No. 14-4047

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

GERMAN WILMER SAENZ MENCIA,

Plaintiff-Appellant,

v.

PHILLIP E. ALLRED, CHANCE ALLRED, DUSTIN ALLRED AND PRESTON ALLRED, dba, ALLRED LAND & LIVESTOCK,

Defendant-Appellee.

On Appeal from the United States District Court
for the District of Utah
Honorable Clark Waddups, Judge, Case No. 2:11CV00200

BRIEF FOR THE SECRETARY OF LABOR AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT

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STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY

Pursuant to Federal Rule of Appellate Procedure 29, the Secretary of Labor ("Secretary") submits this brief as *amicus curiae* in support of Plaintiff-Appellant ("Saenz"). The Secretary is responsible for the administration and enforcement of the Fair Labor Standards Act ("FLSA" or "Act"). *See* 29 U.S.C. 204(a), (b), 216(c), and 217. The Secretary also is responsible for the procedures employers must follow to obtain labor certifications for the admission of H-2A workers under the Immigration and Nationality Act ("INA") and for the enforcement of the program's worker protection provisions. *See* 8 U.S.C. 1184(c)(1), 1188; 20 C.F.R. pt. 655, subpt. B; 29 C.F.R. pt. 501. The Secretary has compelling reasons to participate as *amicus curiae* in this case. He has a substantial interest in the correct interpretation of the FLSA to ensure that all employees receive the wages to which they are entitled. The Secretary also has a substantial interest in ensuring that H-2A workers are paid properly and, in turn, that the wages and working conditions of U.S. workers are not adversely affected.

STATEMENT OF THE ISSUES

1. Whether the district court erred by concluding that an employee can be equitably estopped from asserting that he is entitled to the minimum wage owed under the FLSA or the hourly

Adverse Effect Wage Rate ("AEWR"), which must be paid by agricultural employers of nonimmigrant H-2A workers.

2. Whether the district court erred by concluding that the FLSA exemption from the overtime and minimum wage requirements for certain employees principally engaged on the range in the production of livestock, 29 U.S.C. 213(a)(6)(E), applies in this case where the work performed was near ranch headquarters, not on the range, and was easily tracked.

3. Whether an employer can take advantage of the Department of Labor's ("Department") Special Procedures established pursuant to 20 C.F.R. 655.93(b) to bring H-2A nonimmigrant sheepherders into the country, thereby paying a lower monthly wage rate, if the employees are actually performing work near ranch headquarters that does not require constant attention to protect the sheep around the clock.[1]

STATUTORY AND REGULATORY BACKGROUND

This case involves the interpretation of two statutes, the FLSA and the H-2A program under the INA, and their implementing regulations. "[T]he FLSA applies independently of the H-2A requirements and imposes obligations on employers regarding payment of wages." 20 C.F.R. 655.122(h)(1) (2010); *see Rivera v. Peri & Sons Farms, Inc.*, 735 F.3d 892, 896 (9th Cir. 2013) (citing regulation), *cert. denied,* 134 S. Ct. 2819 (2014).

[1] Unless otherwise noted, citations are to the 2008 H-2A regulations in place during the relevant time period.

1. Congress enacted the FLSA to protect workers from substandard wages and oppressive working hours and the Supreme Court "has consistently construed the Act liberally to apply to the furthest reaches consistent with congressional direction." *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 296 (1985) (internal citation and quotation marks omitted); *see Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981); 29 U.S.C. 202(a), (b). The FLSA requires the payment of minimum wage and overtime unless an exemption applies. *See* 29 U.S.C. 206(a), 207(a). Employees who are employed in agriculture as that term is defined in the Act are exempt from the overtime pay provisions. *See* 29 U.S.C. 213(b)(12), (13). Agricultural employees, however, must be paid the minimum wage unless exempted from this requirement in one of the enumerated exemptions found at 29 U.S.C. 213(a)(1)-(17).

Employees who are employed in agriculture *and* are principally engaged in the range production of livestock are exempt from both the overtime and the minimum wage requirements. *See* 29 U.S.C. 213(a)(6)(E). "Agriculture" is defined in 29 U.S.C. 203(f) to include the raising of livestock; therefore, an employee engaged in the raising of livestock, for the time he is engaged in such activities, would meet the first basic requirement of the range production exemption that he be "employed in agriculture." 29 C.F.R. 780.324(b). In addition,

in order for the range production exemption to apply, an employee must be "principally engaged" (i.e., more than fifty percent of his time during the year) on the "range" in the "production of livestock." 29 C.F.R. 780.324(a); *see* 29 C.F.R. 780.325(b). For employees properly categorized as exempt under this provision, the regular record-keeping requirements do not apply. *See* 29 C.F.R. 516.33.

