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| <b>EMPLOYMENT AND TRAINING ADMINISTRATION<br/>         ADVISORY SYSTEM<br/>         U.S. DEPARTMENT OF LABOR<br/>         Washington, D. C. 20210</b> | <b>CLASSIFICATION</b><br>H-2A Program |
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**ADVISORY:** FOREIGN LABOR CERTIFICATION  
 TRAINING AND EMPLOYMENT GUIDANCE LETTER NO. 15-06

**TO:** OFLC-NATIONAL PROCESSING CENTER DIRECTORS  
 STATE WORKFORCE AGENCY ADMINISTRATORS

**FROM:** EMILY STOVER DeROCCO   
 Assistant Secretary for Employment and Training

**SUBJECT:** Special Procedures for Processing H-2A Applications for Occupations  
 Involved in the Open Range Production of Livestock

- Purpose.** To establish special procedures as part of the H-2A labor certification process for employers who desire to employ temporary foreign workers in the United States for occupations involved in the open range production of livestock.
- References.** 20 C.F.R. Part 655, Subpart B; 20 C.F.R. Part 653, Subparts B and F; and 20 C.F.R. Part 654, Subpart E.
- Background.** Due to the unique characteristics of the open range production of livestock, the Employment and Training Administration (ETA) is establishing special procedures for the processing of H-2A applications for certification of temporary employment in those occupations. 20 C.F.R. 655.93(c) provides the Department with the authority to continue and, where appropriate, revise special procedures in effect for the handling of applications for occupations involved in the open range production of livestock. Historically, H-2A applications for these occupations were processed through ETA's Regional Offices.

However, in December 2004, the Department opened two new National Processing Centers (NPCs) in Atlanta and Chicago. These Centers have been designated to process applications for DOL certification to employ foreign workers for temporary positions under the H-2A agricultural worker visa program. The Department published formal guidance in the Federal Register (Vol. 70, No. 137, pages 41430-41438) on July 19, 2005, clarifying that, effective August 1, 2005, employers must file original copies of their H-2A applications directly with the NPCs, coinciding with the area of intended employment, and simultaneously with the appropriate State Workforce Agency (SWA).

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| <b>RESCISSIONS</b><br>None | <b>EXPIRATION DATE</b><br>Continuing |
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The special procedures outlined in this memorandum for occupations involving the open range production of livestock work in conjunction with this centralized filing process, and ensure greater consistency in the processing of these H-2A applications through the Centers.

4. **Special Procedures.** Attachment A outlines special procedures for labor certification applications submitted by employers for occupations involved in the open range production of livestock under the H-2A program. Unless otherwise specified in Attachment A, applications submitted for these occupations must comply with the requirements for processing H-2A applications contained at 20 C.F.R. Part 655, Subpart B.
5. **Action Required.** NPC Directors and SWA Administrators are directed to provide staff involved in the processing of H-2A applications for the open range production of livestock with a copy of these special procedures.
6. **Inquiries.** Questions from SWA staff should be directed to the appropriate NPC. Questions from NPC staff should be directed to the National Office of Foreign Labor Certification.
7. **Attachments.**  
Attachment A      Special Procedures for Occupations Involved in the Open Range  
Production of Livestock Under the H-2A Program

**ATTACHMENT A**  
**Special Procedures for Occupations Involved in the**  
**Open Range Production of Livestock under the H-2A Program**

This document outlines special procedures for applications submitted by employers for occupations involved in the open range production of livestock under the H-2A program. Unless otherwise specified below, employer applications submitted for these occupations must comply with the requirements for processing H-2A applications contained at 20 C.F.R. Part 655, Subpart B.

- A. **Responsibilities of NPCs.** The NPC having jurisdiction over the state where employment begins is responsible for processing the employer's certification request. Such responsibilities include directing the SWAs to place job orders into intra/interstate clearance, ensuring employers meet advertising and recruitment requirements set forth in the H-2A regulations, and determining whether to approve or deny certification for some or all of the jobs requested.
- B. **Application Filing.** An employer seeking certification under the H-2A program is required to file the application with the NPC having jurisdiction over the state where the employment will begin, and is required to simultaneously file a copy of the application with the appropriate SWA in the area of intended employment. When workers are employed in an adjoining state for the same employer, the employer is authorized to file a single application with the SWA where the employment will begin.
- C. **Intra/Interstate Job Order.** Upon receipt of the application for labor certification, the NPC is responsible for reviewing the request for approval. Once the labor certification is approved, the NPC will instruct the order-holding SWA, which is the state that received the job order, to transmit copies of the job offer to other SWAs. These applicant-holding SWAs, which are states having available workers, should refer qualified job applicants and report recruitment results to the office of the order-holding SWA. In reaching a final determination decision, the NPC will take into consideration information obtained from all sources.
- D. **Wages and Working Conditions.** The regulations at 20 CFR 655.93 specifically allow DOL to establish monthly Adverse Effect Wage Rates "for work in occupations characterized by other than a reasonably regular workday or work week, such as the range production of sheep or other livestock," and to adapt the special procedures applied to shepherder occupations in the Western States "to occupations in the open range production of livestock." The wages for workers engaged in the range production of livestock are established using the methodology for determining statewide prevailing wage rates as set forth by DOL. The use of monthly wage rates for occupations engaged in the range production of livestock is also consistent with the exemption from Federal minimum wage rates in the Fair Labor Standards Act (FLSA) at 29 CFR 780.325. When workers are employed in an adjoining state for the same employer, and the adjoining state's prevailing month wage rate differs, the employer is responsible for determination and payment of the correct monthly wage rate for work performed in each state.

