

ATTACHMENT A
Special Procedures: Labor Certification Process for Applications for Shepherding and Goatherding Occupations under the H-2A Program

This document outlines special procedures for applications submitted by employers for shepherding and/or goatherding occupations under the H-2A Program. Unless otherwise specified in this attachment, applications submitted for these 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 these 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 shepherding and/or goatherding are characterized by other than a reasonably regular workday or workweek, an employer must agree 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. As a condition of receiving an H-2A labor certification, an employer must comply with all applicable Federal, state and local employment-related laws and regulations, including the mandatory state minimum wage rates for the occupation.

In establishing the prevailing wage rate for shepherding and/or goatherding, the Department uses findings from prevailing wage surveys conducted by SWAs in accordance with the procedures in the [ETA Handbook No. 385](#), and consistent with the wage setting procedures historically applied to shepherd occupations in the Western states. SWAs are required to transmit wage rate findings covering shepherding and/or goatherding 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.

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 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 to ensure that the wages of similarly employed workers are not adversely affected.

If the OFLC cannot establish a wage rate by using comparable survey data from an adjoining or proximate SWA, the OFLC will give consideration to aggregating survey data for shepherding and/or goatherding 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 its Farm Labor Survey.

B. Job Orders and SWA Review (20 CFR 655.121).

1. Basic Process. An employer engaged in shepherding and/or goatherding activities 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 Part 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 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.

2. Master Job Orders Filed by Associations. The Department is granting a waiver of the required time period and location(s) of filing job orders prepared by associations acting as a joint employer with its members. Where the job order is being prepared in connection with a future master application, the joint employer association will submit a single "master" job order directly to the Chicago NPC once each calendar year in accordance with a schedule approved by the Chicago NPC. Because of the unique nature of shepherding and/or goatherding work, and the historic shortage of domestic workers, an association is permitted to file a master job order on behalf of a number of its employer-members in more than two contiguous states as long as (a) the job order remains active on a year-round basis, (b) the job order contains the names, addresses, telephone numbers, and number of openings of each employer and identifying, with as much geographic specificity as possible and for each employer, all of the physical locations, directions, and estimated start and end dates of need where work will be performed, and (c) the association agrees to place with any of its employer-members any qualified U.S worker who applies for employment.

The Chicago NPC will review the job order for compliance with all regulatory requirements and work with the association to address any deficiencies in a manner that is consistent with 20 CFR 655.140 and 141. Once the job order is determined to meet all regulatory requirements, the Chicago NPC will issue a Notice of Acceptance consistent with 20 CFR 655.143, place a copy of the master job order on the

Department's national electronic job registry, and notify the association and all appropriate SWAs with jurisdiction over the anticipated worksites.

- C. Contents of Job Offers (20 CFR 655.122). Unless otherwise specified in this section, the content of job orders submitted to the SWAs and the Chicago NPC for sheepherding and/or goatherding occupations must comply with all of the requirements of 20 CFR Part 655, Subpart B, 653 Subparts B and F, and 20 CFR Part 654.

1. Job duties, qualifications, and requirements.

Job Duties. Based on current industry practice, the SWA may rely on the following standard description of the duties to be performed by sheepherders and/or goatherders:

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

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 flocks (e.g., open range bands of sheep are often 1,000 heads or more), 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 sheepherding or 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 a sheepherder or goatherder 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 TEG, 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 as set out 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 shepherding and/or goatherding 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 shepherding and/or goatherding 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 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. Meals. Based on long standing practice in the industry, the employer must provide its U.S. and H-2A workers free of charge either three prepared meals a day, when workers are in camp, or free and convenient cooking facilities and provision of food for the workers to prepare their own meals while in camp or on the range.
6. Transportation; daily subsistence. Based on long standing practice in the industry, the employer must advance inbound transportation and subsistence costs to both U.S. and H-2A workers being recruited and extend the same benefit to workers in corresponding employment, consistent with 20 CFR 655.122(h).
7. 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 shepherders and/or goatherders (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 begins and ends 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.

