

Signed in Washington, DC this 29 day of July 2011.

Jane Oates,

Assistant Secretary for Employment and Training Administration.

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DEPARTMENT OF LABOR

Employment and Training Administration

Training and Employment Guidance (TEGL) Letter No. 16-06, Change 1, Special Procedures: Labor Certification Process for Multi-State Custom Combine Owners/Operators Under the H-2A Program

AGENCY: Employment and Training Administration, Labor.

ACTION: Notice.

SUMMARY: The Employment and Training Administration (ETA) of the United States Department of Labor (Department) is publishing, for public information, notice of the issuance and availability of TEGL 16-06, Change 1, entitled, *Special Procedures: Labor Certification Process for Multi-State Custom Combine Owners/Operators under the H-2A Program*, signed on June 14, 2011, by Jane Oates, Assistant Secretary for Employment and Training Administration.

FOR FURTHER INFORMATION CONTACT: William L. Carlson, PhD, Administrator, Office of Foreign Labor Certification, ETA, U.S. Department of Labor, 200 Constitution Avenue, NW., Room C-4312, Washington, DC 20210; Telephone (202) 693-3010 (this is not a toll-free number). Individuals with hearing or speech impairments may access the telephone number above via TTY by calling the toll-free Federal Information Relay Service at 1-800-877-8339.

SUPPLEMENTARY INFORMATION:

Special Procedures: Labor Certification Process for Multi-State Custom Combine Owners/Operators Under the H-2A Program

1. *Purpose.* To transmit special procedures, updated to reflect regulatory and organization changes in the H-2A Program, for multi-state custom combine owners/operators (including Canadian) who apply to the Department of Labor (Department) to obtain labor certifications to hire temporary agricultural foreign workers as crew members to perform work in the United States (U.S.).

2. References.

- 20 CFR part 655, subpart B;
- 20 CFR part 653, subparts B and F;
- 20 CFR part 654, subpart E;
- Training and Employment Guidance Letter (TEGL) No. 16-06, Special Procedures for Processing H-2A Applications for Multi-State Custom Combine Owners/Operators;
- Field Memorandum (FM) No. 5-04, Special Procedures: Labor Certification for Processing H-2A Applications for Multi-State Custom Combine Owners/Operators;
- 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 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.

The significance of the custom combine activity on the U.S. economy resulted in the promulgation of H-2A special procedures that were initially published in the **Federal Register** on April 12, 1989 (54 FR 14703, Apr. 12, 1989). Upon a request from the U.S. Custom Harvesters, Inc., the special procedures for custom combine owners/operators were revised and transmitted by FM No. 5-04 on January 28, 2004, which was directed to all ETA Regional Administrators. The processing of H-2A applications at that time was conducted by ETA Regional Offices. FM No. 5-04 was rescinded by TEGL 16-06.

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 (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 2010 Final Rule implements changes that affect special procedures for multi-state custom combine owners and operators.

Section 20 CFR 655.102 provides the Administrator of the Office of Foreign Labor Certification (OFLC) with authority to establish, continue, revise or revoke special procedures for processing of certain H-2A applications, including those for custom combine harvesting crews, as long as those procedures do not deviate from statutory requirements under the INA.

This TEGL updates the special procedures previously established for applications for multi-state custom combine owners and operators to reflect organizational changes, in addition to new regulatory and policy objectives. It rescinds and replaces previous guidance disseminated under TEGL No. 16-06, Special Procedures for Processing H-2A Applications for Multi-State Custom Combine Owners/Operators.

4. *Special Procedures.* Attachment A outlines special procedures for applications submitted by multi-state custom combine owners/operators under the H-2A Program. Attachment B outlines standards for housing applicable to multi-state custom combine owners/operators 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 part 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. *Effective Date.* This guidance applies to all temporary labor certification applications for occupations in custom combine operations in the H-2A Program with a start date of need on or after October 1, 2011.

6. *Action.* 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 applications from multi-state custom combine owners/operators.

7. *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.

8. Attachments.

Attachment A—Special Procedures: Labor Certification Process for the Multi-State Custom Combine Owners/Operators under the H-2A Program. *See full text below.*

Attachment B—Standards for Housing Applicable to Multi-State Custom Combine Owners/Operators. *See full text below.*

Attachment A: Special Procedures: Labor Certification Process for Applications 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. Unless otherwise specified in this attachment, applications submitted for custom combine 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 custom combine occupations must comply with the requirements of 20 CFR parts 655, subpart B, 653, subparts B and F, and 654.

