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**ADVISORY: TRAINING AND EMPLOYMENT GUIDANCE LETTER NO. 15-06,
Change 1**

TO: CHICAGO NATIONAL PROCESSING CENTER PROGRAM DIRECTOR
STATE WORKFORCE AGENCY ADMINISTRATORS

FROM: JANE OATES *Jane Oates*
Assistant Secretary

SUBJECT: Special Procedures: Labor Certification Process for Occupations Involved in the Open Range Production of Livestock under the H-2A Program

1. **Purpose.** To transmit special procedures, updated to reflect regulatory and organizational changes in the H-2A Program, for employers who apply to the Department of Labor (Department) to obtain labor certifications to hire temporary agricultural foreign workers in occupations involved in the open range production of livestock in the United States.
2. **References.** 20 CFR Part 655, Subpart B; 20 CFR Part 653, Subparts B and F; and 20 CFR Part 654, Subpart E; and Training and Employment Guidance Letter (TEGL) No. 15-06, Special Procedures for Processing H-2A Applications for Occupations Involved in the Open Range Production of Livestock; and ETA Handbook No. 385.
3. **Background.** In 1986, Congress passed the Immigration Reform and Control Act of 1986 (IRCA) which amended the Immigration and Nationality Act (INA), 8 U.S.C. 1101, et seq., and established the H-2A program. In 1987, the Department issued an Interim Final Rule, promulgating the first H-2A regulations (the 1987 regulations) in accordance with IRCA. 54 FR 20496 (Jun. 1, 1987). The 1987 regulations provided for the administration of the H-2A program by the ETA Regional Administrators, and instituted procedures to offset the adverse effects of immigration on U.S. workers. The 1987 regulations also established special procedures for certain occupations, as long as they did not deviate from the Secretary's statutory responsibility to determine U.S. worker availability and the adverse effect of foreign workers on the wages and working conditions of U.S. workers.

Due to the unique characteristics of the open range production of livestock, the Department established special procedures for the processing of H-2A applications for certification of temporary employment in those occupations. These special procedures were contained most recently in the TEGL No. 15-06.

The 1987 regulations remained in effect, largely unchanged, until the Department promulgated new H-2A regulations on December 18, 2008. 73 FR 77110 (Dec. 18, 2008)

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(the 2008 Final Rule). The 2008 Final Rule implemented an attestation-based application process and made several substantive changes to the program, but retained the special procedures concept. After the Department determined that the 2008 Final Rule did not meet H-2A program policy objectives, the Department commenced another rulemaking process culminating in the publication of new H-2A regulations on February 12, 2010. 75 FR 6884 (Feb. 12, 2010) (the 2010 Final Rule). The Final Rule implements changes that affect special procedures for the occupations involved in the open range production of livestock. Section 20 CFR 655.102 provides the Office of Foreign Labor Certification (OFLC) Administrator with the authority to establish, continue, revise or revoke special procedures for processing of certain H-2A applications, including those for occupations involved in the open range production of livestock, as long as those procedures do not deviate from the statutory requirements under the INA.

This TEGL updates the special procedures previously established for occupations involved in the open range production of livestock to reflect organizational changes, in addition to new regulatory and policy objectives. It replaces previous guidance disseminated under TEGL No. 15-06, Special Procedures for Processing H-2A Applications for Occupations Involved in the Open Range Production of Livestock.