8. Frequency of pay. 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 sheepherders and/or goatherders, the employer is authorized to pay the worker based on a monthly payment arrangement as long as the worker mutually agrees and the arrangement is reflected in the work contract. Employers must pay wages when due.
9. Period of Employment and Work Contract. The total period of employment (Item No. 9 on ETA Form 790) contained in a job offer must be for no more than one year.

Employers whose original certified period of employment is less than the maximum permissible duration, may negotiate a longer-term contract with an H-2A or a U.S. worker after workers arrive at the job site consistent with 20 CFR 655.170. An extension of the work contract period that is negotiated between the H-2A employer and a worker which would extend the work contract period beyond the 12 months permitted by the Department's H-2A regulations, requires that the employer obtain a new labor certification from the Department.

Short term extensions which do not exceed two weeks may be submitted directly to the Department of Homeland Security for approval. However, the employer must first submit for approval any change in the period of employment to the Chicago NPC, consistent with 20 CFR 655.170, if the change would result in an extension of the work contract period in excess of two weeks.

When a longer term contract is negotiated with a worker, the employer is not relieved of the responsibility for reimbursement to the worker for travel and subsistence expenses incurred in getting to the job site which were advanced by the employer and subsequently withheld from the worker's pay until 50 percent of the original contract period elapsed. These payments must be made at the 50 percent completion point of the original certified period of employment. The employer is also responsible for transportation and subsistence expenses from the place of employment if the worker successfully fulfills his/her obligations under the original certified terms of employment or is terminated without cause and has no subsequent H-2A employment. The employer must provide or pay for the worker's return transportation and subsistence whenever the employment relationship is severed after the completion of the original certified work contract period or where the worker is terminated without cause. Similarly, an employer is not relieved of its obligation to pay for return transportation and subsistence if an H-2A worker is displaced as a result of the employer's compliance with the 50 percent rule. Successful completion of the original certified work contract period or job order entitles the worker to return transportation and subsistence regardless of performance under any short or long-term extension of the contract.

II. APPLICATION FOR TEMPORARY EMPLOYMENT CERTIFICATION FILING PROCEDURES

A. Application Filing Requirements (20 CFR 655.130). An individual employer that desires to apply for temporary employment certification for one or more nonimmigrant foreign 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.

B. Master Applications Filed by Associations. An association filing as a joint employer may submit a master application on behalf of a number of its employer-members in more than two contiguous States covering multiple start dates of employment as long as the application identifies the names, addresses, telephone numbers, directions to all work locations/itinerary, estimated dates of need, and the number of openings for each employer-member that will employ workers. The association may prepare, sign, and submit the Appendix A.2 on behalf of its members.

An association with a master job order on file with the Chicago NPC is not required to re-submit the ETA Form 790 and all attachments unless the association is requesting modifications. The Chicago NPC will verify that the master job order associated with a master application is available on the national electronic job registry and covers all the employer-members duly named on the ETA Form 9142. Any changes to the master job order and/or application must be reviewed and approved by the Chicago NPC. Any approved modifications to the master job order will be placed on the Department's national electronic job registry and notification provided to the association and all appropriate SWAs with jurisdiction over the anticipated worksites.

For both individual employer applications and master applications, the filing procedures at 20 CFR 655.130 – 655.135 apply to “initial” applications (i.e., where the employer is requesting a labor certification to hire a nonimmigrant foreign worker to fill a vacant position) as well as to “renewal” applications (i.e., where the employer is requesting certification for a position which is already held by a nonimmigrant foreign worker completing the first or second year of a planned 3-year work period with the employer).

III. POST-ACCEPTANCE REQUIREMENTS

A. Interstate clearance of job order. The Chicago NPC Certifying Officer will place a copy of the master job order on the Department's national electronic job registry, and notify the association and all appropriate SWAs with jurisdiction over the anticipated worksites to make available a copy of the master job order on their active files and initiate

recruitment of U.S. workers. This procedure applies to applications filed by an individual employer as well as an association and satisfies the agricultural clearance order requirements at 20 CFR 653, Subpart F.

