

EMPLOYMENT AND TRAINING ADMINISTRATION ADVISORY SYSTEM U.S. DEPARTMENT OF LABOR Washington, D. C. 20210	CLASSIFICATION H-2A Program
	CORRESPONDENCE SYMBOL OFLC
	ISSUE DATE February 12, 2007

ADVISORY: FOREIGN LABOR CERTIFICATION
 TRAINING AND EMPLOYMENT GUIDANCE LETTER NO. 17-06

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

FROM: EMILY STOVER DeROCCO 
 Assistant Secretary for Employment and Training

SUBJECT: Special Procedures for Employers in the Itinerant Animal
 Shearing Industry Under the H-2A Program

1. **Purpose.** To outline special procedures, determined by the U.S. Department of Labor, as part of the H-2A labor certification process for employers who desire to employ temporary foreign workers in the United States in occupations involving an itinerary for the shearing of sheep, goats, alpacas, or other animals requiring shearing.
2. **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.
3. **Background.** Due to the unique nature of the itinerant animal shearing industry, the Employment and Training Administration (ETA) is establishing special procedures for the processing of H-2A applications for certification of temporary employment in that industry. 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 the itinerant animal shearing industry. Historically, H-2A applications for the animal shearing industry were processed through ETA's Regional Offices.

However, in December 2004, the Department opened two new National Processing Centers (NPCs) located in Atlanta and Chicago. These NPCs have been designated as the Centers to process applications to employ foreign workers for temporary positions under the H-2A agricultural worker visa program. The Department published a notice in the Federal Register (Vol. 70, No. 137, pages 41430-

RESCISSIONS None	EXPIRATION DATE Continuing
----------------------------	--------------------------------------

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 file a copy with the appropriate State Workforce Agency (SWA).

The special procedures outlined in this memorandum for employers in the itinerant animal shearing industry work in concert 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 applications submitted by employers in the itinerant animal shearing industry under the H-2A program. Unless otherwise specified in Attachment A, applications submitted by employers in the itinerant animal shearing industry must comply with the requirements for H-2A applications contained at 20 C.F.R. Part 655, Subpart B.
5. **Action Required.** NPC Directors and State Workforce Agency Administrators are directed to provide staff involved in the processing of H-2A applications for the itinerant animal shearing industry with a copy of these special procedures.
6. **Inquiries.** Questions from State Workforce Agency staff should be directed to the appropriate NPC. Questions from NPC staff should be directed to the National Office of Foreign Labor Certification.
7. **Attachment.**

Attachment A	Special Procedures for Applications in the Itinerant Animal Shearing Industry Under the H-2A Program
--------------	--

ATTACHMENT A
Special Procedures for Applications in the
Itinerant Animal Shearing Industry Under the H-2A Program

This document outlines special procedures, as determined by the U.S. Department of Labor (Department), for applications submitted by employers in the itinerant animal shearing industry under the H-2A program who wish to employ temporary foreign workers. Unless otherwise specified below, employer applications submitted for itinerant occupations involved in the shearing of sheep, goats, alpacas, or other animals requiring shearing must comply with the requirements for H-2A applications contained at 20 C.F.R. Part 655, Subpart B.

- A. **Responsibilities of National Processing Centers (NPCs).** The NPC having jurisdiction over the state where the employer will begin an itinerary of animal shearing in the United States is responsible for processing the employer's certification request for the entire animal shearing itinerary. Such responsibilities include directing State Workforce Agencies (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. The interstate job order clearance is to be done for all states listed in the itinerary and for the entire duration of need. Certifications may be granted to an employer for a period up to, but not to exceed, the estimated date of completion for the animal shearing itinerary.
- B. **Employer's Status.** Shearing contractors who desire to employ one or more foreign workers as shearing crew members on an itinerary must apply to the Department for a temporary labor certification under the H-2A temporary foreign labor certification program. The individual contractor must be listed as the "employer of record" on the H-2A application. For purposes of itinerant animal shearing, the designated employer is the contractor, not the rancher who engages the animal shearing crew. H-2A labor certification is needed for the jobs to be performed by the animal shearers employed by the contractor should those crew members not be U.S. workers.