2. Congress established the H-2A program to allow employers to bring in temporary foreign agricultural workers if domestic workers cannot be found and it can be shown that the use of foreign labor would not adversely affect the wages and working conditions of similarly employed U.S. workers. *See* H.R. Rep. No. 99-682, at 50, *reprinted in* 1986 U.S.C.C.A.N. 5649, 5654, 1986 WL 31950 (1986). An employer must file an application for a labor certification with the Department and attest under penalty of perjury that it will follow specific requirements once it brings workers into the U.S. *See* 20 C.F.R. 655.101. The Secretary may not issue a labor certification unless he finds that there are not sufficient workers in the U.S. available to perform the job and the employment of the H-2A worker will not adversely affect the wages and working conditions of workers in the U.S. similarly employed. *See* 8 U.S.C. 1188.

One of the requirements for an employer's participation in the H-2A program is payment of at least the hourly AEWR, the prevailing wage rate, or the Federal or State minimum wage rate, whichever is highest. *See* 20 C.F.R. 655.104(l)(1). The AEWR is the minimum wage rate that the Administrator of the Office of Foreign Labor Certification ("OFLC") in the Department's Employment and Training Administration ("ETA") has determined must be offered and paid to H-2A workers and U.S. workers in corresponding employment. *See* 20 C.F.R. 655.100(c). The Department's rationale for setting adverse effect wage rates is "to counteract the potential impact on the wages of U.S. workers of the large numbers of foreign workers, particularly undocumented workers, in the agricultural sector." Temporary Agricultural Employment of H-2A Aliens in the United States, 73 Fed. Reg. 77,110, 77,166 (Dec. 18, 2008).

The unique characteristics of sheepherding, including spending extended periods of time in isolated range areas and being on call to protect the sheep at all hours, have historically warranted an exception to the standard H-2A requirements. Pursuant to 20 C.F.R. 655.93(b), OFLC is authorized to establish Special Procedures, including for the employment of H-2A workers as sheepherders, allowing variances from certain H-2A requirements. The Special Procedures contain a standard job description for a sheepherder:

> Attends sheep and/or goat flock grazing on range or pasture: Herds flock and rounds up using trained dogs. Beds down flock near evening campsite. Guards flock from predatory animals and from eating poisonous plants. May examine animals for signs of illness and administer vaccines, medications, and insecticides according to instructions. May assist in lambing, docking, and shearing. May feed animals supplementary feed. May perform other farm or ranch chores related to the production and husbandry of sheep and/or goats on an incidental basis.

See "Labor Certification for Sheepherders and Goatherders Under the H-2A Program," Field Memorandum No. 24-01 ("Special Procedures"), Appendix ("Appx") 806-825.[2] The Special Procedures require that the applicant show that the job demands the sheepherder to be "on call for up to 24 hours per day, 7 days per week." Appx 811. These Special Procedures allow payment of a special, monthly rate of $750, which is substantially lower than the standard hourly H-2A AEWR of $9.42 in 2009 and $10.06 in 2010. Appx 123; 73 Fed. Reg. 10,288 (Feb. 26, 2008); 75 Fed.

[2] These Special Procedures were in effect from August 1, 2001 until June 14, 2011, which covers the time period at issue in this case. On June 14, 2011, new Special Procedures were issued through Training and Guidance Letter ("TEGL") 32-10. The D.C. Circuit has since held that TEGL 32-10 (and TEGL 15-06 for cattleherders) violated the Administrative Procedure Act because they did not go through notice and comment. *See Mendoza v. Perez*, 754 F.3d 1002 (D.C. Cir. 2014). On remand, the district court did not vacate the TEGLs; it instead gave the Department time to promulgate Special Procedures through notice and comment. *See Mendoza v. Perez*, Civil Action No. 11-1790, 2014 WL 5499576 (D.D.C. Oct. 31, 2014). Therefore, the Department continues to enforce the Special Procedures and/or TEGL 32-10 (depending on when the violation occurred) until the new Special Procedures are in place.

Reg. 7293 (Feb. 18, 2010). The Special Procedures also exempt employers from certain recordkeeping requirements, meaning that they do not have to keep track of the hours worked by sheepherders on the open range.

STATEMENT OF THE CASE

1. Appellant Saenz is a Peruvian national who was employed at a sheep ranch in Utah owned by Appellees Phillip, Chance, Dustin, and Preston Allred ("the Allreds"). The Allreds availed themselves of the Special Procedures for the purpose of obtaining a labor certification to bring Saenz into the country on an H-2A visa from April 2009 until May 2010.[3] Saenz subsequently filed a complaint alleging a violation of the minimum wage and overtime requirements of the FLSA; breach of his H-2A contract; intentional infliction of emotional distress; promissory estoppel; and quantum meruit.[4]

The Allreds brought in eleven or twelve H-2A workers, including Saenz, during the relevant period of time. Appx 81. While some of the H-2A employees went out on the range to herd sheep, there were only ten herds of sheep at any one time, and the Allreds needed at least one worker to stay at the ranch. Appx 81. Saenz was primarily assigned to stay near the ranch,

[3] The Allreds provided one H-2A visa to Saenz that covered April 2009 through February 2010 and then extended his employment on another H-2A visa from March 2010 until February 2011; Saenz, however, stopped working for the Allreds in May 2010.