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. Attachment B outlines standards for mobile housing applicable to occupations involved in the open range production of livestock under the H-2A Program. Unless otherwise specified in Attachments A and B, applications submitted for these occupations must comply with the requirements for processing H-2A applications contained at 20 CFR Parts 655, Subpart B. Similarly, unless otherwise specified, job orders submitted for these occupations must comply with the requirements of 20 CFR Parts 655, Subpart B, 653 Subparts B and F, and 654.
5. **Action Requested.** The Chicago National Processing Center (Chicago NPC) Program Director and State Workforce Agency (SWA) Administrators are directed to immediately provide copies of these special procedures to all staff involved in processing H-2A labor certification applications from employers in the open range production of livestock occupations. The revised special procedures will apply to all employer applications with a start date of need on or after October 1, 2011.
6. **Inquiries.** Questions from SWA staff should be directed to the Chicago NPC. Questions from the Chicago NPC staff should be directed to the OFLC National Office.
7. **Attachments.**

Attachment A – Special Procedures: Labor Certification Process for Occupations Involved in the Open Range Production of Livestock Under the H-2A Program

Attachment B – Standards for Mobile Housing Applicable to Occupations Involved in the Open Range Production of Livestock

ATTACHMENT A
Special Procedures: Labor Certification Process for Applications Involved in the Open Range Production of Livestock in the H-2A Program

This document outlines special procedures for applications submitted by employers involved in the open range production of livestock under the H-2A Program. Unless otherwise specified in this attachment, applications submitted for open range livestock occupations must comply with the requirements for processing H-2A applications outlined in 20 CFR Part 655, Subpart B. Similarly, unless otherwise specified, job orders submitted for open range livestock occupations must comply with the requirements of 20 CFR Part 655, Subpart B, 20 CFR Part 653, Subparts B and F, and 20 CFR Part 654.

I. PREFILING PROCEDURES

- A. Offered Wage Rate (20 CFR 655.120(a)). The Department is continuing a special variance to the offered wage rate requirements contained at 20 CFR 655.120(a). Because occupations involving the open range production of livestock are characterized by other than a reasonably regular workday or workweek, an employer must continue to offer, advertise in the course of its recruitment, and pay the monthly, weekly, or semi-monthly prevailing wage established by the OFLC Administrator for each state listed in an approved itinerary. In establishing the offered wage rate for the range production of livestock, the Department uses findings from prevailing wage surveys conducted by SWAs in accordance with the procedures in the ETA Handbook No. 385. SWAs are required to transmit official wage rate findings covering the range production of livestock to the OFLC between May 1st and June 1st of each calendar year. Following a review of the SWA wage rate findings, the OFLC will publish the new agricultural prevailing wage rates in a Federal Register notice with an immediate effective date.

SWA wage rate findings will continue to establish monthly, weekly, or semi-monthly prevailing wages for a statewide or other geographical area in a manner that is consistent with the wage setting procedures applied to sheepherder occupations in the Western states. In circumstances where a SWA is unable to produce a wage rate finding for an occupation, due to an inadequate sample size or another valid reason, the wage setting procedures allow the OFLC to continue to issue a prevailing wage rate for that state based on the wage rate findings submitted by an adjoining or proximate SWA for the same or similar agricultural activities.

If the OFLC cannot establish a prevailing wage rate by using comparable survey data from an adjoining or proximate SWA, the OFLC will give consideration to aggregating survey data for the range production of livestock activities across states to create regional prevailing wage rates. When regional prevailing wages are considered, the OFLC may use the U.S. Department of Agriculture's (USDA) production or farm resource regions or other groupings of states used to conduct the USDA Farm Labor Survey.

- B. Job Orders and SWA Review (20 CFR 655.121). An employer engaged in the range production of livestock is allowed to submit a single Agricultural and Food Processing Clearance Order, ETA Form 790 (job order), Office of Management and Budget (OMB) control number 1205-0134, and all appropriate attachments covering a planned itinerary of work in multiple states. If the job opportunity is located in more than one state, either within the same area of intended employment or multiple areas of intended employment, the employer must submit the job order and all attachments (including a detailed itinerary) to the SWA having jurisdiction over the anticipated worksite(s) where the work is expected to begin. The employer must submit the job order no more than 75 calendar days and no less than 60 calendar days before the employer's first date of need.