All farm labor contractors must meet and maintain both Federal and state farm labor contractor registrations as required by the Migrant and Seasonal Agricultural Worker Protection Act (MSPA) (29 C.F.R Part 500). Evidence of farm labor contractor registration must be provided upon submittal of the labor certification request for processing.

- C. **Application Filing.** A shearing contractor who is seeking certification under the H-2A program is required to file the application with the NPC having jurisdiction over the state where the animal shearing itinerary will begin and is required to simultaneously file a copy of the application with the appropriate SWA where the work will begin. Pursuant to 8 U.S.C. 1188(c)(1) and 20 C.F.R. 655.101(c), the employer must submit the application 45 calendar days before the date of need.

The NPC will promptly review the application and notify the employer within seven (7) calendar days after receipt of the application of any deficiencies that must be corrected. If an application has deficiencies that require modification, the employer has five (5) calendar days from the date of the NPC's mailing to submit the required modifications or face delays in receiving a certification determination. With its application to the NPC and the SWA, the employer must provide a copy of the itinerary in the United States, including the names, locations, and telephone numbers of farmers/ranchers whose animals are to be sheared, and the estimated dates and times for shearing the animals in each location. Itineraries that traverse NPC jurisdictions (one worksite is in a state assigned to Chicago, another to Atlanta) will not be allowed; employers must file separate applications with the respective NPCs.

- D. **Duration of Itinerary.** An animal shearing contractor may require that a U.S. worker applying for a job must be available to work for the remainder of the employer's entire animal shearing itinerary in the United States, and for the total duration of the period of employment specified in the job order. This is considered a lawful job-related requirement, and U.S. workers must be informed of this requirement at the time of referral. A U.S. worker referred after the labor certification has been granted, but before 50% of the employment period has elapsed, must be available and willing to join the crew at whatever place the crew is located at the time and remain with the crew for the balance of the animal shearing itinerary. An employer's rejection of a U.S. worker who is unable or unwilling to accept such a requirement is considered a rejection for a lawful job-related reason.
- E. **Positive Recruitment.** All employers are required to engage in active or positive recruitment efforts for vacant positions prior to approval of a request to the Department for certification to hire foreign workers. The NPC may notify the employer that positive recruitment efforts are required within a multi-state region where there are a significant number of able and qualified U.S. workers who, if recruited, would likely be willing and available for work at the time and place needed. The primary source of U.S. workers for animal shearing has traditionally been the labor organization that represents sheep shearers. Therefore, when an application is received, the NPC will instruct the animal shearing contractor to contact the Sheep Shearers Union of North America at the following location:

Sheep Shearers Union of North America
14 West Platinum Street
Butte, Montana 59701-2542
Phone: 406-782-0006

- F. **Wages/Recordkeeping for Payment of Piece Rates.** In addition to showing the established piece rates (i.e., rate of pay per head sheared) on the job orders for each state where shearing will be performed, employers seeking H-2A certification must guarantee each crew member, for each pay period, at least the highest of the applicable hourly Adverse Effect Wage Rate (AEWR), the prevailing hourly wage rate, or the state or Federal minimum wage rate (if applicable), as established in the area of intended employment where the shearing work will be performed.

In the event the worker's piece rate earnings do not generate the applicable AEW, prevailing hourly wage rate, or minimum wage rate, the employer is required to make up the difference between the piece rate earnings and the highest applicable hourly rate.

The employer must also retain adequate records of actual hours worked by each worker in order to ensure the AEW guarantee is met per pay period, and to permit a determination that the three-fourths guarantee¹ of employment is met. In addition, employer records must show the daily production of each worker paid on a piece rate basis.

- G. **Tools and Equipment.** Normally, employers must provide all tools, supplies, and equipment to the workers without charge where they are required to perform the tasks described in the job offer. However, if employers can demonstrate that it is the common practice in a particular area, agricultural activity, or occupation for workers to provide their own tools, supplies, and equipment, such an arrangement is permissible as long as it is approved in advance by the appropriate NPC. The employer is responsible for providing evidence to the NPC sufficient to establish that a particular practice is, in fact, "common." Absent approval from the NPC, an employer must provide necessary tools, supplies and equipment without charge to the workers.

