SECOND CLASS WORKERS: ASSESSING H–2 VISA PROGRAMS' IMPACT ON WORKERS

HEARING

BEFORE THE

SUBCOMMITTEE ON WORKFORCE PROTECTIONS

OF THE

COMMITTEE ON EDUCATION AND LABOR U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED SEVENTEENTH CONGRESS

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C O N T E N T S

SECOND CLASS WORKERS: ASSESSING H–2 VISA PROGRAMS' IMPACT ON WORKERS

Wednesday, July 20, 2022

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON WORKFORCE PROTECTIONS,
COMMITTEE ON EDUCATION AND LABOR,
Washington, DC.

The Subcommittee met, pursuant to notice, at 10:17 a.m., at 2175 Rayburn Office Building, Hon. Alma Adams (Chairwoman of the Subcommittee) presiding.

Present: Representatives Adams, Takano, Norcross, Jayapal, Cherfilus-McCormick, Scott (Ex Officio), Keller, Stefanik, Miller-Meeks, Good, Steel, and Foxx (Ex Officio).

Staff present: Brittany Alston, Staff Assistant; Nekea Brown, Director of Operations; Ilana Brunner, General Counsel; Rasheedah Hasan, Chief Clerk; Sheila Havenner, Director of Information Technology; Eli Hovland, Policy Associate; Stephanie Lalle, Communications Director; Kevin McDermott, Director of Labor Policy; Kota Mizutani, Deputy Communications Director; Kayla Pennebecker, Staff Assistant; Mason Pesek, Labor Policy Counsel; Veronique Pluviose, Staff Director; Dhrtvan Sherman, Staff Assistant; Banyon Vassar, Deputy Director of Information Technology; Sam Varie, Press Secretary; ArRone Washington, Clerk and Special Assistant to the Staff; Cyrus Artz, Minority Staff Director; Michael Davis, Minority Legislative Assistant; Cate Dillon, Minority Director of Operations; Mini Ganesh, Minority Staff Assistant; John Martin, Minority Deputy Director of Workplace Policy/Counsel; Hannah Matesic, Minority Director of Member Services and Coalitions; Audra McGeorge, Minority Communications Director; Ethan Pann, Minority Press Assistant; Gabriella Pistone, Minority Staff Assistant; Ben Ridder, Minority Professional Staff Member; Krystina Skurk, Minority Speechwriter; Kelly Tyroler, Minority Professional Staff Member.

Chairwoman ADAMS. Thank you. Good morning, everyone. We are ready to begin, and I am going to count down from five and then we will start. Five, four, three, two, one. The Subcommittee on Workforce Protections will come to order. Welcome everyone. I note that a quorum is present.

The subcommittee is meeting today to hear testimony on second class workers, assessing H–2 visa programs' impact on workers. This is a hybrid hearing. Pursuant to House Resolution 8, and the regulations thereto. All microphones, both in the room and on the platform, will be kept muted as a general rule to avoid unnecessary background noise.

Members and witnesses will be responsible for unmuting themselves when they are recognized to speak or when they wish to seek recognition. When members wish to speak, or seek recognition, they should unmute themselves and allow a pause of 2 seconds to ensure that the microphone picks up their speech.

I also ask that members please identify themselves before they speak. Members who are participating in person should not be logged on to the remote platform or should not be logged on to the remote platform in order to avoid feedback, echoes and distortion. Members participating remotely shall be considered present in the proceeding when they are visible on camera, and they shall be considered not present when they are not visible on camera.

The only exception to this is that if they are experiencing technical difficulty, they should inform the committee staff of such difficulty. If any member experiences technical difficulty during the hearing, you should stay connected on the platform, make sure you are muted, and use your phone to immediately call the Committee's IT Director whose number was provided in advance.

Should the Chair need to step away for any reason, another majority member is hereby authorized to assume the gavel in the Chair's absence. In order to ensure that the committee's 5-minute rule is adhered to, staff will be keeping track of time using the committee's digital timer on the remote platform.

For members participating in person, the timer will be broadcast in the committee room on the television monitor as part of the platform gallery view, and visible in its own thumbnail window. The committee room timer will not be in use.

For members participating remotely, this will be visible in gallery view on its own thumbnail window on the remote platform. Members are asked to wrap up promptly when their time has expired.

Finally, while the recent guidance from the Office of the Attending Physician has made mask wearing optional at this time, please know that we have in our midst at both the member and staff levels, individuals who are immune compromised, and who have immediate family members who are immune compromised, as well as who are not vaccinated either due to medical reasons, or because the vaccine is not yet available to children under 6 months of age.

Therefore, the committee strongly recommends that masks continue to be worn out of concern for the safety of unvaccinated and immune compromised committee members and staff and their families. Pursuant to Committee Rule 8(c), opening statements are limited to the Chair and the Ranking Member.

This allows us to hear from our witnesses sooner and provides all the members with adequate time to ask questions. I recognize myself now for the purpose of making an opening statement.

Good morning. Today we are meeting to discuss the important role temporary migrant workers sometimes called guest workers, play in our economy, and the critical need for increased accountability and worker protections. The H–2A and H–2B Visa Programs allow U.S. employers to bring foreign workers to the U.S., to fill temporary agricultural and nonagricultural jobs for which U.S. workers are not available.

Tens of thousands of foreign citizens apply for admission to the United States each year under these H–2 programs, and applications are growing, and so are visa issuances, excuse me. In fact, in 2019 agricultural visa issuances exceeded 200,000 for the first time since the beginning of the program.

According to the latest data, the combined number of H–2A and H–2B visas issued was just under 353,000. Workers apply for H–2 visas to achieve economic opportunity, to escape poor working conditions, and ultimately with the hope that their employment can lead to a better life in America. Regrettably, the programs too often fail to deliver on these goals. Instead, as our witness Mr. Daniel Costa put it, "When it comes to H–2A and H–2B programs, the U.S. Government is failing to meet these basic standards and provide these basic rights to workers."

For example, temporary migrant workers can be charged exorbitant fees by recruiters for the opportunity to work temporarily in the U.S. Meanwhile, these recruiters are rarely held liable for the recruitment fees and abusive tactics.

In a recent case, Operation Blooming Onion, prosecutors charged H–2A owners, contractors, and recruiters, while selling for trading workers, requiring them to dig onions with their bare hands, paying 20 cents for each bucket harvested, and threatening the victims with guns and violence to keep them in line.

Allegations also include kidnapping, rape, and threats of violence and death to family members. The victims were allegedly held in cramped, unsanitary fenced work camps to prevent them from escaping, while little or no food, limited plumbing, and without safe water. At least two of the workers died because of these workplace conditions.

This is not economic opportunity. It is not a chance for a better life. This is Federal prosecutors—as Federal prosecutors have described, is modern day slavery. Problems with this program affect workers in communities across the country. My home State of North Carolina is one of top five employers of H–2A workers. The Midwest Center for Investigative Reporting spoke to many immigrant laborers who have become physically and mentally ill, working North Carolina's tobacco fields.

One H–2A worker said I have seen my coworkers suffer from tobacco sickness. A lot of them get allergies, others get insomnia, vomiting, many get dehydrated. There were times when the workers would need to go for IV drips at local clinics.

Baldemar Velasquez, Co-Founder and President of the Farm Labor Organizing Committee told the reporters no worker in his right mind is going to complain. There is no way to protect the workers from complaints, and to protect them from retaliation. Cases like Operation Blooming Onion are the direct result of extraordinary power and balance between workers and employers in this type of visa program. Unlike workers who are U.S. citizens or permanent residents, H–2 workers cannot easily switch jobs or employers, which is one of the most fundamental protections of a competitive labor market. Instead, when confronted with an unscrupulous employer, they are too often forced to remain silent, rather than speak up and risk retaliation or deportation.

Exploiting foreign workers also hurts American workers. We all know that when workers have more power in the workplace, they have higher wages, better benefits, and safer workplaces. By contrast, exploiting workers leads to degrading wages, and working conditions for all workers in the same occupation. Moreover, we have a real example of H–2A workers displacing an existing local workforce.

As Mr. Ty Pinkins will testify, local black workers have been the backbone of the Mississippi Delta farm economy for generations, and they would like to continue these jobs. However, the same local farmers who employed these workers for decades are now filling the jobs with H–2A workers. These employers also paid the H–2A workers significantly more money for the same or similar work, previously done by local black workers.

We should agree that all workers, both foreign and American, deserve to be treated with dignity and respect. As such, we have a responsibility to reform the H–2 Visa Program. Today I look forward to discussing several proposed solutions focused on prohibiting discrimination, holding recruiters and employers liable for visas, mandating the use of prevailing wages and strong labor standards, providing a path to citizenship, and protecting workers from retaliation.

These important steps, coupled with other critical provisions to increase worker protections and accountability, will ensure that workers can succeed in fair working conditions. Thank you to our witnesses for joining us today. I look forward to our discussion. I now recognize our distinguished Ranking Member for the purpose of making an opening statement, Mr. Keller.

[The statement of Chairwoman Adams follows:]

ED & LABOR **OPENING STATEMENT**

House Committee on Education and Labor
Chairman Robert C. "Bobby" Scott

Opening Statement of Chair Adams (NC-12)
Subcommittee on Workforce Protections
Second Class Workers: Assessing H2 Visa Programs Impact on Workers
Wednesday, July 20, 2022 | 10:15 a.m.

Good morning. Today, we are meeting to discuss the important role temporary migrant workers – sometimes called "guestworkers" – play in our economy, and the critical need for increased accountability and worker protections.

The H-2A and H-2B visa programs allow U.S. employers to bring foreign workers to the U.S. to fill temporary agricultural and nonagricultural jobs for which U.S. workers are not available. Tens of thousands of foreign citizens apply for admission to the United States each year under these H-2 programs—and applications are growing. And so are visa issuances. In fact, in 2019, agricultural visa issuances exceeded 200,000 for the first time since the beginning of the program. And, according to the latest data, the combined number of H-2A and H-2B visa issued was just under 353,000.

Workers apply for H-2 visas to achieve economic opportunity, to escape poor working conditions, and, ultimately, with a hope that their employment can lead to a better life in America.

Regrettably, the programs too often fail to deliver on these goals. Instead, as our witness, Mr. Daniel Costa, put it: "when it comes to the H-2A and H-2B programs, the U.S. government is failing to meet these basic standards and provide these basic rights" to workers. For example, temporary migrant workers can be charged exorbitant fees by recruiters for the opportunity to work temporarily in the U.S. Meanwhile, these recruiters are rarely held liable for the recruitment fees and abusive tactics.

In a recent case—Operation Blooming Onion—prosecutors charged H-2A owners, contractors, and recruiters with selling or trading workers, requiring them to dig onions with their bare hands, paying 20 cents for each bucket harvested, and threatening the victims with guns and violence to keep them in line. Allegations also included kidnapping, rape, and threats of violence and death to family members. The victims were allegedly held in cramped, unsanitary fenced work-camps to prevent them from escaping, with little or no food, limited plumbing, and without safe water. At least two of the workers died because of these workplace conditions.

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H2-A worker said, "I have seen my coworkers suffer from tobacco sickness. A lot of them get allergies, others get insomnia, vomiting, many get dehydrated," and "There were times when the workers would need to go for IV drips at local clinics." Baldemar Velasquez, co-founder and president of the Farm Labor Organizing Committee, told the reporters, "... no worker in his right mind is going to complain. There's no way to protect the workers from complaints and to protect them from retaliation."

Cases like Operation Blooming Onion are the direct result of the extraordinary power imbalance between workers and employers in this type of visa program. Unlike workers who are U.S. citizens or permanent residents, H-2 workers cannot easily switch jobs or employers – which is one of the most fundamental protections of a competitive labor market. Instead, when confronted with an unscrupulous employer, they are too often forced to remain silent rather than speak up and risk retaliation or deportation.

Exploiting foreign workers also hurts American workers.

We all know that when workers have more power in the workplace, they have higher wages, better benefits, and safer workplaces. By contrast, exploiting workers leads to degrading wages and working conditions for *all* workers in the same occupation.

Moreover, we have a real example of H-2A workers displacing an existing local workforce. As Mr. Ty Pinkins will testify, local Black workers have been the backbone of the Mississippi Delta farm economy for generations; and they would like to continue these jobs. However, the same local farmers who employed these workers for decades are now filling the jobs with H-2A workers. These employers also paid the H-2A workers significantly more money for the same or similar work previously done by local Black workers.

We should agree that all workers—both foreign and American—deserve to be treated with dignity and respect. As such, we have a responsibility to reform the H-2 visa program.

So, today, I look forward to discussing several proposed solutions focused on:

- Prohibiting discrimination,
- Holding recruiters and employers liable for abuses,
- Mandating the use of prevailing wages and strong labor standards,
- Providing a path to citizenship, and
- Protecting workers from retaliation.

These important steps—coupled with other critical provisions to increase worker protections and accountability—will ensure workers can succeed in fair working conditions.

So, thank you to our witnesses for joining us today, I look forward to our discussion.

Mr. KELLER. Good morning. Thank you to the witnesses for being here today. Hundreds of thousands of illegal aliens are pouring across the border every month because of President Biden's open border policies. Democrats are holding a hearing about nuances of legal temporary guest worker programs. This is a case of missing the forest through the trees.

Discussing reforms to the H–2 programs make little sense when the border is open and immigration laws are not enforced. H–2 employers following the rules cannot compete with bad actors hiring illegal aliens who are coming into the country in record numbers.

Employers need the ability to bring in temporary guest workers when no U.S. workers are available. Although the H–2 programs should be more efficient and easier for employers to use, these programs are certainly in need of reforms. These programs are far from our primary concern.

