

U.S. Department of Labor
Employment and Training Administration
OFFICE OF FOREIGN LABOR CERTIFICATION

2015 H-2A Herder Rule FAQs: *Temporary Agricultural Employment of H-2A Foreign Workers in the Herding or Production of Livestock on the Range in the United States*

Round 3: Application Filing, Processing, and Post-Certification

Filing the application (Form ETA-9142A) and job order (Form ETA-790)

1. Under the H-2A Herder Rule, can I submit an H-2A application to Chicago National Processing Center (NPC) 75 days before my date of need?

Yes. An employer seeking range workers may choose to submit its H-2A application package earlier than the H-2A Herder Rule requires. The H-2A Herder Rule requires an employer to submit its H-2A application package (including Form ETA-790, *Agricultural and Food Processing Clearance Order*) to the Chicago NPC at least 45 calendar days before its date of need. However, employers are encouraged to use the normal H-2A rule's job order submission timeframe (i.e., 60-75 days in advance of the start date) as a guide for timing the submission of its range herder application package to the Chicago NPC, whenever possible, to facilitate processing and the employer's timely receipt of the final determination.

2. What do I submit to show the housing I will provide workers on the range meets range housing standards?

An employer filing an *H-2A Application for Temporary Employment Certification*, Form ETA-9142A, for processing under the H-2A Herder Rule provisions must show the housing its workers will use on the range is sufficient to accommodate the number of certified workers and meets all applicable range housing standards at 20 CFR 655.235. To do this, the employer must submit a copy of a valid State Workforce Agency (SWA) housing certification (issued within the past 36 months).

During the non-inspection years, the employer must submit a valid SWA housing certification along with a "self-certification" that the employer's housing complies with the range housing standards contained in 20 CFR § 655.235.

A "self-certification" is a written statement, signed and dated, assuring that the range housing the SWA inspected and certified is available, sufficient to accommodate the number of workers being requested for certification, and continues to meet all applicable range housing standards. An employer with multiple housing units should clearly identify the particular unit(s) addressed in the self-certification (e.g., using a unit number or other identification number from the SWA's housing certification) so

that its self-certification can be clearly matched to the SWA's housing certification for the same unit(s).

In some cases, a SWA housing certification that is valid at the time the employer files its H-2A application may expire before the end date of work requested. To clearly ensure continuous compliance during the work contract period, the employer's self-certification statement should indicate its plans for ensuring SWA re-inspection of the range housing before the validity period of housing certification ends.

Important Reminder: An employer who does not have a valid SWA housing certification for the range housing unit(s) it intends to provide its workers (e.g., the unit has never been inspected or the SWA housing certification has expired) must arrange for inspection and obtain SWA housing certification before H-2A certification may be granted.

3. When I submit an *H-2A Application for Temporary Employment Certification*, Form ETA-9142A, to the Chicago National Processing Center for processing under the H-2A Herder Rule, do I have to include the State Workforce Agency (SWA) housing certification and my self-certification of my range housing?

The Chicago NPC cannot issue an H-2A temporary labor certification until it receives evidence that the employer's housing is in compliance with applicable program requirements. Employers are encouraged to submit the required evidence (e.g., the SWA housing certification and the employer's self-certification of range housing) at the time of filing an *H-2A Application for Temporary Employment Certification*, Form ETA-9142A. However, if an employer does not have this documentation ready at the time it submits the application, the employer must submit with its application a written request for conditional access to the SWA's job order system. The employer will be directed by the Notice of Acceptance to submit to Chicago NPC the required evidence of compliant housing before certification may be granted.

4. Do I need to provide proof of workers' compensation insurance coverage in all states where work will be performed?

All employers filing an *Application for Temporary Employment Certification*, Form ETA-9142A, seeking H-2A workers must provide workers' compensation insurance in compliance with State law covering injury and disease arising out of and in the course the worker's employment or, if the type of employment is not covered by or is exempt from the State's workers' compensation law, equivalent insurance at no cost to the worker. 20 CFR 655.122(e). Where a worker will perform labor or services in more than one State, injury or disease arising out of and in the course of employment could occur in any one of those States. Therefore, the employer must provide proof of workers' compensation insurance coverage or, where applicable, its equivalent **in each state** where work will be performed, 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.