Unless otherwise specified in these special procedures, the job order submitted to the SWA must satisfy the requirements for agricultural clearance orders outlined in 20 CFR 653, Subpart F and the requirements set forth in 20 CFR 655.122. The SWA will review the job order for regulatory compliance and will work with the employer to address any noted deficiencies. Upon its clearance of the job order, the SWA must promptly place the job order in intrastate clearance and commence recruitment of U.S. workers.

The job order shall remain active until 50 percent of the work contract period has elapsed for all SWAs in possession of the employer's job order (including those receiving it in interstate clearance under 20 CFR 655.150), unless otherwise advised by the Chicago NPC.

- C. Contents of Job Offers (20 CFR 655.122). Unless otherwise specified in this section, the content of job offers submitted to the SWAs and the Chicago NPC for occupations involved in the open range production of livestock must comply with all of the requirements of 20 CFR Part 655, Subpart B, 20 CFR Part 653, Subparts B and F, and 20 CFR Part 654.

1. Job duties, qualifications and requirements.

Job duties. Based on the current industry practice, the SWAs may rely on the following standard description of the job duties for a job opportunity in the open range livestock production industry:

Perform any combination of the following tasks to attend to livestock on the open range: feeds and waters livestock; herds livestock to pasture for grazing; examines animals to detect diseases and injuries; assists with the vaccination of livestock by herding into corral and/or stall or manually restraining animal on the range; applies medications to cuts and bruises; sprays livestock with insecticide; assists with castration of livestock; clips identifying notches on or brands animals; may assist with irrigating, planting, cultivating, and harvesting hay. Workers must be able to ride and handle horses in a manner to assure the safety of the worker, co-workers, and livestock. Must be able to find and maintain bearings to grazing areas. Must be willing and able to occasionally live and work independently or in small groups of workers in isolated areas for extended periods of time.

Any additional job duties must be normal and accepted for the occupation, and the SWA and Chicago NPC have the authority to request supporting documentation substantiating the appropriateness of the duties prior to accepting the job order. Additionally, the SWA or Chicago NPC may request modifications to the job duties if additional information, such as climatic conditions and/or the size of herd, necessitates the use of pack and saddle horses to reach the range, in order to fully apprise U.S. workers of the nature of the work to be performed.

Experience. Due to the unique nature of the work to be performed, the job offer may specify that applicants possess up to 6 months of experience in similar occupations involving the range tending or production of livestock covering multiple seasons and may require reference(s) to verify experience in performing these activities. Applicants must provide the name, address, and telephone number of any previous employer being used as a reference. The appropriateness of any other experience requirements must be substantiated by the employer and approved by the Chicago NPC.

Hours. The description of anticipated hours of work must show “on call for up to 24 hours per day, 7 days per week” in the job order. If an application filed for an open range livestock worker does not include the requirements of being on call 24 hours per day, 7 days per week, the Chicago NPC may not process the employer’s application under the special procedures enumerated in this TEGL, and must instead require compliance with all the requirements of the H-2A regulations outlined in 20 CFR 655, Subpart B.

2. **Housing.** The employer must state in its job order that sufficient housing will be provided at no cost to H-2A workers and any workers in corresponding employment who are not reasonably able to return to their residence within the same day. Except for long-established standards for mobile housing in Attachment B, all employer-provided housing must comply with requirements set out in 20 CFR 655.122(d) for the entire period of occupancy. An employer whose itinerary requires mobile housing may provide mobile housing to its workers.
3. **Workers’ compensation.** The employer must provide workers’ compensation insurance coverage as described in 20 CFR 655.122(e) in all states where open range work will be performed. Prior to the issuance of the Temporary Labor Certification, the employer must provide the Certifying Officer (CO) with proof of workers’ compensation coverage, including the name of the insurance carrier, the insurance policy number, and proof of insurance for the dates of need, or if appropriate, proof of state law coverage for each state where the open range work will be performed. In the event that the current coverage will expire before the end of the certified work contract period or the insurance statement does not include all of the regulatory information required under the regulations at 20 CFR 655.122(e), the employer will be required to supplement its proof of workers’ compensation for that state before a final determination is due. Where the employer’s coverage will expire before the end of the certified work contract period, the employer may submit as proof of renewed coverage a signed and dated statement or letter showing proof of intent to renew and maintain coverage for the dates of need. The employer must maintain evidence that its workers’ compensation was renewed, in the event the Department requests it.

