "a google search indicates that the worksite and housing" are "in the midst of a residential area." (AF 7). Because of the worksites lack of remoteness and expansiveness, it could not be considered "range". (AF 7–8). Additionally, the Employer's response "failed to address how much of the work will be performed in areas with the operation's structures, such as feedlots and corrals, or any area near ranch headquarters[,]" and provided "[n]o documentation to support the how while in the fixed-site housing provided the herder will be alerted 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." *Id.* Once again, the CO denied the Employer's application.

Thereafter, on June 13, 2020, the Employer requested an expedited administrative review of this matter. (AF 1). The Employer reiterated its need for an open range sheepherder. I note that I cannot consider any new information contained in this letter, as it was not before the CO when it rendered its decision. *See* 20 C.F.R. § 655.171.

APPLICABLE LAW

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 amici curiae."[2] A Certifying Officer's denial of certification must be upheld unless shown by the employer to be arbitrary or capricious, or otherwise not in compliance with law. *J and V Farms, LLC*, 2016-TLC-00022, at 3 (March 4, 2016) (H-2A); *Brook Ledge, Inc.*, 2016-TLN-00033, at 5 (May 10, 2016) ("BALCA reviews decisions under an arbitrary and capricious standard.") (H-2B). Accordingly, an Employer may not refer to any evidence that was not a part of the record as it appeared before the CO.

As an initial matter, it is settled that, throughout the labor certification process, the burden of proof in alien certification remains with the employer. *See, e.g., Garber Farms*, 2001-TLC-00006 (ALJ May 31, 2001) (*citing* 20 C.F.R. § 655.106(h)(2)(i) (relating to refiling procedures)).

The only issue before me is whether the Employer has established eligibility for certification under the range herding and livestock procedures as required by 20 C.F.R. §§ 655.200(b)(2) and 655.201. Departmental regulations define "range" as follows:

> 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.

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." *Id.* Helpfully, departmental regulations also offer examples of what land is *not* 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,

[2] 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."

> ensuring the livestock do not stray, protecting them from predators, and monitoring their health.

Id. Accordingly, I must determine whether the worksite listed by the Employer meets the definition of "range."

DISCUSSION

As explained in the preceding paragraphs, the range is "any area located away from the ranch headquarters used by the employer." *Id.* There are four factors indicative of range land, and I will discuss each of them in turn.

Range land "involves land that is uncultivated." *Id.* Uncultivated land is simply that which is not used to grow crops.[3] The Employer noted in its application that she would provide the worker with loppers and a machete "for the noxious weeds and bushes to be eradicated." (AF 75). There is no indication that the land is being used to grow crops, but there is not enough information (such as detailed pictures of the worksite)[4] to completely determine whether or not it is "uncultivated."

The next indication of whether land is range land is whether "it involves wide expanses of land, such as thousands of acres." 20 C.F.R. § 655.201. At the CO's request I take judicial notice of Google Maps, and note that it shows the worksite is not a particularly wide expanse of land. (AF 7-8). Both Google Maps and the hand drawn map provided by Employer indicate that the property is between SW 148 Ave and SW 154 Ave, these streets are fairly close together, in the midst of a commercial and residential area. (AF 63; AF 7–8). This is not a worksite consisting of "thousands of acres." Additionally, it can be gleaned from the information that has been provided and Google Maps that the worksite in this case cannot be that far from "ranch headquarters," considering the address listed for the worksite is the same as the Employer's address located in a suburban/residential area that houses multiple homes and businesses. (AF 7–8).

Range land is "located in a remote, isolated area." 20 C.F.R. § 655.201. Employer's worksite can in no way be considered remote or isolated. It is within close proximity to Interstate 75, a hospital, multiple restaurants, hotels, car dealerships, retail outlets, and residential housing.[5] A worksite can hardly be remote and isolated if such a variety of establishments and a massive interstate highway are located nearby.

Employer seeks to provide housing consisting of a camper that will be located near the herd of sheep so that the shepherd can watch over the flock and protect it from nocturnal predators. (AF 7; AF 34–35; AF 67). Based on the information provided by the Employer it does appear that housing is required to be in attendance to the herd.

---

[3] *Uncultivated*, *Cambridge Dictionary*, https://dictionary.cambridge.org/us/dictionary/english/uncultivated.
[4] One picture that provides a limited view of the worksite was provided. AF 37.
[5] 3000 SW 154th Ave, Davie, FL 33331, Google Maps, http://maps.google.com; (AF 7-8).

Taking all the factors in turn, and considering the totality of the circumstances, it is clear that the CO's decision was not "arbitrary or capricious," as the worksite is not vast nor is it remote or isolated. Therefore, at least two of the four factors are not satisfied, and it appears the worksite is quite "near ranch headquarters" because both have the same address in a mixed commercial/residential area. Though I am understanding of Employer's need for a temporary worker, Employer has simply not provided enough information to make the case that the worksite fits the definition of "range," and what information is available does not weigh in Employer's favor. Therefore, the worksite cannot be considered range land. Consequently, the Employer has not established that the CO's decision to deny eligibility for certification under the range herding and livestock procedures was not "arbitrary or capricious," as required by 20 C.F.R. §§ 655.200(b)(2) and 655.201.

The denial is **AFFIRMED**.

ORDER

Wherefore, the Denial of Temporary Labor Certification issued by the Certifying Officer in this matter is **AFFIRMED.**

SO ORDERED.

For the Board:

CARRIE BLAND
District Chief Administrative Law Judge

Washington, D.C.