In 2021, Border Patrol agents arrested almost 2 million aliens trying to cross the border illegally. That does not count the 700,000 aliens who entered the country without being apprehended since President Biden took office. In May alone, almost 240,000 aliens were encountered at the southern border, an historic high.

What caused the massive influx of illegal crossings in dangerous conditions? President Biden's open border policies. Ending the Trump era Remain in Mexico policy, suspending asylum agreements with the Northern Triangle countries, and stopping construction of the border wall. President Biden has done everything in his power to make our border less secure and Americans less safe.

Under the Catch and Release Policy, over a million aliens have been allowed to enter the country with little hope that they will show up for their asylum hearing. Asylum hearings that will not be scheduled for two to 3 years because of a massive backlog. We also recently discovered that sponsors of unaccompanied alien children, who sometimes house and care for these children, do not need to be in the United States lawfully themselves, raising serious questions about our vetting processes.

Many of these did not get the unaccompanied minors to the required legal proceedings. Both the Biden administration's rhetoric and policies are creating incentives for more aliens to flood the border. For example, instead of trying to secure the border, the Biden administration is fighting to end Title 42, which could increase border encounters from approximately 7,700 a day to up to 18,000 people per day.

The Biden administration's policies are enriching human traffickers and drug cartels. This sonola cartel for example, is making a fortune smuggling drugs that are killing Americans. 90 percent of Fentanyl enters the U.S. from the southern border and is now the leading cause of death among Americans ages 18 to 45.

These ruthless smugglers have also been known to abandon children in the desert, place aliens in unsafe conditions, and abuse women and children in the process. The Biden administration's decision to ignore immigration laws, bolstered by congressional Democrats' endorsement of this behavior, makes this topic of this hearing misguided at best.

President Biden's willful decision to ignore immigration laws makes every American less safe. Until the border is secure, the wall is built, and our immigration laws are being enforced, we will not be able to have a meaningful discussion about reforming H–2 work visa programs. Thank you and I yield back.

Chairwoman ADAMS. Thank you, Mr. Keller. Without objection, all other members who wish to insert written statements into the record may do so by submitting them to the committee clerk electronically in Microsoft Word format by 5 p.m. on August 3. I will now introduce the witnesses.

Mr. Daniel Costa is the Director of Immigration Law and Policy Research at the Economic Policy Institute and a Visiting Scholar at the Global Migration Center at the University of California. Mr. Costa is an expert on H–2 visa programs, and has extensive knowledge of how the programs operate, and current issues within both programs.

Ms. Teresa Romero is the President of the United Farm Workers. The United Farm Workers is the largest farm worker labor union in the country, and in her role as President, Miss Romero can speak to the issues facing H–2A and other farm workers.

Mr. Leon Sequeira is an attorney in private practice and provides advice and counsel to clients who employ H–2A and H–2B guest workers. Mr. Sequeira has extensive knowledge of the H–2A and H–2B programs and has previously served as an Assistant Deputy Secretary of the Department of Labor under the George W. Bush administration.

Mr. Ty Pinkins is a Consumer Protection Associate at the Mississippi Center for Justice. Mr. Pinkins represents black farmers in the Mississippi Delta who have been displaced by H–2 workers employed by local growers, and he will speak in detail on how the misuse of H–2 programs affects local workers and the economy.

We appreciate the witnesses for participating today, and we look forward to your testimony. I do want to remind the witnesses that we have read your written statements, and they will appear in full in the hearing record. Pursuant to Committee Rule 8(d) and committee practice, each of you is asked to limit your oral presentation to a 5-minute summary of your written statement.

Before you begin your testimony, please remember to unmute your microphone, during your testimony staff will be keeping track of time, and the timer is visible to you at the witness table. Please be attentive to the time, wrap up when your time is over, and remute your microphone.

We will let all of the witnesses make their presentations before we move to member questions. When asking a question, please remember to unmute your microphone. The witnesses are aware of their responsibility to provide accurate information to the subcommittee, and therefore we will proceed with their testimony.

I want to first recognize Daniel Costa, you are recognized sir for 5 minutes.

[The statement of Ranking Member Keller follows:]

07.20.2022 – Workforce Protections Subcommittee Hearing: Second Class Workers: Assessing H2 Visa Programs Impact on Workers.

Opening Remarks from WP Ranking Member, Rep. Fred Keller:

Hundreds of thousands of illegal aliens are pouring across the border every month because of President Biden's open border policies, yet Democrats are holding a hearing about the nuances of legal temporary guest worker programs. This is a case of missing the forest for the trees.

Discussing reforms to the H2 programs makes little sense when the border is open and immigration laws aren't enforced. H2 employers following the rules cannot compete with bad actors hiring illegal aliens who are coming into the country in record numbers.

Employers need the ability to bring in temporary guest workers when no U.S. workers are available, although the H2 programs should be more efficient and easier for employers to use. These programs are certainly in need of reforms. But these programs are far from our primary concern.

In 2021, Border Patrol Agents arrested almost two million aliens trying to cross the border illegally. This does not count the 700,000 aliens who entered the country without being apprehended since President Biden took office. In May alone, almost 240,000 aliens were encountered at the southern border—an historic high.

What caused the massive influx of illegal crossings and dangerous conditions? President Biden's open border policies. Ending the Trump-era Remain in Mexico policy, suspending asylum agreements with the Northern Triangle countries, and stopping construction of the border wall—Biden has done everything in his power to make our border less secure and Americans less safe.

Under the catch-and-release policy, over a million aliens have been allowed into the country with little hope that they will show up for their asylum hearing—asylum hearings that won't be scheduled for two to three years because of a massive backlog. We also recently discovered that sponsors of Unaccompanied Alien Children—who sometimes house and care for these children—do not need to be in the United States lawfully themselves, raising serious questions about our vetting processes.

Both the Biden administration's rhetoric and policies are creating incentives for more aliens to flood the border. For example, instead of trying to secure the border, the Biden administration is fighting to end Title 42, which could increase border encounters from approximately 7,700 a day to 18,000 per day.

The Biden administration's policies are enriching human traffickers and drug cartels. The Sinaloa Cartel, for example, is making a fortune smuggling drugs that are killing Americans. Ninety percent of fentanyl enters the U.S. from the southern border, and it is now the leading cause of death among Americans ages 18 to 45. These ruthless smugglers have also been known

to abandon children in the desert, place aliens in unsafe conditions, and abuse women and children in the process.

The Biden administration's decision to ignore immigration laws, bolstered by Congressional Democrats' endorsement of this behavior, makes the topic of this hearing misguided at best. President Biden's willful decision to ignore immigration laws makes every American less safe.

Until the border is secure, the wall is built, and our immigration laws are being enforced, we will not be able to have a meaningful discussion about reforming the H2 work visa programs.

STATEMENT OF DANIEL COSTA, DIRECTOR OF IMMIGRATION LAW AND POLICY RESEARCH, ECONOMIC POLICY INSTITUTE

Mr. COSTA. Thank you. Good morning, Madam Chair Adams, Chairman Scott, Ranking Member Keller, and other distinguished members of the Subcommittee and Committee. Continuing my background in issues I care about, it is a particularly great honor to be before the Subcommittee today, and I am grateful to the committee that they have decided to examine the issues before us.

I grew up in, and currently live in, the agricultural heartland of California, in the Great Central Valley. My mom, when she came to the United States from Mexico, first worked there in a poultry plant, meat processing being one of the main H–2B occupations, and in fact she still worked there while she was pregnant with me.

My entire dad's side of the family, when they immigrated to the U.S., almost all worked on dairies milking cows in San Joaquin Valley. All of that is just to say that I do not come at this issue from the perspective of just such someone who is a lawyer and researcher.

I feel deeply connected with these issues, and I have been around them almost all my life. I care deeply about this work, and mainly just want to improve conditions for migrant workers and American workers in all of the industries that we are going to discuss today, thus I hope my testimony will be useful to the committee.

Since we are here today to discuss H–2A, H–2B, two of the U.S.'s most discussed, and sometimes controversial visa programs, first I would like to start off and say a few words about those programs in general, which I have studied and read about for over a dozen years.

Most importantly, I want to discuss why they are flawed and need to be fixed by Congress and Federal agencies, and why they are not, as presently constituted, fair labor immigration pathways for workers.

Temporary worker programs are an instrument ultimately used to deliver migrant workers to employers, but without having to afford them equal rights, dignity, or the opportunity to integrate and participate fully in political life.

While such programs may serve as important pathways for migrants to come to the United States, the numerous programmatic flaws that undermine labor standards and leave migrant workers vulnerable to abuses, and even human trafficking, clearly demonstrate a need for dramatic improvements.

What are the major flaws in temporary worker visa programs? Here is a quick list. Illegal recruitment fees and debt bondage are

common. Temporary work visa programs permit employers to circumvent U.S. antidiscrimination laws and segregate the workforce.

The visa status of workers is usually tied to their employer, thus chilling labor rights, preventing job mobility and enabling employer lawbreaking. Temporary migrant workers are often legally underpaid.

Oversight is lacking, leaving workers unprotected. Most temporary migrant workers cannot transition to a permanent immigrant status and the few programs that offer that pathway, is controlled by employers. Finally, many temporary migrant workers are separated from their families while they are employed in the United States.

These temporary work visa programs can and should be reformed to comport with universal human rights labor rights standards. Considering that a record number of temporary migrant workers are now employed in the United States, more than two million, with many performing jobs that are now deemed "essential", the need to protect these workers has never been more acute.

Now just a few words about the H–2A and H–2B program specifically. Employers and defenders of the H–2A and H–2B programs as presently constituted will tell you that you should not worry about or think about H–2B or H–2A because the workers represent such a small share of the workforce, and that anyways, no American workers want to work in agriculture, landscaping, or hospitality. They will say for example, the H–2B is only 66,000 workers in the labor market of 160 million, therefore it is a drop in the bucket in terms of the labor force.

First of all, the reality is that the programs have grown rapidly, a number of H–2A workers was 300,000 last year, and the H–2B program is now more than twice the size of the annual cap.

Well, if it were actually the case that we were just talking about 300,000 H–2A or 150,000 H–2B workers, all of whom have rights and could go work for whichever employer they wanted to and have a path to citizenship, and yes, there would be many fewer concerns about these programs.

Instead, the reality is that H–2 workers do not have rights and cannot go work for whichever employer will offer the best conditions and highest pay. Instead, the migrant workers in the H–2 programs are recruited and hired by employers that control their immigration status and job opportunities.

They go into a small, closed universe of occupations and employers. Nearly all H–2A workers are employed in crops, and there are more than 9,000 H–2A employers. Nearly all H–2B workers are employed in just ten occupations, and there are only 5,000 H–2B employers. That is 5,000 employers out of a labor market with about 11 million establishments nationwide, and that is to say workplaces nationwide.

It is just a very tiny sliver of the labor market that those workers can actually participate in. That means that who H–2 workers can work for, and where they can work is severely limited. They have no say over it, and they have no power once they get to that workplace. We know from wage and hour enforcement data, their wage theft is all too common in the industry that H–2 workers are recruited into.

What is desperately needed then is a way for workers to come forward and have power to report abuses without fear, so they can be paid fairly and treated with dignity and to not have a fear of losing their paycheck or their immigration status.

Part of that is also having labor standard enforcement agencies that are adequately funded and staffed, so they can accomplish their mission of protecting wages and working conditions, as well as holding employers accountable when they break the law, and finally migrant workers in H–2 programs need to have access to a quick path to permanent residence and citizenship, and to not have to labor in a precarious and temporary immigration status, sometimes for decades, when it can be easily robbed and exploited by employers and recruiters because of that status.

With that I will conclude, and I look forward to any questions from the committee.

[The prepared statement of Daniel Costa follows:]

Economic
Policy
Institute

Hearing before the United States House Committee on Education and Labor
Subcommittee on Workforce Protections

2175 Rayburn and Via Zoom (Hybrid)
Wednesday, July 20, 2022– 10:15 AM

SECOND CLASS WORKERS: ASSESSING H2 VISA PROGRAMS IMPACT ON WORKERS

Daniel Costa
Director of Immigration Law and Policy Research – Economic Policy Institute
Visiting Scholar – Global Migration Center, University of California, Davis

Introduction

Thank you to Subcommittee Chair Rep. Adams, as well as Committee Chair Rep. Scott, Ranking Members, and the other distinguished members of the Subcommittee for allowing me to testify at this hearing on the H-2 temporary visa programs and how to better protect workers. I am a researcher at the Economic Policy Institute, a nonprofit, nonpartisan think tank dedicated to advancing policies that ensure a more broadly shared prosperity, and that conducts research and analysis on the economic status of working America and proposes policies that protect and improve the economic conditions of low- and middle-income workers—regardless of their immigration status—and assesses policies with respect to how well they further those goals.

I am especially honored to be before the Subcommittee on Workforce Protections because I am myself the son of two immigrants, each of whom came from a different country and through different immigration pathways, and who met each other in the great melting pot that is my home state of California. My parents I are the direct beneficiaries of the American immigration system—but I also believe that the United States has benefitted greatly from immigration and the immigrants who arrive—both economically and culturally—which is why there is no question in my mind that immigration is good for the United States. It's also why I believe that the United States should grow and expand pathways for immigrants to come and stay and integrate into the United States, and believe we should do much more to improve the migration pathways that currently exist.

The purpose of this hearing is to discuss two of the most well-known and important work visa programs in the United States, the H-2A visa program—for temporary and seasonal jobs in agriculture—and the H-2B program—for temporary and seasonal jobs outside of agriculture. This hearing is timely and of utmost importance because in recent years, the size of both

programs has increased rapidly—but during those years—few, if any, new protections have been implemented to ensure that workers in those programs are adequately protected from abuses like wage theft and trafficking. Congress and federal agencies have failed to implement those measures despite numerous and egregious cases of worker abuse, exploitation, human trafficking, and even deaths.

