

<b>EMPLOYMENT AND TRAINING ADMINISTRATION</b> <b>ADVISORY SYSTEM</b> <b>U.S. DEPARTMENT OF LABOR</b> <b>Washington, D. C. 20210</b>	<b>CLASSIFICATION</b> H-2A Program
	<b>CORRESPONDENCE SYMBOL</b> OFLC
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**ADVISORY: FOREIGN LABOR CERTIFICATION**  
**TRAINING AND EMPLOYMENT GUIDANCE LETTER NO. 16-06**

**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**  
**Multi-State Custom Combine Owners/Operators**

1. **Purpose.** To update guidance to reflect the processing of H-2A applications through ETA's National Processing Centers and outline special procedures as part of the labor certification process for multi-state custom combine owners/operators, including Canadian, who desire to employ temporary foreign workers as members of their respective custom combine crews in the United States.
2. **References.** 20 C.F.R. Part 655, Subpart B; 20 C.F.R. Part 653, Subparts B and F; 20 C.F.R. Part 654, Subpart E; and Field Memorandum (FM) 5-04, Special Procedures: Labor Certification for Processing Applications for Multi-State Custom Combine Owner/Operators (January 28, 2004).
3. **Background.** The custom combine grain harvesting activity has been designated by the U.S. Department of Labor as a major crop activity because of its importance to the national economy. 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 custom combine crews. Historically, H-2A applications for custom combine owners/operators were processed through the Employment and Training Administration's (ETA) Regional Offices.

<b>RESCISSIONS</b> <b>FM 5-04</b>	<b>EXPIRATION DATE</b> Continuing
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**ATTACHMENT A**  
**Special Procedures for Multi-State Custom Combine**  
**Owners/Operators under the H-2A Program**

This document outlines special procedures for applications submitted by multi-state custom combine owners/operators under the H-2A program, who desire to employ temporary foreign workers as members of their custom combine crews in the United States. Unless otherwise specified below, employer applications submitted by multi-state custom combine owners/operators must comply with the requirements for 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 the multi-state custom combine owner/operator will begin grain harvesting in the United States is responsible for processing the employer's certification request. Such responsibility includes directing the SWAs to place intra/interstate clearances orders, 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 clearance order shall be cleared to all states listed in the itinerary and for the entire duration of need. Certifications may be granted to a multi-state custom combine owner/operator for a period up to, but not to exceed, the estimated date of completion for the entire grain harvesting itinerary.
- B. **Application Filing.** A multi-state custom combine owner/operator 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 grain harvesting itinerary will begin. 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. In addition, the employer is required to simultaneously file a copy of the application with the appropriate SWA in the state where the grain harvesting itinerary will begin. With its application to the NPC and SWA, the employer must provide a copy of the itinerary in the United States, including the names, locations, and telephone numbers of farmers whose grain is to be harvested, and the estimated dates and times for harvesting the grain in each location.

The individual custom combine owner/operator must be listed on the H-2A application as the "employer of record." Regardless of the employer's country of origin – U.S. or other – H-2A labor certification must be obtained from DOL for the jobs to be performed by any crew members employed by the custom combiner who are not U.S. workers. However, H-2A certification is not required for a custom combine owner/operator who is Canadian and who wishes to enter the United States to harvest grain; such individuals may apply directly to any U.S. Citizenship and Immigration Services (USCIS) Port of Entry for a B-1 (Visitor for Business) visa waiver.

For more information on the B-1 visa program, please visit the USCIS Web site at <http://www.uscis.gov>.

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 which 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.

Because of delays in mail delivery to and from Canada, Canadian employers are encouraged to use express overnight mail service to expedite the delivery and receipt of communications between employers and the appropriate NPC, so as to ensure meeting regulatory deadlines.

- C. **Duration of Itinerary.** A multi-state custom combine owner/operator may require that a U.S. worker applying for a job be available for the entire duration of the grain harvesting itinerary 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 is granted and the employment period begins, 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 grain harvesting 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.
- D. **Wages and Working Conditions.** A multi-state custom combine owner/operator must offer and pay to all U.S. and H-2A foreign workers (who are members of their custom combine crews) at least the prevailing wage rate, as determined for each state; the applicable hourly Adverse Effect Wage Rate (AEWR), as determined for each state; or the statutory Federal or state minimum wage rate, whichever is highest.

The employer must also guarantee to offer each worker employment for at least three-fourths of the workdays in the work contract period and any extensions, and pay each worker at least twice monthly. The employer must guarantee each crew member, for each pay period, at least the applicable hourly AEWR for each state where the work is to be performed. In accordance with 20 C.F.R. 655.102(b)(7), the employer must also maintain accurate and adequate records

with respect to the workers' earnings and actual time worked to ensure that the AEWG guarantee is met. Prior guarantees for custom combine crews of a minimum monthly wage and provision of a free meal are no longer in force.

In the case of Canadian employers, wages must be paid in U.S. currency or the equivalent in Canadian currency to Canadian workers.

- E. **Standards for Housing.** A multi-state custom combine owner/operator may use a camper, mobile unit, or other similar vehicle for sleeping purposes and supplement this unit with lodging in a motel or other public accommodation(s). The job offer must identify the type of housing that will be used for lodging crew members. An employer's use of a camper, mobile unit, or other similar vehicle for sleeping purposes requires an annual inspection of each vehicle. When lodging will be in a motel or other public accommodation, the H-2A application must identify the rental, public accommodation, or other substantially similar class of habitation to be provided for the contract period, and the employer must submit a written statement of assurance to the NPC that such accommodations will comply with established standards for such housing. Federal regulations at 20 C.F.R. 655.102(b)(1)(iii) state, in pertinent part, the following:

*“Standards for other habitation. Rental, public accommodation, or other substantially similar class of habitation must meet local standards for such housing. In the absence of applicable local standards, State standards shall apply. In the absence of applicable local or State standards, Occupational Safety and Health Administration standards at 29 CFR 1910.142 shall apply. Any charges for rental housing shall be paid directly by the employer to the owner or operator of the housing. When such housing is to be supplied by an employer, the employer shall document to the satisfaction of the RA [ETA Regional Administrator, now the NPC], that the housing complies with the local, State, or federal housing standards applicable under this paragraph (b)(1)(iii).”*

When lodging will be provided in a camper or other similar vehicle and the required inspection and approval report does not accompany the application, the employer may submit the report at a later time. However, applications will not be certified by the NPC until the required inspection report is received from the employer. The only exception to this rule is where the employer amends the application with a written statement of assurance that motels, instead of campers, mobile units, or other similar vehicles, will be used to lodge crew members until the required SWA inspection report is submitted.

Multi-state custom combine owners/operators from Canada who indicate that lodging for their crew members will be campers, mobile units, or other similar vehicles must submit a report of inspection of such vehicles conducted by a representative of the Canadian government with their H-2A applications. A new inspection report is required annually for each vehicle.

F. **Billing.** When the NPC bills custom combine owners/operators for fees associated with approved labor certifications, the billing notice will instruct the employer to pay by check or money order (including International Money Order), and require that the check or money order be payable in U.S. currency.