- B. Newspaper advertisements. Because of the unique nature of sheepherding and/or goatherding work, and the consistent lack of qualified applicants responding to newspaper advertisements, all applications filed by an individual employer and/or an association are exempt from the regulatory requirements at 20 CFR 655.151 to place advertisements in a newspaper of general circulation.
- C. Referrals of U.S. workers. In accordance with 20 CFR 655.155, SWAs may only refer for employment individuals who have been apprised of all the material terms and conditions of employment and have indicated, by accepting referral to the job opportunity, that he or she is qualified, able, willing, and available for employment. For master job orders, the association may accept referrals of U.S. workers, conduct interviews, and make hiring commitments on behalf of its employer-members. In such circumstances, the master job order must clearly explain how applicants will be considered for hire through the association, including the method(s) for contact (e.g., telephone, in person), hours and/or location(s) for conducting interviews, an indication that collect calls will be accepted, and whether referred applicants should report to the nearest local office of the SWA when they arrive in the area of intended employment. Employers who wish to conduct interviews must do so at little or no cost to the worker, in accordance with 20 CFR 655.152(j).

Because of the unique nature of master job orders, the association will need to determine if there is a job opening in the geographic area of the applicant's choice. The association will make every effort to place a qualified applicant with an employer-member in the geographic area of the applicant's choice within 3 working days of the telephone interview. If the applicant is determined to be qualified and the geographic assignment choice can be accommodated, the association, after receiving authorization or confirmation from the specific employer, will make a hiring commitment on behalf of the employer-member who has the job opening to which the applicant will be placed.

The association may also make available to applicants information on job openings with non-association employers, particularly in situations where the association is not able to readily accommodate the applicant's geographic choice of employment. However, receiving such a referral will not preclude the applicant from choosing a different geographic area covering an employer-member or from deferring a decision to accept a job offer until a job opening in the geographic area of choice becomes available with an employer-member. After the matter of geographic location/assignment is resolved, the association will provide notification to the SWA when the applicant has been hired and facilitate the arrangements necessary to ensure that transportation and subsistence are provided in advance to the worker by the association. The association will retain all documentation related to referrals of U.S. workers, interviews and the results of such actions for a period of 3 years and will make all materials related to the recruitment and consideration of U.S. applicants available to the Chicago NPC pursuant to a request for audit as required by 20 CFR 655.180(b).

IV. POST-CERTIFICATION: TRANSFER OF WORKERS

A. Authority

Pursuant to 8 U.S.C. 1188(d)(2), the Department's certification granted to the association may be used for the certified job opportunities of any of its members and such workers may be transferred among its members to perform the services for which the certification was granted. Although a worker may be transferred from one member to another member, the association may not transfer workers to any non-member employer or employer-members not disclosed on the master job order.

The employer must disclose in the job offer that workers may be transferred to any of its certified members and guarantee that workers will be notified at least 7 working days in advance of such transfer. When a worker objects to a transfer, the association will consider the worker's concerns and preferences. However, ultimate refusal on the part of a worker to a transfer may subject the worker to dismissal based on a lawful, job-related reason.

B. Notification to the DOL and SWA

To ensure the employer to whom a worker is being transferred has sufficient housing meeting the applicable standards, the association shall provide written notification to the SWA with jurisdiction over the area of intended employment and the Chicago NPC no less than 7 working days prior to the transfer. Such notification shall describe the details of the transfer, including the number and names of workers and employers affected and housing information. This notification will provide the SWA with time to make a determination regarding the suitability of the housing and, where such a transfer affects the available job openings of the association's employer member(s), allow the SWA and Chicago NPC to make appropriate modifications to the active master job order to reflect any changes in the employer's situation.

If the SWA determines that suitable housing is not available, the SWA shall provide written notification to the association and the Chicago NPC that the planned transfer shall be put in abeyance until the housing is determined by the SWA to be sufficient and meets the applicable standards, or the association agrees to transfer the worker to another employer where the SWA has issued a determination that housing is suitable.

C. Contractual Obligations

The employer who employs the newly transferred worker assumes the existing obligations of the work contract entered into with the previous employer including any multi-year contract negotiated with the worker. The association is responsible for maintaining and making available for inspection a copy of all work contracts for its employer-members. Where the worker is moved to another state with a different offered wage rate, the employer will be required to pay the worker the established prevailing wage for that state.