In the broadest terms, I wish to note at the outset that U.S. workers should have certain rights vis-à-vis the U.S. temporary work visa programs. First, they should have the right to have a fair and first shot at job openings in the United States. Second, U.S. workers should have the right to be protected from competition with workers who are paid artificially low wages that are the result of corporate exploitation of the immigration system. And migrant workers who are recruited to the United States to fill job openings should also have certain rights. They should have the right to be free from paying fees to the recruiters who connect them to jobs in the United States. They should have the right to leave an abusive or law-breaking employer without fearing retaliation and deportation. And they should have the right to be paid no less than the local average wage for the jobs they fill, according to U.S. wage standards. And importantly—because of the exploitative nature of temporary work visa programs—migrant workers should have an opportunity to stay permanently and continue to contribute to the United States, by having access to a quick path to permanent residence and citizenship—and it should be a path that that the migrant controls, not one that is controlled by employers.

Unfortunately, when it comes to the H-2A and H-2B visa programs, the U.S. government is failing to meet these basic standards and provide these basic rights to U.S. workers and migrant workers in the H-2A and H-2B visa programs.

My testimony will discuss the flaws that are common across U.S. temporary work visa programs and offer common sense solutions, and present the available data about the H-2A and H-2B visa programs in terms of their size and workplace abuses and wage theft. It will also suggest executive and congressional reforms that should be implemented. Because other witnesses in this hearing will discuss the H-2A program in depth, the recommendations specific to H-2 in my testimony will focus mainly on the H-2B program.

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U.S. temporary work visa programs

Nearly all immigrants, refugees, and asylum-seekers join the workforce after entering the United States, but a portion of our immigration system is intended to bring people here expressly for work. Within that complex employment-based system, the majority of migrants come through temporary, precarious pathways—known as temporary work visa programs—that provide employers with millions of on-demand workers who have limited rights, and whose needs and realities are not well understood, even by mainstream immigration advocates.

While temporary work visa programs represent a major component of the U.S. immigration system, less is known about them compared with other aspects of the system that garner more public attention. Nonetheless, work visa programs have played an outsized role in political and policy debates about how to reform the immigration system in the past, and likely will again.

Temporary work visa programs are an instrument ultimately used to deliver migrant workers to employers, but without having to afford them equal rights, dignity, or the opportunity to integrate and participate in political life. While such programs may serve as important pathways for migrants to come to the United States, the numerous programmatic flaws that undermine labor standards and leave migrant workers vulnerable to abuses—and even human trafficking—clearly demonstrate a need for dramatic improvements.

This is not news; migrant worker advocates, government auditors, and the media have identified these flaws across U.S. temporary work visa programs for decades. Most of the workers who participate in the programs will never have a chance to become lawful permanent residents or naturalized citizens, despite spending months, and in many cases, years, working in the United States. The COVID-19 pandemic and the national emergency that was declared on March 13, 2020,[1] along with the inadequacy of the federal government's response, have only exacerbated the challenges migrant workers face while employed through temporary work visa programs, many of which continue today.

Despite the popular narrative that former President Trump's administration instituted a so-called immigration crackdown on all pathways into the United States, temporary work visa programs were a clear exception. Even before the pandemic began, important immigration pathways that can lead to permanent residence and citizenship had been slashed by the Trump administration—and humanitarian pathways for asylees and refugees in particular had already been reduced to historic lows. But, at the same time, data show that temporary work visa programs were 13% larger in 2019 than during the last year of the Obama administration. Even the Trump administration's temporary work visa "ban" issued in June 2020 in retrospect looks to have been mostly symbolic—a political tactic to blame migrants for high unemployment and the economic collapse that resulted from the COVID-19 pandemic. This point in history was a dangerous trajectory away from welcoming immigrants as persons

[1] Donald J. Trump, "Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak," (presidential proclamation), March 13, 2020.

who have equal rights and who can settle in the United States permanently and toward using the immigration system mostly to appease the desire employers have for more indentured and disposable migrant workers. Today, the Biden administration is still attempting to reconstitute much of the immigration system that was torn down by the Trump administration. Numerous reports have shown that staffing shortages and backlogs have led to the wasting—in other words the non-issuance of—green cards that should have been issued to people who have been waiting for years to become permanent immigrants to the United States.

When it comes to U.S. labor migration pathways, they can and should be reformed to comport with universal human and labor rights standards. Many major improvements to temporary work visa programs can be accomplished by the executive branch through regulations, new guidance, and other executive actions, as my testimony will discuss. Nevertheless, the reality remains that some of the most transformative and lasting solutions will require congressional action, and those reforms will also be disused herein. An added benefit of these more durable solutions is that they will set a useful baseline of protections for temporary migrant workers, both in normal times and during emergencies like pandemics, and during both periods of high unemployment and tight labor markets.

Now is the moment for policymakers to take stock of the immigration system and implement needed reforms to employment-based migration pathways. And considering that a record number of temporary migrant workers are employed in the United States—more than 2 million, with many performing jobs that have now been deemed "essential"—the need to protect these workers has never been more acute.

The basics: What are temporary work visa programs?

One of the main authorized or "legal" pathways for U.S. employers that wish to hire migrant workers or for migrants who want to work in the United States lawfully is via "nonimmigrant" visas that authorize temporary employment. In the United States, employers almost exclusively control and drive the process, by deciding to recruit and hire employees through temporary work visa programs. Workers who participate in those programs are known as temporary migrant workers, or "guestworkers"—defined as persons employed away from their home countries in temporary labor migration programs. The programs themselves are often referred to as circular or "guest" worker programs, or temporary work visa programs.[2] Temporary and home can be defined in different ways, with "temporary" ranging from several months to several years, and "home" usually meaning the worker's country of birth or citizenship.[3] All temporary work visa programs require migrant workers to return to their home countries when their visa expires; workers can remain legally in the United States only if they obtain another temporary visa or lawful permanent resident status.

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[2] For the most part, these terms are interchangeable, and no one term is definitive or has been agreed to.
[3] See discussion of the average maximum allowed duration of stay of temporary visa holders across Organisation for Economic Co-operation and Development countries in Daniel Costa and Philip Martin, "OECD Highlights Temporary Labor Migration: Almost as Many Guestworkers as Permanent Immigrants," *Working Economics* blog (Economic Policy Institute), Dec. 4, 2019.

The most common argument for using temporary work visa programs to facilitate migration is that they help employers fill vacant jobs, especially when employers assert there is a shortage of U.S. workers, in other words, to fill labor shortages. Other major rationales include (1) to facilitate youth exchange programs and admit foreign students (in both cases, the migrants are usually permitted to work); (2) to allow intracorporate transfers (sometimes called intracompany transfers), meaning that employees of multinational companies move from a branch or office of a company to another branch or office of the same company in a different country; (3) to fulfill trade agreement provisions, such as those included in agreements like the North American Free Trade Agreement; (4) to facilitate foreign investment in countries of destination; (5) to manage migration that would otherwise be inevitable—for example, as the result of geopolitical changes; and (6) to allow for cross-border commuting.[4]

According to the Congressional Research Service, "there are 24 major nonimmigrant visa categories, which are commonly referred to by the letter and numeral that denote their subsection in the Immigration and Nationality Act (INA)"[5]; over the past few years, between 9 million and 11 million total nonimmigrant visas have been issued. While the vast majority of these were visitor visas that do not authorize employment, nevertheless hundreds of thousands of new nonimmigrant visas in an alphabet soup of temporary work visa programs have been issued to migrant workers or renewed; in addition, the United States has approved work permits for nonimmigrants in visa classifications that do not automatically authorize employment.

Some work visa programs have an annual numerical limitation. For example, the H-2B visa is capped at 66,000 per year; the H-1B visa is capped at 85,000 for the private sector—although it also allows an unlimited number not subject to the annual cap for certain employers.[6] However, most work visa programs do not have an annual numerical limit. Each visa program has a different duration of stay associated with it, as well as individual rules about whether and how it can be renewed. For example, H-2A visas for temporary and seasonal agricultural occupations are valid for up to one year, depending on the duration of the job, but can sometimes be renewed, while H-1B visas for occupations that require a college degree may be valid for up to three years, renewable once for a total of six years, and L-1 visas for intracompany transferees may last up to five years for a position that requires specialized knowledge about the employer, or seven years if the worker is a manager or executive.

The Pew Research Center has estimated that approximately 5% of the total foreign-born population are temporarily residing in the United States with nonimmigrant visas.[7] Although good data are lacking from the U.S. government on the exact number of nonimmigrant residents who are employed, and in which visa programs, I have estimated that more than 2

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[4] Daniel Costa and Philip Martin, *Temporary Labor Migration Programs: Governance, Migrant Worker Rights, and Recommendations for the U.N. Global Compact for Migration*, Economic Policy Institute, Aug. 1, 2018.
[5] Jill H. Wilson, *Immigration: Nonimmigrant (Temporary) Admissions to the United States*, Congressional Research Service, updated Sept. 10, 2019.
[6] For example, cap-exempt H-1Bs are available if an employer is a university, a university-affiliated nonprofit entity, or a nonprofit research organization.

[7] Abby Budiman, "Key Findings About U.S. Immigrants," *Fact Tank* (Pew Research Center), Aug. 20, 2020.

million temporary migrant workers were employed in 2019, accounting for 1.2% of the U.S. labor force (see discussion in the following section).[8]

The numbers in context: Temporary work visa programs grew under Trump, while permanent pathways shrunk and have not yet been fully restored

Despite the popular narrative that the former Trump administration instituted an "immigration crackdown" on all pathways into the United States, temporary work visa programs were a clear exception. Other, permanent immigration pathways that can lead to citizenship were slashed—even before the pandemic began—including the number of refugees admitted being reduced to a historic low and asylum being severely restricted[9]—but this has not been the case with temporary work visa programs.

The main factor impacting the issuance of both permanent and temporary visas since the COVID-19 pandemic has been the slowdown and shutdown of consular processing for visas around the world, along with staffing shortages at United States Citizenship and Immigration Services (USCIS), and the impact is still being felt today in mid-2022. In any case, the shift to more temporary work visas and fewer permanent immigrant visas during the Trump administration was a significant and dangerous trajectory away from welcoming immigrants who would be granted equal rights and the ability to settle in the United States permanently; it reflects an immigration system used mainly to appease the business community's demands for more migrant workers who are indentured to them and disposable.[10]

Table 1 below shows an estimate of the number of temporary migrant workers employed in 2016 and in 2019, the year before the disruptions to the immigration system caused by the pandemic, based on an updated version of the methodology devised by Costa and Rosenbaum.[11] It reveals that the number of temporary migrant workers employed during 2019 was nearly 2.1 million—over 237,000 more than during the last year of the Obama administration, or a 13% increase. In total these workers represented 1.2% of the U.S. labor market in 2019. Much of the increase was driven by growth in the visa programs for low-wage jobs—H-2A, H-2B, and J-1—but also by growth in a number of the visa programs for migrant

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[8] Previous estimates include Costa and Rosenbaum, who estimated that approximately 1.4 million temporary migrant workers were employed in the United States in 2013 through temporary work visa programs, accounting for roughly 1% of the labor force at the time, and the Organisation for Economic Co-operation and Development, which estimated in 2019 that there were 1.6 million full-time-equivalent jobs filled by migrants with temporary visas in 2017, also accounting for 1% of the labor force. Daniel Costa and Jennifer Rosenbaum, *Temporary Foreign Workers by the Numbers: New Estimates by Visa Classification*, Economic Policy Institute, March 7, 2017; Organisation for Economic Co-operation and Development, *International Migration Outlook 2019*, Oct. 15, 2019.

[9] See more extensive discussion in Daniel Costa, *Temporary work visa programs and the need for reform: A briefing on program frameworks, policy issues and fixes, and the impact of COVID-19*, Economic Policy Institute, February 3, 2021.

[10] See more extensive discussion in Daniel Costa, *Temporary work visa programs and the need for reform: A briefing on program frameworks, policy issues and fixes, and the impact of COVID-19*, Economic Policy Institute, February 3, 2021.

[11] See Daniel Costa and Jennifer Rosenbaum, *Temporary Foreign Workers by the Numbers: New Estimates by Visa Classification*, Economic Policy Institute, March 7, 2017. The updated methodology includes visa classifications that authorize employment but were not included in the previous estimate and uses additional data sources for B-1, E-2, H-1B, and J-1 visas.

workers who normally possess at least a college degree, including H-1B visas (for information technology jobs), the Optional Practical Training program for foreign graduates with F-1 visas, L-1 visas for intracompany transferees, and O-1 and O-2 visas for persons with extraordinary abilities.

Table 1.