- E. **Record Keeping and Frequency of Pay.** The H-2A regulations at 20 CFR 655.102(b)(7), 655.102(b)(8), and 655.102(b)(9) establish requirements concerning recordkeeping, pay, and earning statements when the worker is to be paid by the hour. Traditionally, the duties of the open range production of livestock occupation can only be performed on the open range and require the worker to be on call 24 hours per day, 7 days per week, including Sundays and holidays. Workers live and work either alone or in small groups, and may be isolated for extended periods of time without supervision. The hours of work vary depending on the time of year, weather, livestock conditions, and other variables. These unique circumstances prevent the monitoring and recording of specific hours of work, as well as the time the worker(s) begin and end each day, making it impossible for ranchers to comply with these requirements.
- F. **Workers' Compensation.** Employers must specify in the job offer that they will provide insurance at no cost to the workers, under a state workers' compensation law or otherwise, covering injury and disease arising out of and in the course of the worker's employment. Such coverage must meet the minimum requirements for each state where the work will be performed, regardless of whether workers' compensation coverage in that specific state is or is not mandatory.
- G. **Standards for Housing.** Open range livestock workers are responsible for the care and tending of livestock on the open range, which may be miles from ranch headquarters. This occupation requires the workers to live in housing of a mobile nature, rather than "a fixed-site farm, ranch or similar establishment." However, when fixed-site housing is utilized, such housing must comply with the full set of DOL standards (OSHA standards at 29 CFR Part 1910 or ETA standards at 20 CFR Part 654, as applicable).

Open range livestock workers generally use housing similar to that traditionally provided to sheepherders by H-2A employers. They have mobile camps that are moved from one area on the open range to another by the rancher using a team of horses or a truck. The standards for determining the adequacy of employer-provided mobile housing units for use on the range are established under the regulations at 20 C.F.R. § 655.102(b)(1)(ii). Housing used exclusively at the ranch site is subject to the same standards as those for other agricultural workers at 20 C.F.R. §§ 654.400-654.417 (see also 29 C.F.R. § 1910.142). Both range and ranch site housing may be self-certified by an employer. Employers must submit a signed statement with the application for labor certification assuring that the housing is available, sufficient to accommodate the number of workers being requested, and meets USDOL standards outlined below.

The following standards will apply to mobile housing units:

1. **Housing Site**

Housing sites shall be well drained and free from depressions in which water may stagnate.

## 2. Water Supply

- a) An adequate and convenient supply of water that meets standards of the state health authority shall be provided. The amount of water provided must be enough to meet the normal drinking, cooking, and bathing needs of each worker; and
- b) Individual drinking cups shall be provided.

## 3. Excreta and Liquid Waste Disposal

- a) Facilities shall be provided and maintained for effective disposal of excreta and liquid waste according to requirements of state health authority or involved Federal agency; and
- b) If pits are used for the disposal by burying of excreta and liquid waste, they shall be kept fly-tight when not filled-in completely after each use.

## 4. Housing Structure

- a) Housing shall be structurally sound, in good repair, in sanitary condition and shall provide protection to occupants against the elements;
- b) Housing, other than tents, shall have flooring constructed of rigid materials easy to clean and so located as to prevent ground and surface water from entering;
- c) Each housing unit shall have at least one window which can be opened or skylight opening directly to the outdoors; and
- d) Tents may be used where terrain and/or land regulations do not permit use of other more substantial mobile housing which provides facilities and protection closer in conformance with the Department's intent.

## 5. Heating

- a) Where the climate in which the housing will be used is such that the safety and health of an open range livestock worker requires heated living quarters, all such quarters shall have properly installed operable heating equipment which supplies adequate heat. In considering whether the heating equipment is acceptable, the NPC shall first determine if the housing will be located in a National Forest Wilderness as specified in the Wilderness Act (16 U.S.C. §§ 1131-1136). Such a location has a bearing on the type of equipment practicable, or whether any heavy equipment is practicable. For example, Section 4 (c) of the Act (16 U.S.C. § 1133(c)) restricts certain motorized or mechanical transport and certain roads in wilderness areas. The U.S. Forest Service has regulations for this at 36 C.F.R. Part 293. Aside from the above, other factors to consider in evaluating heating equipment are how severe the weather will be and the kinds of protective clothing and bedding made available to the worker. If the climate in which the housing will be used is mild and not reasonably expected to drop below 50 degrees Fahrenheit continuously for 24-hours, no separate heating equipment is required if proper protective clothing and bedding are available;