- 5. The definition of “production of livestock” includes “applying weed control” as a ranch duty not closely and directly related to herding and/or the production of livestock. However, it may be necessary for a herder to apply herbicide on a grazing area to a weed that endangers the safety of the livestock (e.g., larkspur is deadly to cattle). Would applying weed control on grazing areas be an acceptable job duty to list on my job order?**

The job order must include only range herding and/or production of livestock duties, which includes duties at the ranch that are, or are closely and directly related to, the herding and/or production of livestock. While the definition of “production of livestock” prohibits “applying weed control” at the ranch, it includes “guarding and protecting livestock from predatory animals and poisonous plants” on the range as a permissible duty of the job. Therefore, a worker applying herbicide to a particular range grazing area for the express purpose of ensuring the safety of the livestock would fall within the scope of the regulatory definition. However, applying herbicides/pesticides off of the range or for purposes other than ensuring the safety of the livestock (e.g., on crop fields located at or near the ranch headquarters, including crops being raised for feed for the herd or stubble grazing) is not a permissible duty for workers employed under the provisions of the H-2A Herder Rule.

Important Reminder: All duties that will be performed off of the range must be specifically listed in the job order.

- 6. The definition of “production of livestock” includes “chopping wood” as a ranch duty not closely and directly related to herding and/or the production of livestock. Can I list chopping wood as a job duty in my job order as long as the wood chopped is for use by the range worker (e.g., as fuel for the wood burning stove) and does not constitute a major part of the worker’s duties?**

The job order must include only range herding and/or production of livestock duties, which includes duties at the ranch that are, or are closely and directly related to, the herding and/or production of livestock. The regulation specifically states that chopping wood off the range is a ranch task that is not closely and directly related to herding or the production of livestock and, therefore, cannot be listed in the job order and cannot be performed by a range worker. This includes where a worker lives in range housing that is temporarily located at the ranch and he or she needs to heat his or her housing unit using a wood burning stove. The employer is responsible for ensuring that the worker has an adequate supply of wood for the heating unit when that worker is near the ranch and continuing to use the range housing.

While chopping wood at the ranch is specifically identified as an impermissible duty, the regulation recognizes that certain tasks may be closely and directly related to the production of livestock when performed on the range, based on the fact that the worker is living on the range with the herd which necessitates certain basic living tasks (e.g., digging a pit for the disposal of excreta, 20 CFR 655.235(c)). Chopping wood for the worker's personal use for heating and/or cooking when the worker is on the range may be similarly permissible, but only if the worker can find and chop wood easily in that particular location on the range.

Please note that it remains the employer's obligation to ensure that the worker has the required functional cooking facilities and heating equipment. The regulations require employers to provide all tools, supplies, and equipment required by law, by the employer, or by the nature of the work. 20 CFR 655.210(d). In addition, the regulations require employers to provide either three sufficient meals a day, or to supply food and free and convenient cooking facilities. 20 CFR 655.210(e)(1). The regulations further require that the employer (where climate conditions necessitate protecting the safety and health of the worker) must "have properly installed operable heating equipment that supplies adequate heat." 20 CFR 655.235(e). These requirements cannot be met without the fuel necessary to operate the equipment. Therefore, if the employee is in an area that does not have an easily accessible supply of firewood, the employer must provide the supplies necessary to fulfill its requirements, for example, by delivering firewood to the worker.

7. My herders will be located in areas of the range where I cannot deliver potable water by motorized vehicle. Can they use natural sources of water for drinking and cooking?

Yes, under certain conditions. The H-2A Herder Rule requires employers to provide their range herding and production of livestock workers an adequate supply of potable water for drinking and cooking. The employer is required to deliver a supply of potable water to its workers on the range on a regular basis to ensure that each worker has at least 4.5 gallons of potable water available for drinking and cooking each day. If an employer anticipates a worker will be located in area(s) of the range during the work contract period that are not accessible by motorized vehicle, the employer may request a variance to the potable water delivery requirement at the time it submits its *H-2A Application for Temporary Employment Certification*, Form ETA-9142A, to the Chicago National Processing Center (NPC).

To request the variance, the employer must submit a written statement with its Form ETA-9142A attesting:

- (1) it has identified natural sources of water that are potable or may be easily rendered potable in the area in which the housing will be located and that those sources will remain available during the period the worker is in that location; and

(2) it will provide each worker with an effective means to test whether the water is potable and, if not, potable, the means to easily render it potable.

The employer is not relieved of the obligation to deliver potable water to a worker on the range unless it requests the variance at the time of filing and the CO approves the request. Moreover, the employer is not relieved of its obligation to deliver potable water to a worker on the range when the worker is in area(s) accessible by motorized vehicle or where natural sources of water are not guaranteed to be available to the worker when needed.