Temporary work visa programs grew 13% under Trump

Estimated number of temporary migrant workers employed in the United States, 2016 and 2019

Nonimmigrant visa classification	Number of workers employed 2016	2019
A-3 visa for attendants, servants, or personal employees of A-1 and A-2 visa holders	2,162	1,687
B-1 visa for temporary visitors for business	3,000	3,000
CW-1 visa for transitional workers on the Commonwealth of Northern Mariana Islands	8,093	3,263
F-1 visa for foreign students, Optional Practical Training program (OPT) and STEM OPT extensions	199,031	223,308
G-5 visa for attendants, servants, or personal employees of G-1 through G-4 visa holder	1,309	945
E-1 visa for treaty traders and their spouses and children	8,085	6,668
E-2 visa for treaty investors and their spouses and children	66,738	66,738
E-3 visa for Australian specialty occupation professionals	15,628	16,858
H-1B visa for specialty occupations	528,993	583,420
H-2A visa for seasonal agricultural occupations	134,368	204,801
H-2B visa for seasonal nonagricultural occupations	149,491	160,410
H-4 visa for spouses of certain H-1B workers	54,936	74,749
J-1 visa for Exchange Visitor Program participants/workers	193,520	222,597
J-2 visa for spouses of J-1 exchange visitors	10,147	11,781
L-1 visa for intracompany transferees	316,224	337,164
L-2 visa for spouses of intracompany transferees	25,670	25,673
O-1/O-2 visa for persons with extraordinary ability and their assistants	38,706	47,725
P-1 visa for internationally recognized athletes and members of entertainment groups	24,262	25,601
P-2 visa for artists or entertainers in a reciprocal exchange program	97	107
P-3 visa for artists or entertainers in a reciprocal exchange program	8,426	9,848
TN visa or status for Canadian and Mexican nationals in certain professional occupations under NAFTA	50,000	50,000
Total	*1,838,886*	*2,076,343*

Notes: Methodology for calculating the number of workers derived from Daniel Costa and Jennifer Rosenbaum, *Temporary Foreign Workers by the Numbers: New Estimates by Visa Classification*, Economic Policy Institute, March 2017. All references to a particular year should be understood to mean the U.S. government's fiscal year (Oct. 1–Sept. 30).

Sources

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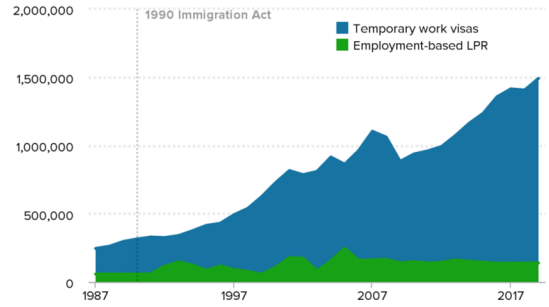
Growth in temporary work visa programs is part of a long-term trend

While temporary work visa programs expanded during the Trump administration, the growth of the programs represented a continuing long-term trend dating back more than 30 years. **Figure A** shows the number of new visas issued in 36 nonimmigrant visa classifications that represent U.S. temporary work visa programs, or programs that allow spouses and children to accompany the principal temporary migrant worker, between 1987 and 2019.[12] For comparison, the figure also shows the number of permanent immigrant visas issued in the employment-based (EB) green card preferences—i.e., green cards issued for the purpose of work, which allow migrants to adjust to become lawful permanent residents—over the same period. The dotted line in Figure A shows the point at which the last major immigration reform was passed in the United States, in November 1990, when the Immigration Act of 1990 (commonly referred to as IMMACT90) was enacted.

Figure A.

Employment-based permanent immigrant visas and temporary nonimmigrant work visas issued, including principal and derivative beneficiaries, 1987–2019



Notes: The Immigration Act of 1990 was enacted on November 29, 1990. LPR stands for lawful permanent resident. Employment-based LPR refers to permanent immigrant visas in the employment-based preference categories, which confer permanent residence on the migrant beneficiary. For more background on employment-based permanent immigrant visas, see USCIS, "Permanent Workers," *Working in the United States*, last reviewed/updated Jan. 9, 2020.

Source

Economic Policy Institute

[12] The data in Figure A do not represent the total population of temporary migrant workers or those with EB green cards who are currently authorized to be employed or who were authorized to be employed at a particular point in time—they only represent new visas issued in each year.

The major trends that have occurred since IMMACT90's enactment were that issuances of EB green cards increased slowly until stabilizing around the new annual cap for EB green cards of 140,000 (created by IMMACT90), while the number of temporary work visas issued increased exponentially during the same period. In 2019, the number of EB green cards issued represented only 8.6% of all new work visas issued to migrant workers and their families (temporary plus EB green cards). These data show that the labor migration pathways available to migrant workers and their families in the U.S. immigration system are almost exclusively temporary.[13]

The difference under Trump was that the steady growth in temporary work visa programs occurred while the Trump administration simultaneously, and successfully, made unprecedented moves to slash virtually every permanent immigrant pathway available in the U.S. system. Despite the Biden administration's stated commitments to restore the immigration system, budget and staffing shortfalls at USCIS have led to many of the green cards available in permanent categories from not being issued, and many are in danger of not being issued again by the end of fiscal year 2022[14]. In terms of reestablishing humanitarian pathways, while the Biden administration raised the refugee cap significantly to 125,000 for fiscal year 2022, statistics suggest that federal agencies will not come close to processing that many refugee visas in 2022.[15]

Temporary migrant workers face unique challenges due to program frameworks

As discussed above, the U.S. labor migration system has shifted towards one that increasingly provides only temporary pathways to work. Yet, although migrants coming to the United States through temporary work visa programs are legally authorized to work, they are among the most exploited laborers in the U.S. workforce because employer control of their visa status leaves many powerless to defend and uphold their rights. Rather than being an issue of a few bad employers, the flaws in temporary work visa programs are systemic and structural. The list below summarizes some of the most problematic aspects of temporary work visa programs and how they impact workers.

Illegal recruitment fees and debt bondage are common

[13] For a more in-depth discussion of these data, see Daniel Costa, "Temporary Migrant Workers or Immigrants? The Question for U.S. Labor Migration," *Russell Sage Foundation Journal of the Social Sciences* 6, no. 3 (2020), https://doi.org/10.7758/RSF.2020.6.3.02.

[14] See for example, Walter Ewing, "The Biden Administration Let Over 200,000 Green Cards Go to Waste This Year," *Immigration Impact* (American Immigration Council blog), October 5, 2021; Andrew Kreighbaum, "Immigration Agency Races to Issue 280,000 Available Green Cards," *Bloomberg Law*, July 8, 2022.

[15] See for example, Migration Policy Institute, "U.S. Refugee Admissions & Refugee Resettlement Ceilings, FY 1980-2022* (thru April 2022)" [data tool; accessed July 17, 2022], showing that halfway through fiscal year 2022, fewer than 11,000 refugees have been admitted out of the 125,000 allotted by the Biden administration.

Temporary migrant workers can face abuse even before arriving in the United States: Many are required to pay exorbitant fees to labor recruiters to secure U.S. employment opportunities, even though such fees are usually illegal.[16] Those fees leave them indebted to recruiters or third-party lenders, which can result in a form of debt bondage.[17] (Even migrants recruited to work with employment-based green cards have ended up paying exorbitant fees, as seen in one case reported in *ProPublica*, in which a Korean worker paid $26,000 to a recruitment agency to work in a poultry processing plant.[18]) After arriving in the United States, temporary migrant workers may find out the jobs they were promised don't exist.[19] And in a number of cases, temporary migrant workers have become victims of human trafficking—with some being forced to work in the sex industry.[20]

Contrary to popular belief, it's not just farmworkers and other temporary migrant workers in low-wage jobs suffering from the abuses that pervade temporary work visa programs: College-educated workers in computer occupations, as well as teachers and nurses, have been victimized and put in "financial bondage" by shady recruiters and staffing firms that steal wages, forbid workers from switching jobs or taking jobs the recruiters don't financially benefit from, and file lawsuits against workers if they try to change jobs or quit.[21]

Temporary work visa programs permit employers to circumvent U.S. anti-discrimination laws and segregate the workforce

While U.S. anti-discrimination laws are intended to make workplaces fairer and more equal by prohibiting discrimination in hiring and employment on the basis of factors like race, color, sex, religion, and national origin at the point of hire—in practice they don't apply to

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[16] Centro de los Derechos del Migrante, *Recruitment Revealed: Fundamental Flaws in the H-2 Temporary Worker Program and Recommendations for Change*, n.d., accessed December 10, 2020.
[17] United Nations Office of the High Commissioner for Human Rights, "End of Visit Statement, United States of America (6–16 December 2016) by Maria Grazia Giammarinaro, UN Special Rapporteur in Trafficking in Persons, Especially Women and Children," Washington, D.C., Dec. 19, 2016. See also United Nations Office of the High Commisioner for Human Rights, "Debt Bondage Remains the Most Prevalent Form of Forced Labour Worldwide—New UN Report" (press release), Sept. 15, 2016; United Nations Human Rights Council, *Report of the Special Rapporteur on Contemporary Forms of Slavery, Including Its Causes and Consequences*, Thirty-third session, Agenda item 3, Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development, July 4, 2016, accessed via the United Nations Official Document System (to access this report, open the Official Document System and then click this link while you have the Official Document System open); United Nations Office on Drugs and Crime, *The Role of Recruitment Fees and Abusive and Fraudulent Practices of Recruitment Agencies in Trafficking in Persons*, 2015.
[18] Michael Grabell, "Who Would Pay $26,000 to Work in a Chicken Plant?" *ProPublica*, Dec. 28, 2017.
[19] Steven Greenhouse, "Low Pay and Broken Promises Greet Guest Workers," *New York Times*, Feb. 28, 2007.
[20] Liam Stack, "Indian Guest Workers Awarded $14 Million," *New York Times*, Feb. 18, 2015; Jessica Garrison, Ken Bensinger, and Jeremy Singer-Vine, "The New American Slavery: Invited to the U.S., Foreign Workers Find a Nightmare," *BuzzFeed News*, July 24, 2015; U.S. Department of Justice, "Miami Beach Sex Trafficker Sentenced to 30 Years in Prison for International Trafficking Scheme Targeting Foreign University Students" (press release), U.S. Attorney's Office, Southern District of Florida, March 24, 2017; Holbrook Mohr, Mitch Weiss, and Mike Baker, "AP Impact: US Fails to Tackle Student Abuses," *Associated Press*, Dec. 6, 2010; last updated Nov. 21, 2015.
[21] Matt Smith, Jennifer Gollan, and Adithya Sambamurthy, "Job Brokers Steal Wages, Entrap Indian Tech Workers in US," *Reveal News*, Oct. 27, 2014; Farah Stockman, "Teacher Trafficking: The Strange Saga of Filipino Workers, American Schools, and H-1B Visas," *Boston Globe*, June 12, 2013; Tom McGhee, "Kizzy Kalu Lured Nurses to U.S. with Promises of High Pay, Prosecutors Say," *Denver Post*, June 4, 2013.

temporary migrant workers who are recruited abroad. Because workers are being selected by recruiters in countries of origin, outside of U.S. jurisdiction, employers have the ability to reclassify entire sectors of the U.S. workforce by race, gender, national origin, and age through temporary work visa programs.[22]

This occurs through recruiters and employers limiting access to jobs made available to workers based on employer preferences for national origin, gender, and age, allowing them to sort workers into occupations and visa programs based on racialized and gendered notions of work. Thanks to temporary work visa programs, an employer may select an entire workforce composed of a single nationality, gender, or age group—for example, selecting only young Mexican men for farm jobs with H-2A visas, or young Indian men to work as computer programmers with H-1B visas, or young women from Eastern Europe for work in restaurants and amusement parks with J-1 visas. The large shares of visas issued to specific countries of origin, and the limited demographic data available, provide evidence that this is occurring,[23] and websites exist that allow employers to browse the profiles of workers on employment agency websites that advertise workers like commodities.[24]

Employers and recruiters can also weed out workers who might dare to speak out against unlawful employment practices, assert their legal rights, or organize for better working conditions by joining or forming a union. They can do this by refusing to hire workers whom they think will be likely to complain, and retaliating against workers who do speak up or complain—for instance, by firing them and effectively forcing them to leave the country, or by threatening to blacklist them from being hired for future job opportunities.

The visa status of temporary migrant workers is usually tied to their employer, thus chilling labor rights, preventing mobility, and enabling employer lawbreaking

The many temporary migrant workers who are in debt after paying recruitment fees are anxious to earn enough to pay back what they owe and hopefully make a profit, and are thus unlikely to speak up at work when things go wrong on the job. But even those who aren't caught in the debt trap are often subject to exploitation once they are working in the United States. Like unauthorized immigrants, temporary migrant workers have good reason to fear retaliation and deportation if they speak up about wage theft, workplace abuses, or other working conditions like substandard health and safety procedures on the job—not because they don't have a valid immigration status, but because their visas are almost always tied to one employer that owns and controls their visa status. That visa status is what determines the worker's right to remain in the country; if they lose their job, they lose their visa and become

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[22] See, for example, Mary Bauer and Meredith Stewart, *Close to Slavery: Guestworker Programs in the United States*, Southern Poverty Law Center, Feb. 19, 2013; International Labor Recruitment Working Group, *The American Dream Up for Sale: A Blueprint for Ending International Labor Recruitment Abuse*, February 2013.
[23] See, for example, Justice in Motion, Visa Pages: U.S. Temporary Foreign Worker Visas, H-2A Agricultural Work Visa, updated November 2015; U.S. Citizenship and Immigration Services, "Buy American and Hire American: Putting American Workers First" (data resources), 2020.
[24] See, for example, Jobofer.org.

deportable. This arrangement results in a form of indentured servitude.[25] Further, as noted in the previous section, employers can punish temporary migrant workers for speaking out by not rehiring them the following year or by telling recruiters in countries of origin that they shouldn't be hired for other job opportunities in the United States (effectively blacklisting them).[26]

The specter of retaliation makes it understandably difficult for temporary migrant workers to complain to their employers and to government agencies about unpaid wages and substandard working conditions. Private lawsuits against employers who break the law are also an unrealistic avenue for enforcing rights, for two reasons: First, most temporary migrant workers are not eligible for federally funded legal services under U.S. law, and second, those who have been fired are unlikely to have a valid immigration status permitting them to stay in the United States long enough to pursue their claims in court. Because of the conditions created by tying workers to a single employer through their visa status, temporary work visa programs have been dubbed by some as "close to slavery" or "the new American slavery," and government auditors have noted that increased protections are needed for temporary migrant workers.[27]