- b) Any stoves or other sources of heat using combustible fuel shall be installed and vented in such a manner as to prevent fire hazards and a dangerous concentration of gases. Portable electrical heaters may be used, and if approved by Underwriters' Laboratory, kerosene heaters may be used according to manufacturer's instructions. If a solid or liquid fuel stove is used in a room with wooden or other combustible flooring, there shall be a concrete slab, insulated metal sheet, or other fireproof material on the floor under each stove, extending at least 18 inches beyond the perimeter of the base of the stove;
- c) Any wall or ceiling within 18 inches of a solid or liquid fuel stove or stove pipe shall be of fireproof material. A vented metal collar shall be installed around a stovepipe or vent passing through a wall, ceiling, floor or roof; and
- d) When a heating system has automatic controls, the controls shall be of the type which cuts off the fuel supply when the flame fails or is interrupted or whenever a predetermined safe temperature or pressure is exceeded.

#### 6. Lighting

- a) In areas where it is not feasible to provide electrical service to mobile housing, including tents, lanterns shall be provided (Kerosene wick lights meet the definition of lantern); and
- b) Lanterns, where used, shall be provided in a minimum ratio of one per occupant of each unit, including tents.

#### 7. Bathing, Laundry, and Hand Washing

Movable bathing, laundry and hand washing facilities shall be provided when it is not feasible to provide hot and cold water pressure.

#### 8. Food Storage

When mechanical refrigeration of food is not feasible, the worker must be provided with another means of keeping food fresh and preventing spoilage, such as a butane or propane gas refrigerator. Other proven methods of safeguarding fresh foods, such as salting, are acceptable.

#### 9. Cooking and Eating Facilities

- a) When workers or their families are permitted or required to cook in their individual unit, a space shall be provided with adequate lighting and ventilation; and
- b) Wall surfaces next to all food preparation and cooking areas shall be of nonabsorbent, easy to clean material. Wall surfaces next to cooking areas shall be of fire-resistant material.

## 10. Garbage and Other Refuse

- a) Durable, fly-tight, clean containers shall be provided to each housing unit, including tents, for storing garbage and other refuse; and
- b) Provision shall be made for collecting or burying refuse, which includes garbage, at least twice a week or more often if necessary. Refuse disposal shall conform to federal, state or local law, whichever applies.

## 11. Insect and Rodent Control

Appropriate materials, including sprays, must be provided to aid housing occupant in combating insects, rodents, and other vermin.

## 12. Sleeping Facilities

Separate sleeping units shall be provided for each person, except in a family arrangement. Such a unit shall include a comfortable bed, cot or bunk with a clean mattress. When filing an application for certification, the employer may request a variance from the separate sleeping unit requirement to allow for a second herder to join the operation on a provisional basis. However, the employer must explain to the satisfaction of the reviewing SWA why it is impractical to set up a second unit, and must clearly outline the period of time (not to exceed seven calendar days) the second herder will occupy the same unit. The second herder must provide his/her individual sleeping bag or bed roll. If this is impractical, the employer must supply a sleeping bag or bed roll.

## 13. Fire, Safety, and First Aid

- a) All units in which people sleep or eat shall be constructed and maintained according to applicable state or local fire and safety law;
- b) No flammable or volatile liquid or materials shall be stored in or next to a room used for living purposes, except for those needed for current household use;
- c) Mobile housing units for range use must have a second exit means of escape. The second egress must be a window which can be easily opened, a hatch or other provision. It must be demonstrated that the worker would be able to crawl through the second egress without difficulty;
- d) Tents are not required to have a second means of escape, except when large tents with walls of rigid material are used. A heater may be used in a tent if the heater is approved by a testing service, such as Underwriters' Laboratory, and if the tent is fireproofed; and
- e) Adequate fire extinguishers in good working condition and first aid kits shall be provided in the mobile housing.

H. **SWA Housing Inspections.** The SWA uses the standards outlined under Section G for the purpose of conducting inspections of fixed-site and mobile housing units at least once every three years. With respect to self-certification of housing, the employer must submit with the H-2A application a signed statement assuring that the housing/lodging is available, sufficient to accommodate the number of workers being requested, and meets all applicable DOL standards. SWAs must inspect at least one-third of such self-certified housing once a year, and develop a schedule of inspections which insures that each employer's housing is inspected at least once every three years. These inspections may be performed either before or after a request is submitted for H-2A foreign workers. Before referring a worker who is entitled to such housing, the SWA must ensure that the housing is available and has been, or will be, inspected in accordance with the three-year schedule. For employer-provided housing, if either fixed-site housing or mobile units owned or controlled by the employer cannot be inspected in accordance with the three-year schedule, or if such housing, when it is inspected, does not meet the applicable standards within the prescribed time frame, certification of the employer's H-2A request will be denied in full or in part, as warranted. In all circumstances, if the SWA determines that an employer's housing does not meet DOL standards, the NPC may require additional inspections as needed.