The wage rates prevailing in the shearing industry reflect a historical practice of employees providing their own tools. If the NPC has approved a contractor's request to have its workers provide their own tools, the piece rates as published by the Department will apply. However, if an employee uses the contractor's tools, an appropriate wage differential should apply. This differential has usually been \$0.05 per animal shorn. In other words, workers using tools, equipment, or supplies provided by the contractor are entitled to a wage rate of \$0.05 per animal shorn less than the published Department rate. Any change to the above stated differential will be published through formal guidance by the Department and made available on its Web site.

- H. **Workers' Compensation.** Animal shearing contractors must specify in their job offer(s) that they will provide, at no cost to the workers, insurance, under a state workers' compensation law or otherwise, covering injury and disease arising out of and in the course of the workers' employment. Such coverage must meet the minimum requirements for each state where shearing work will be performed, regardless of whether workers' compensation coverage in that specific state is mandatory.

¹ The employer must guarantee to offer each worker employment for at least three-fourths of the workdays in the work contract period and any extensions. If the employer affords less employment, then the employer must pay the amount which the worker would have earned had the worker been employed the guaranteed number of days.
<http://www.foreignlaborcert.doleta.gov/h-2a.cfm> and 20 C.F.R 655.102(b)(6).

- I. **Workers Productivity, Tying Specification (sheep only), and Training Opportunities.** Animal shearing contractors seeking H-2A certification who pay piece rates and specify in their job offer(s) a minimum level of production a worker must achieve in order to retain employment, must be able to demonstrate, to the NPC's satisfaction, that these productivity requirements are no more than those normally required of U.S. workers by other employers in the area of intended employment (unless the NPC approves a higher minimum). In all circumstances, the productivity requirement must be approved by the NPC and must be stated in an employer's job offer(s).

Studies conducted by the Agricultural Research Service in Idaho indicate that the "tying" method of shearing is documented to cause damage and even death to the animal. Consequently, for purposes of occupational qualifications in job offers, the "Australian" or "free-style" method of shearing can be required as a lawful, job-related requirement for shearers. U.S. workers who are otherwise qualified but whose experience has been limited to shearing using the "tying" method must be afforded a specified break-in period to improve their performance and adapt to the "free-style" method.

- J. **Standards for Fixed-Site and Mobile Housing.** Employer-provided housing is housing owned or controlled by the animal shearing contractor. Fixed-site housing must comply with the full set of Department standards (OSHA standards at 29 C.F.R Part 1910 or ETA standards at 20 C.F.R Part 654, Subpart E, as applicable). The standards for determining the adequacy of 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 the 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 good 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 structured to prevent ground and surface water from entering;
- c) Each housing unit shall have at least one window or skylight which can be opened directly to the outdoors; and
- d) Tents may only be used where terrain and/or land regulations do not permit the use of more substantial mobile housing providing facilities and protection adhering to the Department's intent.

5. Heating

- a) Where the housing location climate is such that the safety and health of an animal shearer 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:
 - i. 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; and
 - ii. Consider other factors in evaluating heating equipment are how severe the weather will be and the kinds of protective clothing and bedding made available to the shearer. 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, when 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 under 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, state or local law, whichever applies.

11. Insect and Rodent Control

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

12. Sleeping Facilities

Except in a family arrangement, a separate sleeping unit 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, or sleeping bag or bed roll in case of tent accommodation. When filing an application for certification, the employer may request a variance from the separate sleeping unit requirement to allow for a second shearer to join the operation on a provisional basis. However, the employer must explain why it is impractical to set up a second unit and the employer must clearly outline the period of time (not to exceed seven (7) calendar days) the second shearer will occupy the same unit. The second shearer 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 rooms used for living purposes, except for those needed for current household use;
- c) Mobile housing units for range use must have a second 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 shearer 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.

K. **SWA Housing Inspections.** The SWA uses the standards outlined under Section J of this TEGl in 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 USDOL 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 animal shearers. 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 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 USDOL standards, the NPC may require additional inspections as needed.

A shearing contractor may lease a mobile unit owned by a shearing crew member or other person, or make some other type of "allowance" to the owner. Neither the NPC, nor the SWA, should be involved in establishing or negotiating the amount an employer offers to provide to a worker or other person who owns a mobile unit and desires to lease it to the employer. However, if the employer represents such mobile unit as "housing or lodging provided by the employer", the employer "controls" the unit and, consequently the mobile unit must meet the applicable standards and must be inspected at least once every three years. The employer in such case may self-certify such a mobile unit.