While temporary migrant workers generally cannot easily change jobs or employers, the terms and conditions of some nonimmigrant visas for college-educated workers actually do permit them to change employers—in particular the J-1, F-1 Optional Practical Training (OPT) program, H-1B, and TN visas allow workers to change employers—although the rules vary even among these visas. In the J-1 visa, which is managed by the State Department, there are sponsor organizations that partner with the State Department to manage oversight and compliance. Those private organizations act as middlemen between the J-1 workers and U.S. employers, and ultimately must sign off on a job change for a J-1 worker, rendering it difficult in practice. In the F-1/OPT context, universities play a key role and ultimately approve employment for OPT workers but exercise little oversight, sometimes resulting in abuses.[28]

It is important to stress that temporary migrant workers in these four visa programs that allow for some portability have nevertheless been subjected to substandard workplace conditions, and been the victims of fraud and even trafficking, which suggests that the ability to change employers, on its own, is not a panacea for protecting temporary migrant workers. Allowing temporary migrant workers to change employers is something that some proponents of expanded temporary work visa programs—like researchers from the Center

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[25] See, for example, Christopher Lapinig, "How U.S. Immigration Law Enables Modern Slavery," *The Atlantic*, June 7, 2017.
[26] See, for example, Mary Bauer and Meredith Stewart, *Close to Slavery: Guestworker Programs in the United States*, Southern Poverty Law Center, Feb. 19, 2013.
[27] Mary Bauer and Meredith Stewart, *Close to Slavery: Guestworker Programs in the United States*, Southern Poverty Law Center, Feb. 19, 2013; Jessica Garrison, Ken Bensinger, and Jeremy Singer-Vine, "The New American Slavery: Invited to the U.S., Foreign Workers Find a Nightmare," *BuzzFeed News*, July 24, 2015; U.S. Government Accountability Office, *H-2A and H-2B Visa Programs: Increased Protections Needed for Foreign Workers*, GAO-15-154, reissued May 30, 2017.
[28] Nikhil Swaminathan, "Inside the Growing Guest Worker Program Trapping Indian Students in Virtual Servitude," *Mother Jones*, September/October 2017 issue.

for Global Development and the Cato Institute[29]—have proposed in lieu of additional labor standards enforcement. But the legal ability to change jobs does not alone provide protection from exploitation; while this is a pervasive assumption in basic economics, it is a generally incorrect assumption that is finally being called into question.[30] The ability to change employers should be a basic fundamental freedom for workers, not an excuse to abandon labor standards enforcement.

Temporary migrant workers are often legally underpaid

There is abundant evidence that the laws and regulations governing major temporary work visa programs—such as H-2B and H-1B—permit employers to pay their temporary migrant workers much less than the local average wage for the jobs they fill.[31] For example, in the H-1B visa program—which has a prevailing wage rule that is intended to protect local wage standards—60% of all H-1B jobs certified by the U.S. Department of Labor (DOL) in 2019 were certified at a wage that was below the local average wage for the specific occupation.[32] And despite the wage rules in H-1B, there is evidence that wage theft of H-1B workers may be occurring on a massive scale.[33]

However, most work visa programs have no minimum or prevailing wage rules at all—perhaps that's why some employers have believed they could get away with vastly underpaying their temporary migrant workers, as one Silicon Valley technology company in Fremont, California, did by paying less than $2 an hour to skilled migrant workers from India on L-1 visas who were working up to 122 hours per week installing computers.[34]

While employers are still required by law to pay temporary migrant workers at least the state or federal minimum wage, that's often far less than the true market rate, or the local average wage, for the occupation in which they are employed. The company employing the L-1 workers in Fremont who were paid less than $2 an hour was cited for violations by DOL

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[29] Comments of Michael Clemens at "Shared Border, Shared Future: A Blueprint to Regulate US-Mexico Labor Mobility," an event hosted by the Center for Global Development, Sept. 13, 2016; Alex Nowrasteh, *How to Make Guest Worker Visas Work*, Cato Institute, Jan. 31, 2013.

[30] See for example the Economic Policy Institute's Unequal Power project, started in 2020, and see also, Economic Policy Institute, "Ability to quit does not prevent employer exploitation," virtual event on June 22, 2022.

[31] Daniel Costa, *The H-2B Temporary Foreign Worker Program: For Labor Shortages or Cheap, Temporary Labor?*, Economic Policy Institute, Jan. 19, 2016; Ron Hira, "New Data Show How Firms Like Infosys and Tata Abuse the H-1B Program," *Working Economics Blog* (Economic Policy Institute), Feb. 19, 2015; Daniel Costa, "H-2B Crabpickers Are So Important to the Maryland Seafood Industry That They Get Paid $3 Less Per Hour Than the State or Local Average Wage," *Working Economics Blog* (Economic Policy Institute), May 26, 2017.

[32] Daniel Costa and Ron Hira, *H-1B Visas and Prevailing Wage Levels: A Majority of H-1B Employers—Including Major U.S. Tech Firms—Use the Program to Pay Migrant Workers Well Below Market Wages*, Economic Policy Institute, May 4, 2020.

[33] Daniel Costa and Ron Hira, *New evidence of widespread wage theft in the H-1B visa program: Corporate document reveals how tech firms ignore the law and systematically rob migrant workers*, Economic Policy Institute, December 9, 2021.

[34] Monte Francis, "Fremont Tech Company Paid Workers $1.21 an Hour: U.S. Dept. of Labor," *NBC Bay Area*, Oct. 22, 2014. See also George Avalos, "Workers Paid $1.21 an Hour to Install Fremont Tech Company's Computers," *Mercury News*, Oct. 22, 2014; updated Aug. 12, 2016. L-1 visa status confirmed in an email from George Avalos of *Mercury News*, Oct. 23, 2014.

because California law required that they be paid no less than $8 an hour (the state minimum wage at the time), plus time-and-a-half for overtime. But the average wage in Fremont for the job they were doing—installing computers—was $20 per hour at the time according to DOL data, and if they were also configuring the computers for the company's network, the going rate for their work would have been $44 per hour.[35] In the end, the company was required to pay back wages of $40,000 plus a fine of $3,500 "because of the willful nature of the violations"—a slap on the wrist considering the egregiousness of the wage theft, and hardly a disincentive against future violations.[36]

Considering how the wage rules or lack thereof in these programs operate, and the situation workers are left in, perhaps it is no surprise there is evidence that temporary migrant workers in low-wage jobs earn approximately the same wages, on average, that unauthorized immigrant workers do for similar jobs, despite the fact that unauthorized workers have virtually no rights in practice.[37] In other words, these temporary migrant workers do not have any financial incentive to work legally through visa programs since there is no wage premium to be gained for it—and, in fact, authorized temporary migrant workers can end up worse off economically than unauthorized workers because of the debts they incur through fees paid to recruiters, and considering the fact that they may have no family or social networks to rely on. This could ultimately result in incentivizing workers to migrate without authorization, rather than using available legal channels.

In essence, these visa programs operate in practice to create a labor market monopsony for employers—awarding employers greater leverage over their workers[38]—and growing research has shown that even modest amounts of employer monopsony power are utterly corrosive to workers' ability to bargain for better wages.[39]

Oversight is lacking, leaving temporary migrant workers unprotected

There is very little oversight of temporary work visa programs by DOL. In fact, most of the programs have no rules in place at all to protect temporary migrant workers after they arrive in the United States. Where such rules *are* in place—namely in the H-1B, H-2A, and H-2B programs—enforcement is inadequate to protect workers, and companies that are frequent and extreme violators of the rules are often allowed to continue hiring through visa programs

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[35] Author's analysis of historical data from Foreign Labor Certification Data Center, Online Wage Library, "7/2013 – 6/2014 FLC Wage Data," https://flcdatacenter.com/Download.aspx, for Standard Occupational Classification codes 15-1142 and 49-2011, for region 36084, Oakland-Fremont-Hayward, CA Metropolitan Division (2013–2014).
[36] U.S. Department of Labor, Wage and Hour Division, "US Department of Labor Investigation Finds Silicon Valley Technology Employer Owed More Than $40,000 to Foreign Workers" (press release no. 14-1717-SAN [SF-71]), Oct. 22, 2014, accessed Aug. 27, 2019.
[37] Lauren A. Apgar, *Authorized Status, Limited Returns: The Labor Market Outcomes of Temporary Mexican Workers*, Economic Policy Institute, May 21, 2015.
[38] Bivens and Shierholz broadly define "monopsony power" as "the leverage enjoyed by employers to set their workers' pay." See Josh Bivens and Heidi Shierholz, *What Labor Market Changes Have Generated Inequality and Wage Suppression?: Employer Power Is Significant but Largely Constant, Whereas Workers' Power Has Been Eroded by Policy Actions*, Economic Policy Institute, Dec. 12, 2018.
[39] Eric M. Gibbons et al., "Monopsony Power and Guest Worker Programs," IZA Institute of Labor Economics, Discussion Paper no. 12096, January 2019.

with impunity.[40] Part of the problem lies with DOL's weak legal mandate, but is also due to the reality of DOL being woefully underfunded and understaffed. In fact, funding for DOL's Wage and Hour Division (WHD) and Occupational Safety and Health Administration (OSHA) has remained flat over the past decade, while the number of workers they are responsible for protecting has increased sharply.[41] To put that into context, consider that in 2018, the budget for labor standards enforcement across all federal U.S. agencies was only $2 billion, while spending on immigration enforcement in 2018 was $24 billion, an astonishing *11 times greater* than spending to enforce labor standards—despite the mandate labor agencies have to protect 146 million workers employed at 10 million workplaces.[42] Consider as well that the Wage and Hour Division—the division at DOL in charge of enforcement in the H visa programs—had fewer investigators on staff in 2019 than it did almost five decades earlier, which explains the agency's limited capacity to conduct investigations.[43]

Most temporary migrant workers cannot transition to a permanent immigrant status; in the few programs that offer a pathway, it is controlled by employers

None of the U.S. temporary work visa programs provide for an automatic path to lawful permanent residence—i.e., obtaining a "green card"—which would also allow them to eventually qualify for naturalization (citizenship) after a few years, nor do they allow for a quick and direct path for temporary migrant workers to apply for green cards themselves. As a result, many temporary migrant workers return to the United States every year for decades in a nonimmigrant status, often for six to nearly 12 months at a time—rendering them permanently temporary in many respects—which also impacts their ability to integrate into the United States and prevents them from earning the higher wages associated with permanent residence and citizenship.[44]

Only two temporary work visa programs allow for a relatively straightforward application process for green cards, the H-1B and L-1 visas. But in those programs, it is the employer who decides whether the worker should get a green card; the employer also controls the green card application and process. This creates an imbalance of power between temporary migrant workers and their employers that allows employers to exert undue influence over the lives of their workers with visas, and disincentivizes workers from speaking up about workplace abuses, as speaking up could jeopardize their ability to remain in the United States.

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[40] Ken Bensinger, Jessica Garrison, and Jeremy Singer-Vine, "Employers Abuse Foreign Workers. U.S. Says, by All Means, Hire More," *BuzzFeed News*, May 12, 2016.
[41] Ihna Mangundayao, Celine McNicholas, and Margaret Poydock, "Worker protection agencies need more funding to enforce labor laws and protect workers," *Working Economics* blog (Economic Policy Institute), July 29, 2021.
[42] Daniel Costa, "Immigration Enforcement Is Funded at a Much Higher Rate Than Labor Standards Enforcement—and the Gap Is Widening," *Working Economics* Blog (Economic Policy Institute), June 20, 2019.
[43] Daniel Costa, Philip Martin, and Zachariah Rutledge, *Federal Labor Standards Enforcement in Agriculture: Data Reveal the Biggest Violators and Raise New Questions About How to Improve and Target Efforts to Protect Farmworkers*, Economic Policy Institute, December 2020.
[44] See, for example, Sankar Mukhopadhyay and David Oxborrow, "The Value of an Employment-Based Green Card," *Demography* 49 (February 2012): 219–237, https://doi.org/10.1007/s13524-011-0079-3; Manuel Pastor and Justin Scoggins, *Citizen Gain: The Economic Benefits of Naturalization for Immigrants and the Economy*, Center for the Study of Immigrant Integration, University of Southern California, December 2012.

Even when employers decide to apply for green cards for the temporary migrant workers who are eligible, workers can end up in what's known as the green card "backlog," waiting years and even decades for a green card to become available to them. The Congressional Research Service has estimated that approximately 1 million temporary migrant workers are in the green card backlog.[45] During their time in the backlog, workers can experience an employment relationship that is ripe for exploitation, because workers are unable to switch easily between jobs or employers by virtue of their prolonged temporary status.

Many temporary migrant workers are separated from their families while employed in the United States

While many temporary work visa programs technically allow migrant workers to bring their spouses and children, in most cases U.S. visa rules do not authorize spouses to work—making it difficult, if not impossible, for spouses and children to accompany workers because of the high cost of living and low pay in work visa programs. Taking into consideration that so many temporary migrant workers return every year for decades, workers and their family members can end up facing prolonged separation and trauma—children may grow up hardly knowing, or ever seeing, one or both of their parents.

The H-2A and H-2B visa programs: Recent, rapid growth

While the preceding sections discussed issues that cut across all U.S. temporary work visa programs, the following sections will focus on the H-2A and H-2B visa programs.