[4] Saenz did not pursue his claims for FLSA overtime, promissory estoppel, and intentional infliction of emotional distress.

performing ranch chores and taking care of male sheep (bucks or rams), as well as assisting when the sheep were giving birth during lambing season in the spring. Appx 81. The sheep typically went out into the desert to graze in the winter months and out into the mountains to graze in the summer months; Saenz, however, did not accompany them, with the exception of two weeks in June 2009. Appx 81-84.

Specifically, Saenz lived in a trailer close to the Phillip Allred's home at the Fountain Green ranch. Appx 82. During April and May, the sheep would return to the ranch for lambing season. Appx 82. During lambing season, the H-2A workers, including Saenz, worked in shifts and were supervised by the Allreds. Appx 82. The rest of the year, Saenz's duties primarily consisted of taking care of the rams and other animals, which included putting hay in the manger and filling the water trough for the bucks. Appx 82-83. Saenz also performed other ranch hand jobs such as cleaning up around the ranch, installing heating cables, chopping wood, clearing snow, watering alfalfa, cleaning trailers, building corrals, building a shed, and building fences. Appx 83-84, 886-91. When he did not have any tasks to perform at the ranch, he would go with the Allreds to make deliveries of alfalfa, water, groceries, and salt to the sheepherders in the mountains; these trips took three to four hours and he would return to the ranch afterward.

Appx 84. He also occasionally assisted the Allreds with tasks away from the ranch, but remained with the Allreds in performing these tasks, returning with them to the ranch at the end of the day. Appx 84.

Almost all of these activities occurred within the immediate vicinity of the Fountain Green Ranch, where Phillip Allred resided. Appx 79. The Allreds conducted their administrative activities from Phillip Allred's residence at this location. Appx 79. The lambing sheds were located at the Fountain Green ranch, close to the trailer where Saenz resided. Appx 82. The rams that he fed and watered were kept in corrals a couple of hundred yards northwest of Saenz's trailer. Appx 83. The last six weeks of his employment, from mid-March until early May 2010, Saenz worked at a separate location called Tintic, near Nephi, Utah, assisting with lambing. Appx 85. The Tintic location is bordered by a highway on both sides. Appx 493-94.

2. Following the Allreds' Motion for Summary Judgment and the Plaintiff's Motion for Partial Summary Judgment as to liability on his FLSA minimum wage claim and his claim for the hourly H-2A AEWR, the district court granted the Allreds' motion and denied Plaintiff's motion. *See* Memorandum Decision and Order Granting Defendants' Motion for Summary Judgment ("Order")

7. The district court specifically concluded that Saenz's FLSA claim was barred by the doctrine of estoppel (which, in the court's view, similarly foreclosed any argument that Saenz was entitled to the hourly H-2A AEWR) and, alternatively, that Saenz was exempt from the minimum wage and overtime requirements of the FLSA under the range production of livestock exemption.

ARGUMENT

I. THE DISTRICT COURT ERRED BY CONCLUDING THAT THE DOCTRINE OF EQUITABLE ESTOPPEL COULD BE USED TO PREVENT SAENZ FROM EARNING THE MINIMUM WAGE UNDER THE FLSA OR THE HOURLY AEWR UNDER THE INA

1.a. It is well-established that a worker cannot waive his or her FLSA rights, and likewise cannot be estopped from asserting those rights. *See Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 740 (1981) ("This Court's decisions interpreting the FLSA have frequently emphasized the nonwaivable nature of an individual employee's right to a minimum wage and to overtime pay under the Act."); *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697 (1945); *Marshall v. Quik-Trip Corp.*, 672 F.2d 801, 806 (10th Cir. 1982) (holding that "receipts" signed by the employees could not defeat their rights to the payments required by the Act); *see also Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 302 (1985); *Burry v. Nat'l Trailer Convoy, Inc.*, 338 F.2d 422, 426–27 (6th Cir. 1964); *Caserta v. Home Lines Agency, Inc.*, 273 F.2d 943, 946 (2d Cir. 1959); *Robertson v. Alaska Juneau Gold Mining Co.*, 157 F.2d 876, 879 (9th Cir.

1946), *cert. granted in part, judgment modified,* 331 U.S. 793 (1947). In *Handler v. Thrasher*, 191 F.2d 120, 123 (10th Cir. 1951), this Court held that an employee could not be estopped by a written agreement not to work overtime because "it is too well settled to admit of discussion that a contract which has . . . the effect of circumventing or invading the command of the Wage and Hour Act, is invalid and unenforceable." And in *Wirtz v. Bledsoe*, 365 F.2d 277, 278 (10th Cir. 1966), this Court concluded that "it has long been established that the purpose of the Fair Labor Standards Act cannot be frustrated by an employer's instructions or even a contract not to work overtime." (Citation omitted.)