4. Employer-provided items. Due to the remote and unique nature of the work to be performed, the employer must also specify in the job order and provide at no cost to workers an effective means of communicating with persons capable of responding to the worker's needs in case of an emergency. These means are necessary to perform the work and can include, but are not limited to, satellite phones, cell phones, wireless devices, radio transmitters, or other types of electronic communication systems.
5. Earnings records and statements. The employer must keep accurate and adequate records with respect to the workers' earnings and furnish to the worker on or before each payday a statement of earnings. Because the unique circumstances of employing range livestock workers (i.e., on call 24/7 in remote locations) prevent the monitoring and recording of hours actually worked each day as well as the time the worker began and ended each workday, the employer is exempt from reporting on these two specific requirements at 20 CFR 655.122(j) and (k). However, all other regulatory requirements related to earnings records and statements apply.
6. Frequency of pay. Consistent with 20 CFR 655.122(m), the employer must state in the job offer the frequency with which the worker will be paid, which must be at least twice monthly or according to the prevailing practice in the area of intended employment, whichever is more frequent. Due to the unique circumstances of employing range livestock workers, the employer may, upon mutual agreement with the worker, pay the worker once per month as long as the monthly payment arrangement is reflected in the job offer and work contract, if any. Employers must pay wages when due.

II. APPLICATION FOR TEMPORARY EMPLOYMENT CERTIFICATION FILING PROCEDURES

Application Filing Requirements (20 CFR 655.130). An individual employer that desires to apply for temporary employment certification for one or more nonimmigrant workers must file the following documentation with the Chicago NPC no less than 45 calendar days before the employer's date of need:

- ETA Form 9142 (OMB control number 1205-0466), Application for Temporary Employment Certification, and Appendix A.2;
- Copy of the ETA Form 790 and all attachments previously submitted to the SWA;
- A planned itinerary listing the names and contact information of all farmers/ranchers and identifying, with as much geographic specificity as possible and for each farmer/rancher, all of the physical locations and estimated start and end dates of need where work will be performed; and
- All other required documentation supporting the application.

ATTACHMENT B
Standards for Mobile Housing Applicable to Occupations Involved in the
Open Range Production of Livestock

I. PROCEDURES

Occupations involving the open range production of livestock generally require workers to live in remote housing of a mobile nature, rather than “a fixed-site farm, ranch or similar establishment.” This type of housing is typically referred to as mobile housing. For purposes of these special procedures, mobile housing is any housing that is capable of being moved from one area on the open range to another. The employer must provide housing at no cost to the H-2A workers and those workers in corresponding employment who are not reasonably able to return to their residence within the same day.

Where housing for work performed on the range is provided, the regulations at 20 CFR 655.122(d)(2) require that such housing meet standards of the DOL Occupational Safety and Health Administration (OSHA). In the absence of such standards, range housing for sheepherders and other workers engaged in the range production of livestock must meet guidelines issued by OFLC. Due to the fact that OSHA standards currently do not cover mobile housing, Section II of this attachment establishes the standards for determining the adequacy of employer-provided mobile housing for use on a range. However, any other type of housing, used by an employer to house workers engaged in open range production of livestock activities, must meet the standards applicable to such housing under 20 CFR 655.122(d).

Both mobile housing and fixed-site farm or ranch housing may be self-certified by an employer. Employers must submit a signed statement to the SWA and the Chicago NPC with the application for labor certification assuring that the housing is available, sufficient to accommodate the number of workers being requested, and meets all applicable standards.