H-2A and H-2B are two of many U.S. temporary work visa programs.[46] The Immigration and Nationality Act of 1952 first created some of the current temporary work visas, including the H-2 visas for foreign nationals "coming temporarily to the United States to perform other temporary services or labor, if unemployed persons capable of performing such service or labor cannot be found in this country."[47] In 1986, the Immigration Reform and Control Act (IRCA) split the H-2 visa into two separate visas, the H-2A for temporary workers employed in agricultural occupations and H-2B for temporary workers in occupations outside of agriculture.[48] H-2A is explicitly for temporary and seasonal jobs in agriculture, and in practice mostly used for crop farming, and the H-2B program is intended to be used when non-agricultural employers face labor shortages in seasonal jobs. The most common occupations in H-2B are landscaping, construction, forestry, seafood and meat processing, traveling carnivals, restaurants, and hospitality. The H-2A visas program has no annual numerical limit or "cap." In H-2B however, legislation enacted subsequent to IRCA, the Immigration Act of 1990, established an annual numerical limit of 66,000 H-2B visas that could be issued

[45] William Kandel, *The Employment-Based Immigration Backlog*, Congressional Research Service, R46291, March 26, 2020.
[46] Daniel Costa, *Temporary work visa programs and the need for reform: A briefing on program frameworks, policy issues and fixes, and the impact of COVID-19*, Economic Policy Institute, February 3, 2021.
[47] Immigration and Nationality Act of 1952, Section 101(a)(15)(h)(ii).
[48] Immigration Reform and Control Act, Section 301(a).

annually, and which took effect in fiscal year 1992.[49] This annual numerical limit of 66,000 visas is often referred to as the H-2B annual "cap."

In this section I will begin with a discussion about the current size of both programs. The H-2A program has expanded rapidly over the past decade and the H-2B visa program, despite the annual cap of 66,000 per fiscal year, has grown quickly since 2016, when Congress began to include riders to create supplemental visas beyond the H-2B annual cap.

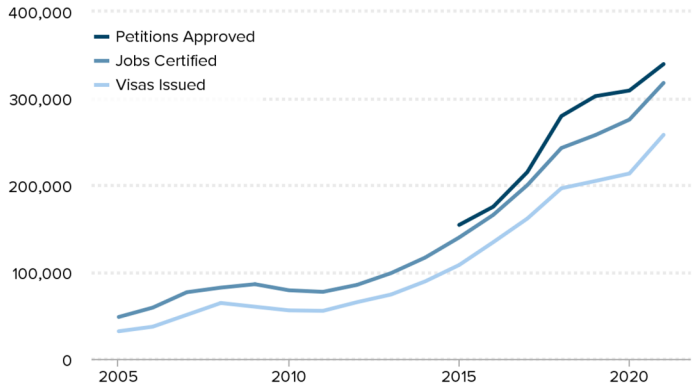
The size of the H-2A program has tripled over the past decade, and over half of jobs are located in just five states

As **Figure B** shows below—whether by the number of jobs certified by the U.S. Department of Labor (DOL) or the number of visas issued by the State Department—the size of the H-2A program has more than tripled over the last decade. In 2012, DOL certified 85,248 jobs for H-2A, and in 2021, there were 317,619 certified jobs. In 2012, the State Department issued 65,345 H-2A visas, and in 2021, issued 257,898.

[49] Immigration Act of 1990, Section 205(g)(1)(B).

Figure B.

H-2A jobs certified and visas issued, 2005—2021, and petitions approved, 2015—2021



Notes: All references to a particular year should be understood to mean the U.S. government's fiscal year (October 1–September 30).

Source: U.S. Department of Labor, Office of Foreign Labor Certification, OFLC Performance Data; U.S. Department of State, Bureau of Consular Affairs, "Nonimmigrant Visa Statistics"; U.S. Department of Homeland Security, United States Citizenship and Immigration Services, H-2A Employer Data Hub.

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Because three separate agencies are involved in managing the H-2A visa program, it is difficult to know the exact number of H-2A workers employed in the United States: DOL reviews and adjudicates applications for job certifications, USCIS in the Department of Homeland Security reviews and adjudicates petitions, and State issue or denies visas. This leads to three separate data sources which offer a different picture of the size of the program (see the three lines on the chart in Figure B).

In my opinion, the best methodology for estimating the size of the H-2A workforce is to add the number of new visas issued by State and adding the number of H-2A approvals for

continuing employment (in other words, visa extensions) by USCIS.[50] This is because H-2A visas issued represent new H-2A workers and extensions by USCIS represent H-2A workers who did not leave the United States because USCIS approved them to remain and continue working at their job.

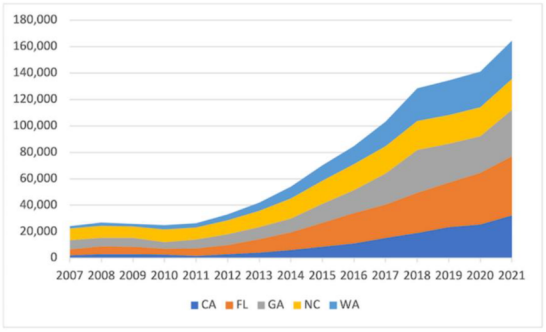
In 2021, State issued 257,898 visas. USCIS H-2A employer data hub shows there were 43,020 approved petitions for continuing employment, leading to a total of 300,918 H-2A workers employed in 2021. According to 2020 labor certification from DOL, we know that on average, H-2A jobs were certified for 168 days, which is just under six months.[51] Since each H-2A job is certified on average for six months, that means that 300,918 six-month H-2A jobs is equal to 150,459 full-time equivalent jobs filled with H-2A workers.

Finally, **Figure C** from *Rural Migration News* at the University of California, Davis, shows that over half of the H-2A jobs certified by DOL had worksites located in just five states: California, Florida, Georgia, North Carolina, and Washington.[52] The share of H-2A jobs that these states accounted for rose from 34% in 2007 to 52% in 2021, meaning that much of the growth in the H-2A program has been accounted for by the growth in these five states in the southeast and west.

Figure C.

[50] Data on H-2A petitions approved for continuing employment are only available from USCIS going back to fiscal year 2015. See USCIS, H-2A Employer Data Hub [last accessed July 17, 2022].
[51] Philip Martin, "The H-2A Program in 2021," The Wilson Center, June 21, 2021.
[52] Rural Migration News, "The H-2A Program in 2022," University of California, Davis, May 16, 2022.

The top five states had 52% of H-2A jobs in Fiscal Year 2021; in California and Washington H-2A rose the fastest



Note: Numbers represent approved job certifications for H-2A by the Office of Foreign Labor Certification in the Employment and Training Administration, U.S. Department of Labor, in five states: California, Florida, Georgia, North Carolina, and Washington.

Source: Figure reproduced with permission from author. Rural Migration News, "The H-2A Program in 2022," University of California, Davis, May 16, 2022.

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New data reveal the size of the H-2B program in 2021 nearly equaled its record high

While, as noted above, the annual cap for the H-2B program has been set in law at 66,000 since 1992, in recent years the number of H-2B workers has been much higher, due mostly to congressionally authorized increases every year, along with extensions and exemption from the cap. The first temporary modification to the H-2B cap occurred during fiscal years 2005-2007, when Congress passed a law putting in place a temporary "returning worker exemption" during those years that allowed migrant workers who had been employed with an H-2B visa in any one of the previous three fiscal years to not be counted against the annual cap. As a result, the H-2B program reached its high point of 129,547 in fiscal year 2007.[53] It should be noted that because of extensions and exemptions from the cap, the actual number of H-2B workers was likely higher in 2007, but the true number is unknown because those data on visa extensions are not publicly available.

New data from the USCIS H-2B Employer Data Hub that were first published in 2021 provide new insights into the current size of the H-2B program and the impact of the returning worker and supplemental H-2B visas that have been added since fiscal year 2016.

[53] Andorra Bruno, *The H-2B Visa and the Statutory Cap*, Congressional Research Service, R44306, updated February 28, 2020.

Previously, similar to H-2A, the best available information on the size of the H-2B program came from disclosure data on labor certifications, which are published by the Department of Labor (DOL), and the number of visas issued, which is published by the State Department. Labor certifications, however, do not consider the H-2B cap—in other words, DOL will continue to approve them even if the H-2B cap has been reached. Therefore these certifications show only the number of H-2B jobs that have been certified by DOL to be filled with H-2B workers, not the actual number of H-2B workers who are ultimately employed. Once DOL has certified the jobs employers wish to fill, the employers must then petition USCIS for H-2B workers. Before USCIS approves an H-2B petition, it must consider whether the H-2B job and petition fall under the annual cap. The result of this process is that every year there are many more labor certifications from DOL than there are petitions that are ultimately approved by USCIS allowing employers to hire H-2B workers.

The State Department's publication of the number of visas issued is another important data source, but these data do not account for H-2B workers who had their visas extended and remained in the United States beyond the initial fiscal year for which they were approved, or for H-2B workers who may have switched into H-2B from another status. For these reasons, the State Department data are also an imperfect source for measuring the number of H-2B workers.

Data from the USCIS H-2B Employer Data Hub, on the other hand, since it represents individual jobs that USCIS has approved to be filled with H-2B workers, and includes data on visa extensions, is the best available tool for measuring the total number of workers employed in H-2B status. However, as noted in the box on data above, there are caveats.

For one, the number of approvals in the USCIS H-2B data may overcount the number of individual H-2B workers. That's because in cases in which a worker was changing jobs or changing job conditions with the same employer, that individual may appear twice in the database; however USCIS does not identify when an approval is for an H-2B worker changing jobs or job conditions.

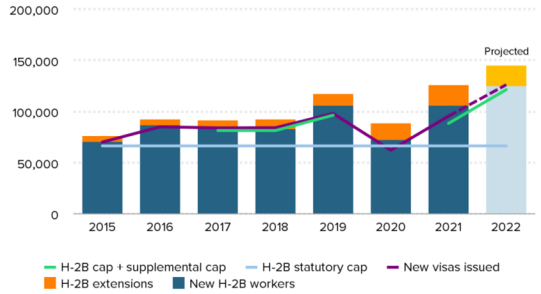
In addition, there is not a direct correspondence between the number of H-2B petitions and the number of H-2B workers ultimately employed because visas for workers with approved USCIS petitions may be denied at the consular level by the State Department. In my estimate on the number of H-2B workers I account for this by subtracting the number of H-2B visas denied by the State Department from the number of petitions approved by USCIS for new employment.

USCIS H-2B Data Hub data are available only going back to 2015—the year immediately before Congress first expanded the H-2B program through an appropriations rider—but those data at least permit us to see what the baseline number of H-2B workers employed was before the expansions via supplemental visas. **Figure D** shows that in 2015, while the statutory cap of 66,000 was still in place—the total number of H-2B workers approved by USCIS was 85,793, of which 79,603 were new approvals and 6,190 were visa extensions. A total of 9,188 H-2B visa applications were denied by the State Department at the consular stage. After subtracting visa denials, the total estimated number of H-2B workers in 2015 is 76,605.

Figure D.

The H-2B visa program is nearly double the size of the original annual cap and set to grow larger

H-2B workers employed in the United States according to approved USCIS petitions and visas issued by the State Department, FY 2015–21, and projected H-2B workers in 2022



Note: "New H-2B workers" column represents USCIS petitions for H-2B workers approved for new employment, minus the number of visas denied for H-2B workers in the same fiscal year (see text). "H-2B visa extensions" represents USCIS petitions for H-2B workers approved for continuing employment (i.e. visa extensions). The line labeled "New visas issued" represents the number of H-2B visas issued by the State Department in the corresponding fiscal year. The "H-2B statutory cap" is set in law at 66,000 new H-2B visas per year. The line labeled "H-2B cap + supplemental cap" is the number of H-2B visas authorized in the statutory cap plus the number of supplemental visas authorized by Congress and the executive branch for the corresponding fiscal year. The column labeled "Projected" are totals that have been projected for fiscal year 2022 (see text).

Source: EPI analysis of United States Citizenship and Immigration Services, U.S. Department of Homeland Security, H-2B Employer Data Hub, fiscal year 2015-2021 data files, and U.S. Department of State, "Nonimmigrant Visa Statistics" [see PDF files for tables listed under "Nonimmigrant Worldwide Issuance and Refusal Data by Visa Category" and "Nonimmigrant Visas by Individual Class of Admission" for fiscal years 2015-2021].

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In 2021, when 22,000 supplemental H-2B visas were added to the statutory cap of 66,000, for a total cap of 88,000, USCIS approved a total of 132,101 petitions for H-2B workers. The 132,101 H-2B workers included 112,546 new H-2B workers and 19,555 visa extensions. However 5,911 visas were denied in 2021. After subtracting denied visas, the total number of H-2B workers for 2021 was 126,190. The 2021 total was nearly double the size of the annual cap and came close to the record high of 129,547 from 2007.

It must also be noted that there are some discrepancies in the H-2B data reported by USCIS that have not been explained by the agency. For example, while the data in the 2021 USCIS H-2B Employer Data Hub show there were 132,101 total approvals for H-2B workers, the USCIS

Characteristics of H-2B Nonagricultural Temporary Workers report shows that there were 134,654 total H-2B petitions approved.[54] The number of new approved workers in 2021, at 112,546, is much higher than the annual cap plus the number of permitted supplemental visas for 2021, which totaled 88,000. There were only 10,665 approvals in the Data Hub data for new H-2B workers that were exempt from the cap in 2021, a number much lower than the 24,546 difference between the authorized 88,000 visas and the 112,546 petitions approved for 2021. One possibility is that the difference is made up of H-2B workers with petition approvals to change employers or change job conditions. However, the USCIS data are not detailed enough to allow us to discern between the different types of approvals and USCIS has not reported or suggested anywhere that this is the case. All of this raises the question of whether USCIS is approving more H-2B petitions than allowed by law.