To hold otherwise would be contrary to the important congressional purposes underlying the Act, which established minimum wages and maximum hours in recognition of the fact that because of "the unequal bargaining power as between employer and employee, certain segments of the population required federal compulsory legislation to prevent private contracts on their part which endangered national health and efficiency and as a result the free movement of goods in interstate commerce." *Brooklyn Sav. Bank*, 324 U.S. at 706-07. These purposes would be nullified if waiver of statutory wages by agreement were permitted. *Id.* If an exception to the Act's protections was carved out for employees who were willing to testify that they

were not subject to the Act, employers might be able to use superior bargaining power to coerce employees to waive their protections under the Act. *See Tony & Susan Alamo Found.*, 471 U.S. at 302. This is especially true in regard to H-2A employees who are in an inherently weaker position vis-à-vis the H-2A employer.

In this case, the district court concluded that Saenz could not assert his right to the minimum wage under the FLSA because he did not object to the work he was assigned to perform and he continued working for the Allreds after they renewed his visa. The court ignored precedent, failing to even mention the Supreme Court and this Court's cases cited above. The district court's decision is clearly contrary to this well-established law and undermines the underlying purposes of the FLSA. Even if Saenz had affirmatively represented that he did not believe he was due the minimum wage, it would not have nullified his rights under the Act. Saenz cannot be barred from seeking wages due under the FLSA simply because he failed to object to the type of work he was performing and continued working after his visa renewal.

b. The district court relied on cases from the Fifth, Ninth, and Sixth Circuits allowing estoppel to be used in a very specific, limited circumstance – whether work is suffered or permitted. *See Brumbelow v. Quality Mills, Inc*., 462 F.2d 1324, 1327 (5th Cir. 1972); *Forrester v. Roth's I.G.A. Foodliner,*

Inc., 646 F.2d 413, 414 (9th Cir. 1981); and *White v. Baptist Memorial Health Care Corp.*, 699 F.3d 869, 876 (6th Cir. 2012). Section 7(a) of the FLSA regulates overtime, stating that "no employer shall employ any of his employees" for more than forty hours in a workweek unless the employee is compensated at least at one and one-half times her regular rate of pay. 29 U.S.C. 207(a). "Employ" is defined as "to suffer or permit work." 29 U.S.C. 203(g). The cases cited by the district court focus on the interpretation of the suffer or permit standard requiring that an employer knew or had reason to know whether the employee was working overtime, which is not at issue in this case. *See* 29 C.F.R. 785.11 ("Work not requested but suffered or permitted is work time. . . . The reason [such work is performed] is immaterial. [If t]he employer knows or has reason to believe that the employee is continuing to work . . . the time is working time.").

Moreover, "it is the duty of the management to exercise its control and see that the work is not performed if it does not want it to be performed. It cannot sit back and accept the benefits without compensating for them." 29 C.F.R. 785.13. As the Eleventh Circuit has explained, an employer does not rid himself of this obligation because he cannot personally supervise the work – "[t]he cases must be rare where prohibited work can be done . . . and knowledge or the consequences of

knowledge avoided." *Reich v. Dep't of Conservation & Natural Res.*, 28 F.3d 1076, 1082 (11th Cir. 1994) (internal citations and quotation marks omitted); *see Chao v. Gotham Registry, Inc.*, 514 F.3d 280, 288 (2d Cir. 2008); *Reich v. Stewart*, 121 F.3d 400, 407 (8th Cir. 1997); *Forrester*, 646 F.2d at 414 ("An employer who is armed with this knowledge cannot stand idly by and allow an employee to perform overtime work without proper compensation."). And "[t]his duty arises even where the employer has not requested the overtime be performed or does not desire the employee to work, or where the employee fails to report his overtime hours." *Gotham Registry, Inc.*, 514 F.3d at 288 (citations omitted).

Thus, in *Brumbelow*, the Fifth Circuit case cited by the district court, the plaintiff failed to follow the specific record-keeping requirements for homeworkers, falsely reporting that she completed the minimum production requirements in eight hours when in fact it took her longer. Based on the "narrow facts of this case," the plaintiff was deemed to be estopped from profiting as a result of furnishing false data to the employer. 462 F.2d at 1327. However, the court acknowledged that an employee would not be estopped from claiming additional overtime if "[t]he court found that the employer knew or had reason to believe that the reported information was inaccurate." *Id.; see Newton v. City of Henderson*, 47 F.3d 746, 749 (5th Cir.