I. Prefiling Procedures

A. Offered Wage Rate (20 CFR 655.120(a)). An employer must offer, advertise in the course of its recruitment, and pay a wage that is the highest of the Adverse Effect Wage Rate, the prevailing hourly wage, the agreed-upon collective bargaining wage, or the Federal or State minimum wage, in effect at the time custom combine work is performed and for each State listed in an approved itinerary. In establishing agricultural prevailing wages, including those for custom combine activities, the Department continues to use findings from prevailing wage surveys conducted by SWAs in accordance with the procedures in the ETA Handbook No. 385. SWAs are required to transmit wage rate findings covering custom combine activities 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.

B. Job Orders and SWA Review (20 CFR 655.121). An employer engaged in custom combine activities is allowed to submit a single Agricultural and Food Processing Clearance Order, ETA Form 790 (job order), Office of Management and Budget (OMB) 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 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 custom combine activities must comply with all of the requirements of 20 CFR parts 655, subpart B, 653, subparts B and F, and 654.

1. Job qualifications and requirements.

Experience. Due to the unique nature of the work to be performed, the job offer may require that applicants possess up to 6 months of experience in custom combining activity and may require reference(s) to verify experience in performing such 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.

Completion of Itinerary. An employer engaged in multi-state custom combine activity may require in its job offer that an applicant for the job must be available to work for the remainder of the entire itinerary. An applicant referred to the employer after the labor certification has been granted, but before 50 percent of the work contract period for the entire itinerary 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 duration of the custom combine itinerary.

2. *Housing.* The employer must state in its job offer 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. A custom combine 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 custom combine 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 custom combine 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 offer 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 to assist workers in performing assigned duties.

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 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 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.

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

B. H-2A Labor Contractor (H-2ALC) Filing Requirements (20 CFR 655.132). The Department is granting a special variance to the application filing procedures for H-2ALCs contained at 20 CFR 655.132(a). Specifically, an employer engaged in multi-state custom combine activities is authorized to file an *Application for Temporary Employment Certification* covering one or more areas of intended employment based on a definite itinerary. An employer who desires to employ one or more nonimmigrant workers on an itinerary to provide custom combine services to fixed-site farmers/ranchers is, by definition, an H-2ALC. Therefore, the custom combine labor contractor must identify itself as the employer of record on the ETA Form 9142 by completing Section C and marking item C.17 as "H-2A Labor Contractor," and submitting, in addition to the documentation required under 20 CFR 655.130, all other required documentation supporting an H-2ALC application. The only special variance to the requirements at 20 CFR 655.132(b) is the recognized exemption of custom combine activities from the requirements of the Migrant and

Seasonal Agricultural Worker Protection Act (MSPA) (29 U.S.C. 1801, 1803(a)(30)(E) *et seq.*).

III. Post-Acceptance Requirements

Billing (20 CFR 655.163(a)). When Canadian custom combine owners/operators are billed for 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.

Attachment B: Standards for Housing Applicable to Multi-State Custom Combine Owners/Operators

I. Procedures

Multi-state custom combine occupations generally require workers to live in housing of a mobile nature, a fixed-site farm, ranch or similar establishment or rental or public accommodations. For purposes of these special procedures, mobile housing is any housing that is capable of being moved from one area 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.

Except for long-standing standards for mobile housing which are listed under II below, all employer-provided housing must comply with 20 CFR 655.122(d). Multi-state custom combine owner/operators must provide an annual housing inspection report for all employer-owned housing (mobile or fixed-site housing) or other similar establishment used for sleeping purposes. Where the required inspection and approval report does not accompany the application, the employer may submit the report before the determination due date. However, the Chicago NPC will not certify applications unless the CO receives the required inspection report from the employer. The employer may amend the application with a written statement of assurance that motels, instead of mobile units, or other similar vehicles will be used to lodge crew members until the required SWA inspection report is submitted. 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 Chicago NPC that such accommodations will comply with established standards for such housing during the entire period of

occupancy. Any charges for rental or public accommodations must be paid directly by the employer to the owner or operator of the housing.

Multi-state custom combine owners/operators from Canada who indicate that lodging for their crew members will be 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. I

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 it 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 custom combine 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.

Signed in Washington, DC, this 29th day of July 2011.

Jane Oates,

Assistant Secretary for Employment and Training Administration.

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DEPARTMENT OF LABOR

Employment and Training Administration

Training and Employment Guidance (TEGL) Letter No. 17–06, Change 1, Special Procedures: Labor Certification Process for Employers in the Itinerant Animal Shearing Industry Under the H–2A Program

AGENCY: Employment and Training Administration, Labor.

ACTION: Notice.

SUMMARY: The Employment and Training Administration (ETA) of the United States Department of Labor (Department) is publishing, for public information, notice of the issuance and availability of TEGL 17–06, Change 1 entitled, *Special Procedures: Labor*