



DOL's Proposed H-2A Herder and Range Livestock Regulations: Welcome and Long Overdue, but Needing Improvements

Pedro¹ had been a teacher in his native Peru, but when he was told he could make \$1,300 a month as a shepherd in the U.S. he jumped at the chance to better provide for his wife and child. He paid roughly \$5,500 in recruiting fees, arriving in Colorado on an H-2A visa in spring 2009. But he then learned that he would be working 11-14 hour days, seven days a week, for only \$750 a month. His employer took his passport, social security card, and other documents. On the ranch, he was housed in a small sheep wagon with holes and a door that did not shut properly. There was no bathroom or refrigerator to store food. Though his employer was supposed to provide him with food every weekend, he would often not show up. When Pedro protested, the ranch owner threatened to send him back to Peru. Soon, Pedro was sent to herd sheep in the mountains. He lived in a tent and became ill. Though the rancher deducted \$27 per month from Pedro's pay for health insurance, he refused to take him to the doctor. And Pedro could not use ranch vehicles to go to town and buy food. In August, he left, and the local police led him to a legal services attorney, who was able to help him reclaim his documents and some of his stolen wages.

As Pedro's story illustrates, the herder and range livestock H-2A programs lend themselves to abuse due to the workers' isolation, remote and primitive living conditions, extremely low wages and dependence on their employers. A survey of shepherding workers by Colorado Legal Services found that more than 80% were not permitted to leave their ranch, have visitors, or engage in social activities at any time during their employment. Seventy percent reported that they never had access to a functioning toilet and less than one-third had refrigerators to store food in their mobile campers. Many workers reported that their employer confiscated their passport and other documents, and some were not paid until they returned home to their countries of origin. Wage theft, dilapidated housing, and forced labor are commonplace in this industry.²

The H-2A program is intended to be a program of last resort for temporary, seasonal jobs when employers are unable to find U.S. workers available to perform the work. In order to hire H-2A workers, employers must show that they are unable to find U.S. workers to meet their labor needs and that bringing in guestworkers won't adversely impact the wages and working conditions of U.S. workers. The H-2A program includes some modest requirements to protect U.S. workers from the negative effects on wages and working conditions that result when employers hire guestworkers, as well as to protect those guestworkers from exploitation. While these H-2A program protections are limited, they are important; yet some of the key protections are not available to herders and range livestock workers. Due to the politically powerful ranching lobby,³ there have been longstanding "special procedures" for herder and range livestock H-2A workers.³

¹ Pseudonym

² Colorado Legal Services Migrant Farm Worker Division, "Overworked and Underpaid: H-2A Herders in Colorado" (14 January 2010), online at <http://users.frii.com/cls/Overworked%20and%20Underpaid.pdf>.

³ U.S. Department of Labor, Employment and Training Administration, Field Memorandum No. 32-10, "Special Procedures: Labor Certification Process for Employers Engaged in Shepherding and Goatherding Occupations Under the H-2A Program" (14 June 2011), online at: <http://wdr.doleta.gov/directives/attach/TEGL/TEGL32-10ACC.pdf>

Under the DOL special procedures, ranchers are permitted to pay H-2A herders just \$750 a month in most states even though the workers are required to be on call nearly 24 hours a day, 7 days a week while tending to animals on the open range. In many states, these wages effectively have not increased in roughly 20 years. The special procedures also allow employers to house sheepherders in wagons or tents and provide alternatives to toilets, showers, running water, and electricity if these amenities are not available. As a result, the H-2A program is often the only source of sheepherders and other range livestock workers: the special procedures allow employers to offer stagnant wages and dismal working conditions, rendering these jobs extremely unattractive to U.S. workers.

Even so, there are some U.S. workers who remain interested in the work, but are constrained by the very poor wages and other conditions. In the *Mendoza v. Perez* litigation, former H-2A sheepherders challenged the special procedures for sheep and goat herders as well as open range livestock workers. The plaintiffs, now lawful permanent residents, were interested in the sheepherder jobs but unable to accept them due to the low pay and poor working conditions. The Court agreed with the challenge to the “special procedures” and on April 15, 2015, in response to the court’s order, the Department of Labor issued a Notice of Proposed Rulemaking for H-2A sheepherders, goatherders, and open range livestock workers governed by “special procedures” under the program. The proposed rules are intended to replace the DOL’s Training and Enforcement Guidance Letters (TEGLs) that currently govern the program, but which must be repealed per the court’s order by December 1, 2015.