SWAs must develop and implement a schedule which ensures that each employer’s self-certified housing is inspected no less frequently than at least once every 3 years. These inspections may be performed either before or after a request is submitted for nonimmigrant livestock workers on the open range. Before referring a worker who is entitled to such housing, the SWA office must ensure that the housing is available and has been inspected in accordance with the inspection schedule. If the SWA determines that an employer’s housing cannot be inspected in accordance with the inspection schedule or, when it is inspected, does not meet all the applicable standards, the Chicago NPC may deny the H-2A application in full or in part or require additional inspections in order to satisfy the regulatory requirement.

II. MOBILE HOUSING STANDARDS

An employer may use a mobile unit, camper, or other similar mobile vehicle for housing workers that meets the following standards:

A. Housing Site

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

B. Water Supply

1. 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 for normal drinking, cooking, and bathing needs of each worker; and
2. Individual drinking cups shall be provided.

C. Excreta and Liquid Waste Disposal

1. Facilities shall be provided and maintained for effective disposal of excreta and liquid waste in accordance with requirements of the state health authority or involved Federal agency; and
2. If pits are used for disposal by burying of excreta and liquid waste, they shall be kept fly-tight when not filled in completely after each use. The maintenance of disposal pits must be in accordance with state and local health and sanitation requirements.

D. Housing Structure

1. Housing shall be structurally sound, in good repair, in sanitary condition and shall provide protection to occupants against the elements;
2. 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;
3. Each housing unit shall have at least one window which can be opened or skylight opening directly to the outdoors; and
4. 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.

E. Heating

1. Where the climate in which the housing will be used is such that the safety and health of a 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 Chicago NPC shall first determine if the housing will be located in a National Forest Wilderness Section as specified in the Wilderness Act (16 U.S.C. §§ 1131-1136). Such a location has a bearing on the type of equipment practicable, and whether any heavy equipment can be used. For example, the Wilderness Act (16 U.S.C. § 1133(c)) restricts certain motorized or mechanical transport on certain roads in wilderness areas. The U.S. Forest Service has regulations for this at 36 CFR Part 293. Aside from the above, other factors to consider in evaluating heating

equipment are the severity of the weather and the types 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 made available;

2. 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;
3. Any wall or ceiling within 18 inches of a solid or liquid fuel stove or stove pipe shall be made of fireproof material. A vented metal collar shall be installed around a stovepipe or vent passing through a wall, ceiling, floor or roof; and
4. 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.

F. Lighting

1. 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
2. Lanterns, where used, shall be provided in a minimum ratio of one per occupant of each unit, including tents.

G. 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.

H. 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.

I. Cooking and Eating Facilities

1. 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

2. 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.

J. Garbage and Other Refuse

1. Durable, fly-tight, clean containers shall be provided to each housing unit, including tents, for storing garbage and other refuse; and
2. 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.

K. Insect and Rodent Control

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

L. Sleeping Facilities

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. When filing an application for certification and only where it is demonstrated to the Certifying Officer that is impractical to set up a second sleeping unit, the employer may request a variance from the separate sleeping unit requirement to allow for a second worker to temporarily join the open range operation. The second worker may be temporarily housed in the same sleeping unit for no more than three consecutive days and the employer must supply a sleeping bag or bed roll free of charge.

M. Fire, Safety and First Aid

1. All units in which people sleep or eat shall be constructed and maintained according to applicable state or local fire and safety law;
2. No flammable or volatile liquid or materials shall be stored in or next to rooms used for living purposes, except for those needed for current household use;
3. Mobile housing units for range use must have a second means of escape. One of the two required means of escape must be a window which can be easily opened, a hatch, or other provision. It must be demonstrated that the custom combine worker would be able to crawl through the second exit without difficulty;
4. 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 fireproof; and
5. Adequate fire extinguishers in good working condition and first aid kits shall be provided in the mobile housing.