1995); *Brennan v. Gen. Motors Acceptance Corp*., 482 F.2d 825, 827 (5th Cir. 1973) (holding employer had constructive knowledge of overtime hours in a case involving employees whose jobs demanded "long and irregular hours in the field" and who worked on their own and without direct supervision); *Bailey v. TitleMax, Inc.,* No. 14-11747, 2015 WL 178346, at *6 (11th Cir. Jan. 15, 2015) (noting that *Brumbelow* was distinguishable from a case where the employer knew or had reason to know that the employee was underreporting).

c. While the courts have formulated the test for determining when an employer has actual or constructive knowledge and what role an employee's failure to notify the employer plays in that inquiry, none of them has extended the principle outside of an interpretation of the "suffer or permit" standard. *See Lillehagen v. Alorica, Inc.,* No. SACV 13-0092-DOC, 2014 WL 6989230, at *19 (C.D. Cal. Dec. 10, 2014) (collecting cases).

Unlike the overtime cases cited by the district court, there is no question here as to whether the Allreds knew that Saenz was performing work. The Allreds knew the duties being performed by Saenz and, at a minimum, should have known the hours that he worked in light of the fact that the Allreds supervised him and that he generally worked close to the ranch where the Allreds were located. *See Bledsoe*, 365 F.2d at 278

(despite that the employer lacked actual knowledge that any employee was working overtime hours, the employees' duties were well known to the defendants). There is also no evidence that the Allreds attempted to prohibit Saenz from performing work or from doing a certain type of work that is outside of the Special Procedures. Rather, Saenz was performing work duties that were assigned to him by the Allreds, generally within their plain view and on a daily basis. They had ample opportunity to assign him different duties, or limit his work hours, should they have chosen to do so.

In fact, it is without question that Saenz would be due compensation for hours worked as a non-exempt employee because those hours worked were suffered or permitted by the Allreds; the parties disagree as to whether the FLSA exemption for being primarily engaged on the range in the production of livestock applies (and at what rate he should be paid under the applicable H-2A provisions). This question turns on the type of work Saenz performed, not whether he was suffered or permitted to perform work.[5] The cases cited by the district court dealing with the

[5] The district court also stated that because the Special Procedures exempt employers from the recording and reporting of hours worked, "Defendants' reliance on Saenz's own reporting and representations prevented them from knowing or having the ability to know that Saenz was supposedly working too many hours on non-exempt work." Order 6. However, the Allreds were only entitled to take advantage of the more lenient recordkeeping requirements if Saenz was actually doing work covered by the Special Procedures, which he was not. Therefore, the Allreds

concept of suffer or permit are neither precedential nor instructive in answering this question.

2. For similar reasons, Saenz cannot be estopped from asserting his rights under the H-2A program, including his entitlement to the regular hourly H-2A AEWR. The precedent cited by the district court, albeit in the context of the FLSA, is inapposite, as discussed above. Additionally, allowing Saenz to be estopped from asserting his rights under the H-2A provisions would defeat the statutory purpose of the H-2A program. The risk of "'acceptance by illegal aliens of jobs on substandard terms as to wages and working conditions'" would be realized if estoppel were permitted, resulting in "'seriously depress[ed] wage scales and working conditions of citizens and legally admitted aliens.'" Temporary Agricultural Employment of H-2A Aliens in the United States, 73 Fed. Reg. 8538, 8541 (proposed Feb. 13, 2008) (quoting *Sure-Tan v. NLRB*, 467 U.S. 883, 892 (1984) (citing *DeCanas v. Bica*, 424 U.S. 351, 356-57 (1976)). By inaccurately representing the nature of the work that Saenz would be performing, the Allreds deprived U.S. workers of the opportunity to compete for the ranch hand job. In this scenario, where the actual job is not advertised so

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should have been keeping time records. Moreover, even if the employer had been maintaining time records, they would not indicate the type of work being performed by Saenz, so they would show nothing about his exempt or nonexempt status, which is the FLSA issue in this case.

potential U.S. workers do not apply, wages for ranch hand positions are likely to decline, thereby adversely affecting the wages of U.S. workers and defeating Congress's purpose in enacting the H-2A program. Thus, for reasons similar to those pertaining under the FLSA — the specific purpose underlying the H-2A provisions as well as the unequal bargaining power in which an H-2A worker finds himself (thereby counseling against waiver) — the doctrine of equable estoppel should not be available under the H-2A provisions of the INA based on a failure by Saenz to object to the assigned work, and his continuing to work after his visa was renewed.

II. THE FLSA RANGE PRODUCTION OF LIVESTOCK EXEMPTION DOES NOT APPLY IN THIS CASE BECAUSE SAENZ WAS NOT WORKING ON THE RANGE

In order for the FLSA's range production exemption to apply, an employee who is engaged in agriculture must be principally engaged on the range in the production of livestock. *See* 29 C.F.R. 780.324(a). The district court determined that it was unnecessary to determine the definition of "range" under the FLSA exemption. *See* Order 6 ("Although the parties disagree whether 'range' includes land beyond the headquarters building and if so, how much land is included, the court finds it unnecessary to make that determination because Saenz's own admissions establish that he spent more than fifty percent of his work on exempt duties."). If the court had correctly

interpreted the meaning of the range production exemption, it should have concluded that Saenz is not exempt under the Department's regulations, which are firmly rooted in the legislative history and have been consistently interpreted for many years.