The size of the H-2B program is projected to reach a new high in 2022

The number of H-2B workers is set to grow higher still in fiscal year 2022. As discussed above, the Biden administration has added 55,000 supplemental H-2B visas to the 66,000 annual cap, setting the total limit for the year at 121,000. The last bar in Figure D (labeled "Projected") shows an estimate of the number of H-2B workers for 2022. I construct the 2022 estimate as follows: First, I take the number of H-2B workers in the cap set by the Biden administration of 121,000 for 2022. I then add 10,665 additional workers, using the number of new H-2B workers from 2021 that were exempt from the annual cap, according to the USCIS H-2B Employer Data Hub. Then I subtract from that total 5,911, the number of visas that were denied by the State Department in 2021. Finally, I add the number of visa extensions from 2021 (19,555). The final result is a projected total of 145,301 H-2B workers for 2022, a new record high and more than double the original statutory annual cap.[55]

The H-2A and H-2B visa programs: Wage and hour enforcement statistics show that workers are vulnerable in the workplace

Why does it matter that the H-2A and H-2B programs have grown in recent years? Because while the H-2A and H-2B programs continue to expand—with further growth expected, and the Biden administration making H-2 programs a central component of their Collaborative Migration Management Strategy for Central and North America—at the same time, data on labor standards enforcement from the Wage and Hour Division make clear that farmworkers in agriculture, including H-2A workers, and all workers in H-2B industries are not adequately protected in the workplace. As the program expansions continue, much more must be done to ensure that both temporary migrant workers and U.S. workers are paid and treated fairly. This section discusses some of the available data on wage and hour enforcement in H-2A and H-2B industries.

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[54] USCIS, *Characteristics of H-2B Nonagricultural Temporary Workers, Fiscal Year 2021 Report to Congress*, March 10, 2022; see Table 3 on page 7.

[55] Since the number of H-2B extensions is likely to be larger in 2022 due to a larger pool of H-2B workers in 2021, the 2021 total for extensions used here is likely an undercount of the number of extensions in 2022 (see discussion about cap exemptions and extensions).

Inadequate labor standards enforcement in agriculture leaves all farmworkers vulnerable to wage theft and other violations

Farmworkers in the United States earn some of the lowest wages in the labor market and experience an above-average rate of workplace injuries.[56] In addition, a large share of them are also vulnerable to exploitation and abuse in the workplace because of their immigration status.

The U.S. Department of Labor's National Agricultural Workers Survey reports that 44% of the non-H-2A crop workers were unauthorized immigrants in 2019–2020,[57] and as discussed above there were just over 300,000 H-2A workers employed in the United States in 2021, who worked for an average of six months out of the year, representing roughly 10% to 15% of farmworkers employed on U.S. crop farms. Both unauthorized and H-2A workers have limited labor rights and are vulnerable to wage theft and other abuses due to their immigration status.[58] The remaining farm workforce, roughly half of all farmworkers, are U.S. citizens and legal immigrants with full rights and agency in the labor market. But that means that roughly half of all farmworkers are vulnerable to violations of their rights because of their lack of an immigration status or their precarious, temporary immigration status.

The U.S. Department of Labor's (DOL) Wage and Hour Division (WHD) is the federal agency that protects the rights of farmworkers in terms of wage and hour laws, including those that protect H-2A workers. WHD labor standards enforcement actions are intended to ensure that the rights of workers are protected, and to level the playing field for employers, so that employers that underpay workers or engage in other cost-reducing behavior in violation of wage and hour laws do not gain a competitive advantage over law-abiding employers. WHD aims to "promote and achieve compliance with labor standards to protect and enhance the welfare of the nation's workforce" by enforcing 13 federal labor standards laws, including the Fair Labor Standards Act (FLSA), which requires minimum wages and overtime pay, and regulates the employment of workers who are younger than 18, as well as the Family and Medical Leave Act, and laws governing government contracts, consumer credit, and the use of polygraph testing, etc.[59] WHD also enforces two laws and their implementing regulations specific to agricultural employment. One is the Migrant and Seasonal Agricultural Worker

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[56] Daniel Costa, "The farmworker wage gap continued in 2020: Farmworkers and H-2A workers earned very low wages during the pandemic, even compared with other low-wage workers," *Working Economics Blog* (Economic Policy Institute), July 20, 2021; Bureau of Labor Statistics, *Injuries, Illnesses, and Fatalities*, "Table 1. Incidence Rates of Nonfatal Occupational Injuries and Illnesses by Industry and Case Types, 2019" [online table]. Accessed October 2020.
[57] National Agricultural Workers Survey, Data Tables for 2019-2020, Employment and Training Administration, U.S. Department of Labor.
[58] Annette Bernhardt, Ruth Milkman, et al., *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities,* Center for Urban Economic Development, National Employment Law Project, and UCLA Institute for Research on Labor and Employment, September 2009; Lauren Apgar, *Authorized Status, Limited Returns: The Labor Market Outcomes of Temporary Mexican Workers*. Economic Policy Institute, May 21, 2015.

[59] Wage and Hour Division, U.S. Department of Labor, *Laws Administered and Enforced* (last accessed July 17, 2020).

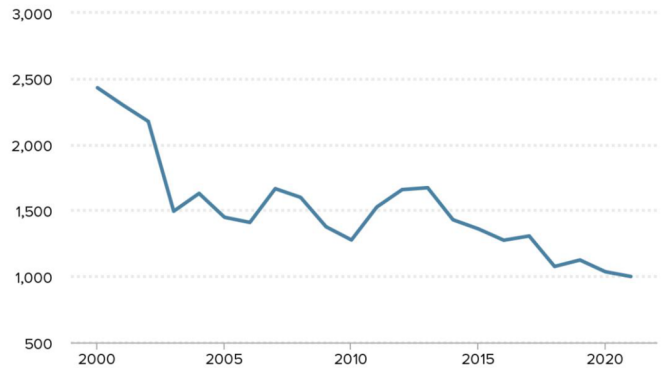
Protection Act (MSPA), the major federal law that protects U.S. farmworkers. The other is the statute that establishes the H-2A program.

In December 2020, Dr. Philip Martin, Dr. Zach Rutledge, and I published a lengthy report analyzing 20-years of data from WHD on their enforcement actions in agriculture.[60] The rest of this section highlights some of the key findings and updates some of the data findings.

First, it is important to note that the number of WHD investigations in agriculture has declined sharply since the year 2000. **Figure E** shows a clear downward trend in the number of WHD investigations at agricultural worksites over the past two decades, from more than 2,000 a year in the early 2000s to just 1,000 in fiscal year 2021.

Figure E.

Wage and Hour Division investigations of agricultural employers, fiscal years 2000–2021



Source: Authors' analysis of U.S. Department of Labor, Wage and Hour Division, Agriculture data table.

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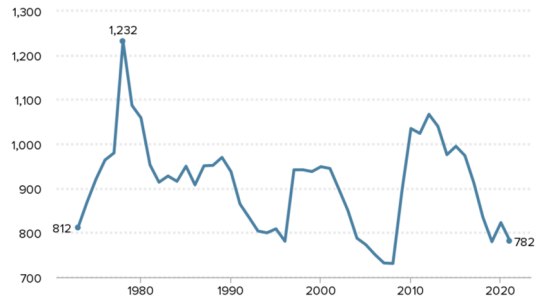
[60] Daniel Costa, Philip Martin, and Zachariah Rutledge, *Federal labor standards enforcement in agriculture: Data reveal the biggest violators and raise new questions about how to improve and target efforts to protect farmworkers*, Economic Policy Institute, December 15, 2020.

What explains fewer investigations of farm employers? While labor enforcement priorities vary by administration, funding for WHD has lagged behind the growth of the U.S. labor force. In inflation-adjusted dollars, WHD's budget in 2020 was $13 million less than it was in 2012.[61] **Figure F** shows that in 2021 there were only 782 WHD investigators enforcing federal labor standards, 30 fewer than in 1973. Hamaji et al. note that in 1978, there was one WHD investigator for every 69,000 U.S. workers; by 2018, there was one investigator for every 175,000 U.S. workers.[62] And as noted earlier, funding for DOL's WHD and OSHA has remained flat over the past decade, while the number of workers they are responsible for protecting has increased sharply.[63]

Figure F.

Number of Wage and Hour Division investigators, U.S. Department of Labor, 1973–2021



Note: Numbers represent Wage and Hour Division investigators on staff at the end of each year.

Source: Authors' analysis of Wage and Hour Division data on the number of investigators; from unpublished Excel files provided by WHD staff members to the author. For 2020 and 2021, source is Rebecca Rainey, "Wage-Hour Investigator Hiring Plans Signal DOL Enforcement Drive," Bloomberg Law, January 28, 2022.

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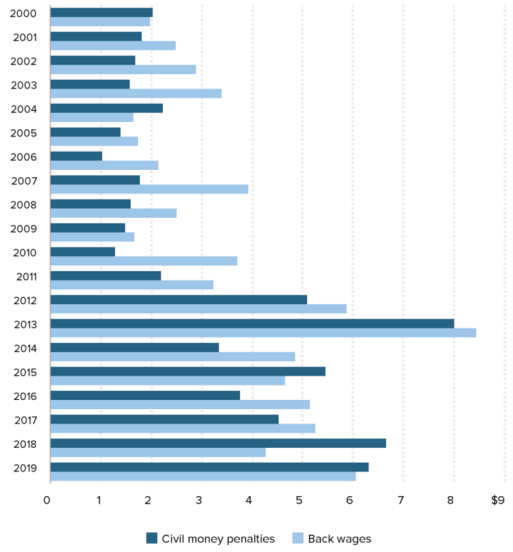
Nonetheless, **Figure G** shows that despite fewer investigations and WHD investigators, the total back wages owed for all violations of federal wage and hour laws in agriculture has been

[61] Authors' analysis of WHD budget data, see U.S. Department of Labor, *FY 2020 Department of Labor Budget Summary Tables*.
[62] Kate Hamaji, Rachel Deutsch, et al., *Unchecked Corporate Power: Forced Arbitration, the Enforcement Crisis, and How Workers are Fighting Back*. Economic Policy Institute, May 2019.
[63] Ihna Mangundayao, Celine McNicholas, and Margaret Poydock, "Worker protection agencies need more funding to enforce labor laws and protect workers," *Working Economics* blog (Economic Policy Institute), July 29, 2021.

on a generally upward trend, peaking at $8.4 million in FY2013 (in constant 2019 dollars), the same year that civil money penalty assessments peaked at $8.0 million. Annual back wages and CMPs were between $3.8 million and $6.7 million between 2015 and 2019 (in 2019 dollars). The latest data released by WHD shows that in 2021, with 1,000 investigations in agriculture, 10,379 workers were assessed to be owed back wages, with a total of $8.4 million total owed back wages for agricultural workers (in 2021 dollars) and over $7.4 million assessed to agricultural employers in civil money penalties.[64]

Figure G.

Back wages and civil money penalties assessed (in millions of dollars) against agricultural employers by the Wage and Hour Division, fiscal years 2000–2019



Note: Data are inflation adjusted to 2019 dollars.

Source: Authors' analysis of U.S. Department of Labor, Wage and Hour Division, Agriculture data table (U.S. DOL-WHD 2020a).

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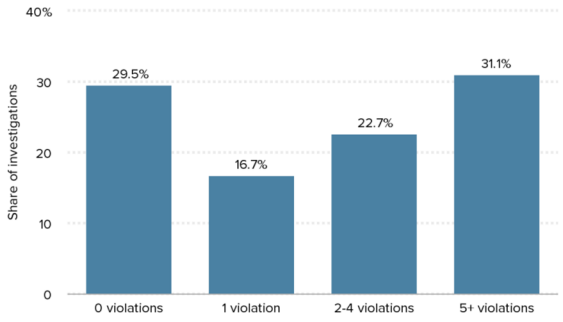
[64] U.S. Department of Labor, Wage and Hour Division, Agriculture data table.

In addition, despite fewer investigations, it is the case that when WHD initiates an investigation of an agricultural employer, they often find violations. **Figure H** groups the number of violations found per investigation during the FY2005–FY2019 period, from zero to more than five violations per investigation. When looked at this way, the data reveal a U-shape among the violators, with almost 30% of investigations bunched at the zero and 31% bunched at more than five violations; those two ends of the spectrum account for almost two-thirds of the violations, while 17% of investigations found one violation and 23%, nearly a quarter, found two to four violations. However, overall, *the data show that 70% of all investigations detected violations*, while 30% detected zero violations. In addition, it should be noted that this figure does not account for the severity of the violations or the amounts assessed. In other words, some investigations that detected one or two violations may have detected egregious violations and found employers owing large amounts of back pay, while investigations that detected with five or more violations may have resulted in smaller amounts of back wages owed.

Figure H.

Over 70% of federal investigations of agricultural employers detected wage and hour violations

Violations detected during investigations of agricultural employers, by number of violations found per investigation, fiscal years 2005–2019



Note: Data include H-2A, MSPA, FLSA, and all other types of employment law violations in the agricultural sector.

Source: Authors' analysis of U.S. Department of Labor, *Wage and Hour Compliance Action Data* (U.S. DOL-WHD 2020f).

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One particular area of interest to highlight with respect to wage and hour enforcement in agriculture is the employment of farmworkers by farm labor contractors (FLCs). FLCs are nonfarm employers that act as staffing firms for farm employers. For FLCs, which correspond to NAICS code 115115, average employment was 181,000 in 2019, according to the Quarterly Census of Employment and Wages from DOL; FLCs are a subset of the Support Activities for Crop Production category (NAICS 1151), which had average employment of 342,000 in 2019, meaning that FLCs accounted for 53% of U.S. crop support services employment.