Important Reminder: If the CO approves the variance, the employer must disclose in the job order that it will provide as equipment necessary to perform the job, at no cost to the worker, the means to test whether a natural source of water is potable and, if not, the means to easily render it potable.

8. If my worker has his or her own electronic communication device (e.g., a cell phone) and I will reimburse the worker for work-related calls, do I have to provide a separate electronic communication device, and specify the type of device I will provide, in the job order?

Yes. The H-2A Herder Rule requires the employer to disclose in the job order the type of communication device that it will provide at no cost to the worker. At the time of placing the job order an employer cannot know what device(s) a prospective applicant might have. Moreover, while a worker may choose to use his or her own electronic communication device, the employer has an independent obligation under the regulation to provide a device to the worker for use on the range both to communicate with the employer and to communicate with persons capable of responding in an emergency.

Processing the application (Form ETA-9142A)

9. What information must I include in my recruitment report under the H-2A Herder Rule? Are content requirements different for an agricultural association preparing the recruitment report on behalf of its employer-members?

Your recruitment report must include the same information required of all H-2A employers:

- The name of each recruitment source;
- The name and contact information of each U.S. worker (including former U.S. workers) who applied or was referred to your job up to the date you prepared the recruitment report and the disposition of each worker;

- A statement confirming that former U.S. workers were contacted and by what means; and
- If applicable, for each U.S. worker who applied for the position but was not hired, explain the lawful job-related reason(s) for not hiring the U.S. worker.

An association that fulfills the recruitment requirements for its employer-members must maintain a written recruitment report containing this required information **for each individual employer-member** identified on the application or job order, including any approved modifications. While there is no specified format for the recruitment report, the association must prepare it in a manner that allows the Department to see the recruitment results for each of the employer-members separately.

Important Reminder: The Notice of Acceptance will provide instructions about preparing your recruitment report and a specific date by which you must sign, date, and submit the initial recruitment report to the Chicago NPC.

Post-Certification

10.I received a certification under the H-2A Herder Rule. What records am I required to keep of my range worker's hours and activities?

An employer subject to the provisions of the H-2A Herder Rule is exempt from recording the hours actually worked each day, the time the worker begins and ends each workday, and the duties performed, but all other earnings records and hours and earning statements requirements from the standard H-2A regulations apply. See 20 CFR 655.122(j) and (k). In addition, the employer must record the site of the employee's work each day, indicating whether the worker performed work on the range or off. This daily record, tracking which workdays the worker spent at the ranch versus days on the range, is essential to enabling the employer, and the Department if necessary, to assess compliance with the requirement that a majority (i.e., more than 50 percent) of the workers' days be spent on the range in order for the provisions of the H-2A Herder Rule to apply.

Important Reminder: On a day where a worker spends a portion of the day on the range and some portion on the ranch, the employer will record the day as a range day or a ranch day depending upon where the worker spent a majority of the hours worked during that workday.

11. How can I tell whether to record a day of work as on or off the range?

The H-2A Herder Rule provides a definition of “range” to assist employers in evaluating whether the location where a range worker performs work each day should be recorded as a “range” or “off range” workday for purposes of the required daily record of worksite location. 20 CFR 655.201.

The term “range” is defined as any area located away from the ranch headquarters where the herder is required to constantly attend to the livestock, evaluated based on the totality of the circumstances using a multi-factor test. It is important to understand that no one factor is controlling and the totality of the circumstances is considered in determining whether the area where work is performed is considered “range.” According to the definition, the following factors are indicative of the range:

- Involves land that is uncultivated;
- Involves wide expanses of land, such as thousands of acres;
- Located in a remote, isolated area; and
- Typically range housing is required so that the herder can be in constant attendance to the herd.

The definition of range also identifies locations that are not considered “range.” According to the definition, the following **do not** constitute the “range”:

- Ranch headquarters;
Ranch headquarters may or may not be where the owner resides. It is a place where the business of the ranch occurs, and does not embrace large acreage. It only includes the ranchhouse, barns, sheds, pens, bunkhouses, cookhouses, and other buildings in the vicinity).
- Feedlots, corrals, or any area where the stock involved would be near ranch headquarters; and
- Any area where a herder is not required to be available constantly to attend to the livestock and to perform tasks, including but not limited to, ensuring the livestock do not stray, protecting them from predators, and monitoring their health.

Where a range worker performs work in multiple locations during a single workday such that work is performed on both sites (i.e., on and off the range) during that workday, the employer will record the workday as a range day or a ranch day based on the site (i.e., on or off the range) where a worker spent the majority of the work hours that day.