The proposed rules offer some improvements, but leave some troubling issues. As a threshold matter, one issue that must be addressed is the designation of “range worker.” Under the new regulations, the scope of which work is considered range work and ranch work is unclear and lumps sheepherder and open range workers into a single category of range workers. As a result, ranch hand and other livestock occupations at ranches currently filled by US workers could be encompassed by this proposed new category of range worker, which would result in the loss of jobs for US workers.

On a more positive note, under the proposed rules, the stagnant wage rate of \$750 per month for sheepherders in most states is proposed to be adjusted over the next five years. During this time, the wage will reach a level more reflective of average farmworker wage rates – more than double the current \$750 wage rate. The DOL proposed the practical and commonsense approach of basing the monthly wage on the same wage rate that is used by all H-2A employers – the Department of Agriculture’s Farm Labor Survey of the average wage paid to nonsupervisory field and livestock workers. While this is a welcome change that begins to address the wage stagnation in these herder and range livestock programs, further improvements are needed. DOL proposes that the wages be based on a 44-hour work week, but the reality is that range workers are on call 24 hours a day, 7 days a week while they are on the open range. Furthermore, DOL does not distinguish between time spent on the ranch performing ranch duties and time spent on the range. It would be fairer and simpler to require that when workers are living at or near the ranch, they be paid the AEWR on an hourly basis, as other ranch hands would be. Moreover, DOL proposes to phase in the wage increase over 5 years instead of taking more prompt steps to address this shamefully low wage. This is unacceptable, given that DOL’s special procedures caused the program’s wage stagnation. Finally, DOL should require workers to be paid on at least a bi-weekly basis and should include measures to ensure that they have access to their earnings.

Another positive development is DOL's expanded clarification of items employers must provide free of charge. Many H-2A range workers, like Pedro, come to the United States without any bedding, protective clothing or gear, because they are told that all needed supplies will be provided. Instead, these items are deducted from their paltry pay, resulting in very little earnings. This proposed regulation is an improvement, particularly if the further clarification DOL suggests is included.

The proposed regulations do address housing and make some minimal improvements, but propose very few changes to improve the unsafe and deplorable housing in which range workers live. Under the H-2A regulations, employer-provided housing must undergo annual inspection. Despite widespread concerns about range worker housing, DOL maintains the current exception for range workers, which only requires the state to inspect housing at a minimum of every three years, with employers permitted to self-inspect in other years. The standards for the range housing must also be improved. While there are obvious limitations on range housing, in this day and age many basic requirements can be met: the regulations should include improved minimum standards for heating and bedding, particularly in light of the often frigid conditions in which range workers live; requirements for food storage such as refrigeration; and regular access for range workers on at least a biweekly basis to running water to bathe or wash their clothes. One modest improvement is a stated need to ensure potable water for cleaning and laundry in addition to cooking, consumption and bathing.

The DOL has also sought input on the food requirements for range workers. Unfortunately, because most herders are isolated and dependent on their employers for even the most basic needs, they frequently find themselves without adequate food due to their employer's failure to bring them food on a regular basis; or when food is provided, it is often expired, rotten, bug-infested or simply lacking the necessary nutrients. The DOL must take adequate steps to ensure access to a nutritious food supply for these workers.

Finally, some requirements not included in the regulations must be addressed given the rampant abuses of basic human rights in the shepherd programs. While it may seem to go without saying, we believe the regulations must require employers to allow workers access to visitors and to receive their mail unopened. Workers must also be given time off at least every six months and as required for other H-2A workers, who cannot be required to work more than 6 days per week, while at the ranch. Finally, employers must be required to provide transportation to receive medical care at the request of their employees and access to healthcare outreach workers.

Farmworker Justice commends the beginning of a process to address the extreme injustice in our nation's H-2A program for herders and open range livestock workers and looks forward to further improvements.

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