1. As an initial matter, "exemptions are to be narrowly construed against the employers seeking to assert them and their application limited to those establishments plainly and unmistakably within their terms and spirits." *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960). The burden is on the defendant to demonstrate that the exemption applies. *See Lederman v. Frontier Fire Prot., Inc.*, 685 F.3d 1151, 1157 (10th Cir. 2012); *Schoenhals v. Cockrum*, 647 F.2d 1080, 1081 (10th Cir. 1981) (citing *Legg v. Rock Prods. Mfg. Corp.,* 309 F.2d 172, 174 (10th Cir. 1962)). Citing no supporting case law, the district court improperly shifted this burden to the employee by concluding that Saenz was exempt without requiring the Allreds to submit evidence demonstrating this fact.

2. By including a separate exemption from both the FLSA's minimum wage and overtime requirements for an employee engaged in agriculture "if such employee is principally engaged in the *range* production of livestock," 29 U.S.C. 213(a)(6)(E) (emphasis added), Congress recognized the unique nature of these jobs that are performed out in remote, uncultivated areas, making the

computation of hours extremely difficult. In light of these unique circumstances, including the difficulty of computing hours, Congress made a determination that an exemption from the minimum hourly wage requirement was appropriate. *See generally* 112 Cong. Rec. 11,391-92 (May 25, 1966). Saenz, whose work mainly involved duties performed close to (and that were related to) ranch work, i.e., not on remote, uncultivated land, should not have been found to have met this exemption.

The legislative history is instructive. The range production exemption from minimum wage and overtime pay was enacted as part of the 1966 amendments to the FLSA. The narrow exemption, which is currently in effect, was introduced in the Senate. During the floor debate, Senator Yarborough emphasized that "the committee intends to exempt only those employees engaged in activities which require constant attendance on a standby basis, such as herding and similar activities where the computation of hours of work would be very difficult." 112 Cong. Rec. 20,621 (Aug. 25, 1966). Senator Fannin confirmed that "the intent of this particular amendment is restrictive," explaining that

> [a] good illustration would be the Basque sheepherders who are brought to this country from Spain. They are away from headquarters for long periods of time, herding sheep. It is impractical for them to keep time or to control their hours of work. They may be in sleeping bags at night, and they may have to get up in the middle of the night because of predatory animals attacking the sheep; then they would go out to work again.

112 Cong. Rec. 20,621. In explaining the exemption, the Senate Report referred to the "special circumstances" of these employees and reiterated that the committee intended to exempt only those employees engaged in activities requiring constant attendance on a standby basis, such as herding and similar activities where the computation of hours would be very difficult. S. Rep. No. 89-1487, *reprinted in* 1966 U.S.C.A.N.N. 3002, 3011, 1966 WL 4378 (1966).

3. The regulations are consistent with the statute and congressional purpose. They provide that an employee's "primary duty must be the range production of livestock *and* that this duty necessitates his constant attendance on the range, on a standby basis, for such periods of time so as to make the computation of hours worked extremely difficult." 29 C.F.R. 780.329(a) (emphasis added).[6] Crucially, for the purposes of this case, the regulations define range as land that is not cultivated and produces native forage for animal consumption. *See* 29 C.F.R. 780.326(a). Not only is the range uncultivated land, but "[t]ypically it is . . . not suitable for cultivation because it is rocky, thin, semiarid, or otherwise poor." 29 C.F.R. 780.326(b). The animals typically graze over "wide

[6] In order to be "principally engaged" in the range production of agriculture, the primary duty of a range employee must be "to take care of the animals actively or to stand by in readiness for that purpose," for over fifty percent of his time during the year. *See* 29 C.F.R. 780.325(a), (b).

expanses of land, such as thousands of acres" to secure adequate forage when on the range. *See* 29 C.F.R. 780.326. The regulations further provide that "exempt work must be performed away from the 'headquarters.'" 29 C.F.R. 780.329(b). "Headquarters" is where the business of the ranch takes place and is "a particular location for the discharge of the management duties." *Id*. The term is limited in that it does not embrace large acreage; it only includes "th[e] ranchhouse, barns, sheds, pen, bunkhouse, cookhouse, and other buildings in the vicinity." *Id*. Further, the regulations explain that "th[e] exemption was not intended to apply to feed lots or to any area where the stock involved would be near headquarters." 29 C.F.R. 780.329(c); *see* 112 Cong. Rec. 20,621.

4. The Department's interpretation of the range production exemption is consistent with the position that the Department has articulated since the 1966 amendments were enacted. *See* U.S. Dep't of Labor, Wage-Hour Opinion Letters dated Aug. 18, 1967; No. 596 (Apr. 13, 1967); No. 599 (Apr. 11, 1967); No. 709 (Dec. 12, 1967); No. 902 (May 28, 1968); No. 915 (Jan. 17, 1968) (Addendum, Tabs A-F, respectively). The Department's consistent interpretations in its regulations and its opinion letters are entitled to deference under the principles of *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-40 (1944) (the Administrator's FLSA interpretations "constitute a body of experience and informed

judgment to which courts and litigants may properly resort for guidance"); *Clements v. Serco, Inc.*, 530 F.3d 1224, 1229 (10th Cir. 2008) (opinion letters entitled to *Skidmore* deference).

Moreover, the two reported cases interpreting the range production exemption were the result of the Department's own litigation, where it consistently and successfully asserted its position. *See Hodgson v. Elk Garden Corp.*, 482 F.2d 529, 531 (4th Cir. 1973); *Hodgson v. Mauldin*, 344 F. Supp. 302, 311 (N.D. Ala. 1972), *aff'd,* 478 F.2d 702 (5th Cir. 1973). In both cases, the courts analyzed the legislative history of the exemption, as well as guidance (containing similar language to that found in the regulations) that the Department published before issuing its regulations. The Fourth Circuit, in concluding that the exemption did not apply, stated that it was not enough "to show merely that the land can be classified as range and that the employees are principally engaged in producing livestock. To secure the exemption the employer must additionally show that the employees' duties make the computation of their working hours extremely difficult." *Elk Garden Corp.*, 482 F.2d at 531; *see Mauldin*, 344 F. Supp. at 313 (concluding that employees were exempt because the computation of hours worked would be "extremely difficult").

5. Saenz was not engaged in any *range* production of agriculture, with the exception of the two weeks he was out on

the range herding sheep. For the rest of his employment, Saenz's work primarily took place in the immediate vicinity around the Fountain Green ranch where Phillip Allred lived and the Allreds conducted their administrative business.[7] Similarly, in *Elk Garden Corp.*, none of the employees was required to work at a distance from headquarters for long periods of time, and the farthest distances at which the cattle grazed from the respective farm headquarters were three miles and one and one-quarter miles. 482 F.2d at 534. While some of the Allreds' other H-2A workers herded sheep at farther distances, Saenz worked within a few hundred yards of Phillip Allred's home.[8] For example, the rams were kept in corrals a few hundred yards from Phillip Allred's home. Thus, the work performed by Saenz was close to the ranch headquarters and was easily supervised by the Allreds, making the hours easy to calculate and thereby removing the critical underlying rationale for the exemption. The pens and sheds on the Fountain Green ranch (where Saenz performed many of his duties) are precisely the type of structures included in the definition of "headquarters" in the regulations.

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[7] For the occasional work that Saenz performed away from the ranch, such as riding with the Allreds to deliver provisions to the sheepherders in the mountains, he was closely supervised by the Allreds and thus still was not within the exemption.

[8] Even if the Allreds owned or leased range land, and employed some employees as sheepherders on the open range, Saenz was not one of them. The exemption must be met for the individual worker, not the employer. *See* 20 C.F.R. 780.323.

As the regulations explain, work done this close to headquarters is not contemplated by the exemption; instead, sheepherding takes place out in uncultivated terrain, with the sheep grazing over many miles, requiring constant attendance and surveillance. *See* 29 C.F.R. 780.329(c).[9]

The six weeks that Saenz spent working at the Tintic location were also not on the range for purposes of the exemption. The corral and lambing sheds at Tintic were bordered by highways on two sides – such land is not the expansive, uncultivated range land contemplated by the regulations. Nor was it shown that his hours were extremely difficult to calculate, as Saenz worked under the supervision of the Allreds while at Tintic. *See Elk Garden Corp.*, 482 F.2d at 531.

Therefore, the special circumstances that are required for the exemption did not exist in this case. The Department does not disagree that Saenz performed activities, such as feeding and watering the sheep, which may constitute the production of livestock. He also may have done such "immediately incidental" duties as repairing fences, which would not have removed him from the exemption. *See* 29 C.F.R. 780.327. But the exemption

[9] One of the odd jobs around that ranch that Saenz performed was watering the Allred's alfalfa fields. The alfalfa fields are not "range," as they are cultivated land. While land that is "revegetated naturally or artificially to provide a forage cover that is managed like range vegetation" can constitute the range, the alfalfa here was grown and harvested. *See* Appx 134.

for the range production of livestock applies only if Saenz had spent over fifty percent of his time performing exempt duties *on the range*. *See* 29 C.F.R. 780.325(b). He did not do so here. As the Department has stated, "there is no basis for exemption under section 13(a)(6)(E) for an employee who is employed at the headquarters ranch in activities connected with range production, if he is not principally engaged on the range in range production activities which require constant attendance of the animals on a standby basis." *See* Wage-Hour Opinion Letter No. 599 (Apr. 11, 1967) (Addendum, Tab C).

III. IN LIGHT OF THE FACT THAT THE WORK PERFORMED BY SAENZ WAS OUTSIDE THE SCOPE OF THE H-2A SPECIAL PROCEDURES BECAUSE IT DID NOT REQUIRE CONSTANT ATTENDANCE TO SHEEP AROUND THE CLOCK IN A REMOTE LOCATION, THE REGULAR HOURLY AEWR APPLIES

As discussed above, under the H-2A program, the Secretary has a statutory responsibility to ensure that there are no able, willing, qualified, and available U.S. workers to perform the job, and that the employment of foreign workers will not adversely affect the wages and working conditions of workers in the U.S. similarly employed. The Department's Special Procedures fulfill this responsibility for sheepherders. These procedures were established in recognition of the special legislative and administrative history and the unique characteristics of sheepherding, which requires "spending extended periods of time grazing herds of sheep in isolated

mountainous terrain; being on call to protect flocks from predators 24 hours a day, 7 days a week." Appx 806. "Except as otherwise provided in the Special Procedures, the regular H-2A regulations at 20 C.F.R. Part 655, Subpart B apply." Appx 810. Under the H-2A regulations for regular agricultural jobs that do not fall under the Special Procedures, "the employer must pay the worker at least the AEWR in effect at the time recruitment for the position was begun, the prevailing hourly wage rate, the prevailing piece rate, or the Federal or State minimum wage rate, whichever is highest, for every hour or portion thereof worked during a pay period." 20 C.F.R. 655.104(l)(1).

In evaluating applications, the Department generally must rely on the information submitted by the applicants. The Allreds represented to the Department, under penalty of perjury, that they would comply with certain terms and working conditions in order to obtain a labor certification for an H-2A visa. Specifically, the Allreds wrote in their labor certification application that they were in need of temporary foreign workers because "[o]pen Range livestock positions are difficult to fill requiring employers to seek workers outside the United States to fill labor needs" and that "[i]t requires workers to work and live in remote locations more than 50% of the contract period and to be on-call 24-hours per day 7 days a week." Appx 601. Indeed, the Special Procedures require that the application

reflects that the anticipated hours of work are "on call for up to 24 hours per day, 7 days per week." Appx 811.

The work performed by Saenz did not in fact require him to work and live in remote locations for more than fifty percent of the contract period or to be on call twenty-four hours a day, seven days a week. A worker performing the job that Saenz did, including feeding and watering sheep in the corrals at the ranch and other chores around the ranch, does not qualify for the Special Procedures for similar reasons to those described in detail above, i.e., the nature and location of Saenz's work, which involved a significant amount of ranch duties and was essentially confined to the area where the ranch was located (headquarters). While some of Saenz's duties may fall within the standard job description for a sheepherder contained in the Special Procedures (e.g., lambing; see *supra*, p. 6), his work did not entail the type of constant attendance – "being on call to protect flocks from predators 24 hours a day, 7 days a week" – required for the Special Procedures, nor did he have to spend extended periods of time "grazing herds of sheep in isolated mountainous terrain." Appx 806. When read as a whole, the Special Procedures require more than simply performing some lambing and feeding of sheep near the ranch, as Saenz did here.

Had the Allreds accurately filled out the application for Saenz, their petition (which necessarily entails a job posting)

would not have qualified for the Special Procedures, and may have drawn interest from U.S workers interested in the ranch hand position. Simply because the labor certification was granted by ETA does not mean that the employer's obligation to adhere to the H-2A requirements ends; if that were the case, the program would be unenforceable in those situations, as occurred here, where it was later determined that the certification was based on false information. Because Saenz's work fell outside the Special Procedures, he did not qualify for the special monthly wage rate for sheepherders. Instead, the regular H-2A provisions, including payment of the hourly AEWR, applied to the work he performed.

CONCLUSION

For the foregoing reasons, the district court's decision should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this Brief complies with the length limitation set forth in Federal Rules of Appellate Procedure 35(b)(2) and 40(b) because it contains 6,921 words (excluding the parts of the Brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii)).

This Brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5) and 32(a)(6). This Brief was prepared using Microsoft Office Word utilizing Courier New 12 point and a monospaced font.

Dated: February 24, 2015

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CERTIFICATE OF VIRUS CHECK

I hereby certify that a virus check, using McAfee VirusScan Enterprise and AntiSpyware Enterprise 8.8 was performed on the PDF file and paper version of this brief and no viruses were found.

Dated: February 24, 2015

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CERTIFICATE OF SERVICE AND ECF COMPLIANCE

I hereby certify that on February 24, 2015, a copy of the foregoing Brief for the Secretary Of Labor as *Amicus Curiae* in Support of Plaintiff-Appellant was electronically filed with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

I further certify that I have complied with the privacy redaction requirements and that seven paper copies of the brief required to be submitted to the clerk's office are exact copies of the CM/ECF filing.

Dated: February 24, 2015

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