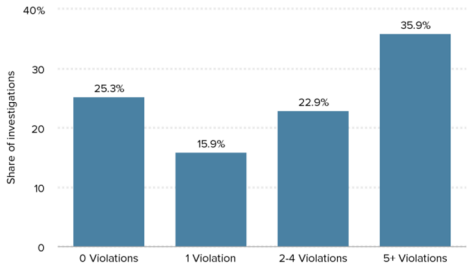
FLCs accounted for 14% of total average employment in UI-covered agriculture of 1.3 million in 2019—including employment in both crops and animal agriculture—but accounted for one-quarter of all wage and hour law violations detected in agriculture (24%). Thus, the share of agricultural employment law violations committed by farm labor contractors was 10 percentage points greater than the FLC share of average annual agricultural employment. In practical terms, that means that farmworkers employed by FLCs or on farms that use FLCs are more likely to suffer wage and hour violations than farmworkers who are employed by farms directly.

We also found that 75% of all WHD investigations of FLCs detected violations, while 25% of investigations detected zero violations. We grouped the number of violations detected per investigation of FLCs, as shown in **Figure I.** The share of investigations of FLCs that found zero violations, at 25%, was significantly less than the share of investigations of FLCs that found five or more violations, 36%. Nearly two-fifths of investigations detected either one violation or two to four violations.

Figure I.

Three-fourths of federal investigations of farm labor contractors detected wage and hour violations

Violations detected during investigations of farm labor contractors, by number of violations found per investigation, fiscal years 2005–2019



Source: Authors' analysis of U.S. Department of Labor, *Wage and Hour Compliance Action Data* (U.S. DOL-WHD 2020f).

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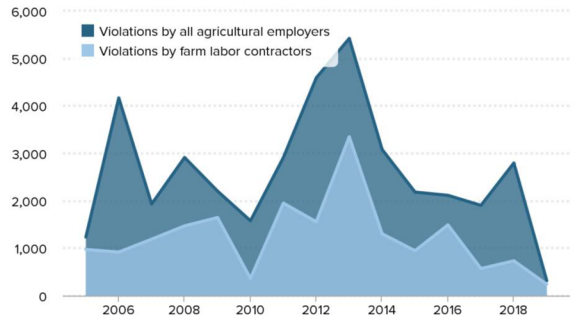
We also reviewed violations by FLCs in the two major agricultural states of California and Florida. California and Florida each accounted for 14% of the wage and hour violations detected as the result of WHD investigations nationwide, by far the most, followed by North Carolina with 10%, Texas and Washington with 5% each, and Oregon with 4%. These six states accounted for 52% of all employment law violations found in agriculture. In the two states with the highest shares of violations, California and Florida, FLCs accounted for the largest share of the violations detected by WHD investigators. **Figure J** shows that FLCs accounted for 48% of the total violations in California during fiscal years 2005 to 2019, and **Figure K** shows that FLCs accounted for 50% of the total violations detected in Florida over the same period. This finding is particularly significant for California, given that FLCs now account for a majority of crop employment in the state.[65]

Figure J.

Employment law violations detected in California by the Wage and Hour Division among all agricultural employers and farm labor contractors, fiscal years 2005–2019



Note: Violations by California farm labor contractor are a subset of employment law violations detected among all agricultural employers in California.

Source: Authors' analysis of U.S. Department of Labor, *Wage and Hour Compliance Action Data* (U.S. DOL-WHD 2020f).

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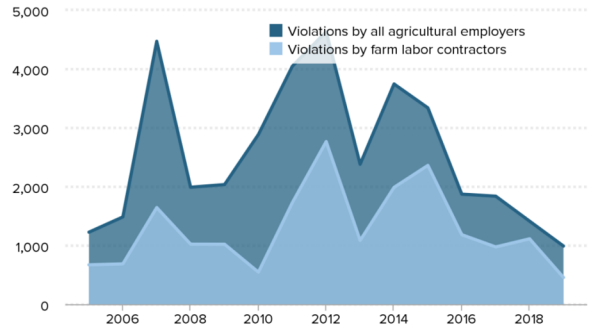
[65] Rural Migration News, "California: FLC Employment Down and Wages Up in 2020," University of California, Davis, July 16, 2021.

Figure K.

Employment law violations detected in Florida by the Wage and Hour Division among all agricultural employers and farm labor contractors, fiscal years 2005–2019



Note: Violations by Florida farm labor contractor are a subset of employment law violations detected among all agricultural employers in Florida..

Source: Authors' analysis of U.S. Department of Labor, *Wage and Hour Compliance Action Data* (U.S. DOL-WHD 2020f).

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To conclude, it is within this context H-2A workers are employed; where there are fewer investigations and fewer WHD investigators policing the farm labor market, where thousands of workers are robbed by farm employers every year, and where farm labor contractors with a fissured business model are proliferating. As a result, much more must be done to protect H-2A workers in the workplace, given that they are vulnerable due not just to the industry in which they are employed, but also because their precarious immigration status makes it difficult for them to complain when they are victimized by employers, recruiters, and FLCs.

Wage theft is a massive problem in the major H-2B industries: Employers stole $1.8 billion from workers since 2000

The data discussed in the previous section are clear that the H-2B program's size is on the cusp of reaching new heights. Why does that matter? Because at the same time, data on labor standards enforcement from DOL's WHD paint a picture of rampant wage theft and lawbreaking by employers in the industries that employ most H-2B workers. H-2B workers are being recruited into industries where they will be vulnerable, but no new measures have been implemented yet by the Biden administration to better protect them.

WHD publishes and annually updates tables with summary data on the outcomes of WHD enforcement actions in what it calls "industries with high prevalence of H-2B workers." The seven industries that WHD lists in these data tables include landscaping services, janitorial services, hotels and motels, forestry, food services, construction, and amusement. Data on the top H-2B occupations (from DOL labor certifications and from the USCIS H-2B Employer Data Hub) show that the vast majority of H-2B jobs that are certified by DOL and approved by USCIS are within these broad industries.[66]

Table 2 lists the top H-2B occupations by number of approvals in the USCIS H-2B Employer Data Hub. The listed occupations generally correspond with the seven "high H-2B prevalence" industries listed by WHD in their data tables and accounted for 99.1% of all H-2B approvals in 2021. If we exclude occupation #8, "N/A"—which represents data observations in which the occupation field was missing—the remaining nine occupations still account for 95.7% of all H-2B approvals in 2021.[67]

Table 2.

[66] Office of Foreign Labor Certification, "H-2B Temporary Non-Agricultural Program – Selected Statistics, Fiscal Year (FY) 2021 EOY," Employment and Training Administration, U.S. Department of Labor; and USCIS, H-2B Employer Data Hub, U.S. Department of Homeland Security.
[67] To the extent that the N/A occupations fall within the seven industries, the actual share could be as high as 99.1%.

Nearly all H-2B workers are employed in less than 10 broad occupation groups

Top 10 H-2B occupations by number of USCIS approved petitions, fiscal year 2021

H-2B Rank	Major group SOC code	Occupation	Initial approval	Continuing approval	Total approvals	Share of total H-2B approvals
1	*37*	*Building and Grounds Cleaning and Maintenance Occupations*	56,388	6,960	63,348	48.0%
2	*51*	*Production Occupations*	13,087	2,674	15,761	11.9%
3	*45*	*Farming, Fishing, and Forestry Occupations*	10,692	2,057	12,749	9.7%
4	*35*	*Food Preparation and Serving Related Occupations*	6,744	3,262	10,006	7.6%
5	*39*	*Personal Care and Service Occupations*	8,785	1,149	9,934	7.5%
6	*47*	*Construction and Extraction Occupations*	7,270	1,052	8,322	6.3%
7	*53*	*Transportation and Material Moving Occupations*	4,512	576	5,088	3.9%
8	*N/A*	*N/A*	3,191	1,424	4,615	3.5%
9	*49*	*Installation, Maintenance, and Repair Occupations*	512	101	613	0.5%
10	*27*	*Arts, Design, Entertainment, Sports, and Media Occupations*	520	22	542	0.4%
Totals for the top 10			111,701	19,277	130,978	99.1%
Totals for top 10 occupations excluding N/A			108,510	17,853	126,363	95.7%
Total H-2B approvals, all occupations			112,546	19,555	132,101	100%

Note: SOC stands for Standard Occupational Classification, which is a system of job classification created by the U.S. Department of Labor, see https://www.bls.gov/oes/current/oes_stru.htm#47-0000

Source: United States Citizenship and Immigration Services, U.S. Department of Homeland Security, H-2B Employer Data Hub, fiscal year 2021 data file.

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The published WHD enforcement data include tables for individual fiscal years in four different categories.[68] The first set of tables, "All Acts," includes data on violations of all wage and hour laws enforced by WHD in the listed industries. The second set of tables, "H-2B," summarizes employer violations of H-2B program laws and regulations. The next set, "FLSA," summarizes employer violations of the Fair Labor Standards Act. The final set, "All Others,"

[68] Wage and Hour Division, "Industries with High Prevalence of H-2B Workers: FY2000–FY2021" [data tables], U.S. Department of Labor.

summarizes violations of all laws that WHD enforces except for violations of FLSA or H-2B laws and regulations.

In the "All Acts" tables, the data fields listed by WHD in their enforcement data for the seven selected industries include:

- **Cases:** the number of cases investigated by WHD
- **Cases with violation:** the number of cases in which violations of the law were found
- **EEs (employees) employed in violation:** the number of employees involved in the cases in which violations were found
- **EE's ATP (employees' assessed total penalties):** the number of employees who were found to be owed back wages as a result of the identified violations
- **BW ATP (back wages assessed total penalties):** the total amount of back wages that were assessed by WHD to be owed to workers
- **CMP assessed:** the total amount of civil money penalties (CMPs) that were assessed to employers that committed violations. The assessment of CMPs is intended to deter future violations of wage and hour laws.

It is important to note that the violations and back wages owed that are detailed in these tables from WHD do not represent enforcement actions that involve only H-2B workers; they represent violations and back wages owed to *any* workers in the seven selected H-2B industries. These may include U.S. citizens, green card holders, H-2B workers, or workers of any other immigration status, including unauthorized immigrant workers.

The WHD's "All Acts" tables provide these data for 22 fiscal years, from 2000 to 2021. **Table 3** below sums the total numbers of listed cases and employees involved, along with the total amounts of back wages owed and civil money penalties across all 22 fiscal years, adjusting the back wages owed and CMPs assessed to constant 2021 dollars.

Table 3 shows that across the 2000–2021 period, there were over 225,227 cases investigated by WHD, and violations were found in 180,451 of those cases, or 80% of cases. That means that whenever WHD initiates an investigation into an employer in these seven major H-2B industries, there is an 80% chance—a very high likelihood—that WHD will find employer violations.

Table 3.

Rampant wage theft and employer lawbreaking in industries that employ H-2B workers

At least $1.8 billion stolen from workers in industries with a high prevalence of H-2B workers, fiscal years 2000-21

Industry	Cases	Cases with violations	Employees involved in violation	Employees receiving back wages	Back wages assessed ($2021)	Average back wages owed per employee ($2021)	Civil monetary penalties assessed ($2021)
Total or Average	225,227	180,451	1,835,805	1,666,195	1,792,259,236	1,076	114,791,387
Landscaping services	5,705	4,289	64,734	58,404	60,088,422	1,029	4,833,676
Janitorial services	11,660	9,391	105,604	96,279	96,808,594	1,006	3,289,109
Hotels and motels	22,469	18,501	150,452	140,864	86,691,426	615	8,430,597
Forestry	1,479	1,102	13,089	10,860	10,781,520	993	4,262,217
Food services	108,244	88,765	839,171	752,417	654,970,169	870	64,575,989
Construction	68,012	52,441	591,131	542,034	847,882,693	1,564	20,515,880
Amusement	7,658	5,962	71,624	65,337	35,036,411	536	8,883,919

Note: Tables include all violations of laws enforced in the selected industries by the Wage and Hour Division of the U.S. Department of Labor. Dollar amounts reported in this table have been adjusted for inflation to constant 2021 dollars using the CPI-U-RS. As a result, the dollar amounts presented here may differ from the amounts reported in the source data. Totals may not sum due to rounding.

Source: EPI analysis of U.S. Department of Labor, Wage and Hour Division, "Industries with High Prevalence of H-2B Workers" [data tables for fiscal years 2000-21].

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Table 3 also shows that 1.8 million workers were involved—i.e., were potential victims—in the cases that detected violations, and nearly 1.7 million of those workers were assessed by WHD to have actually been victims of wage theft—that is, their employers had failed to pay them the full wages to which they were entitled by law.

For those 1.7 million employees, WHD assessed a total of nearly $1.8 billion in back wages that were owed to them by their employers during the 22 fiscal years from 2000 through 2021. That's nearly $81.5 million stolen per year. Such a large dollar amount of stolen wages is

particularly shocking when considering that most of the jobs in the seven major H-2B industries are associated with very low wages.[69]

In addition to the column headers available in the WHD tables, Table 3 includes an additional column (vis-à-vis DOL's original tables) calculating the average back wages owed per employee who was assessed back wages. On average, each worker who was assessed back wages was owed $1,076 by their employer. Back wages owed to workers were highest in construction, an average of over $1,500 per worker. The second-highest amount of back wages owed per worker was in landscaping—the industry that every year accounts for nearly half of all H-2B jobs—at just over $1,000 per worker.

In terms of civil money penalties (CMPs), the total amount of CMPs assessed during 2000–2021 was nearly $115 million. The largest share, $65 million (representing more than half of the total penalties), was assessed in food services. Construction accounted for nearly 18% of the CMPs assessed, at $21.5 million. Since CMPs are assessed as a punitive measure to deter future violations, and are more likely to be assessed when a particularly egregious violation has occurred, it is reasonable to assume that the most egregious violations of wage and hour laws were occurring in food services and construction.

The H-2A and H-2B visa programs: Studies and reports show thousands of migrant workers have been victims of human trafficking

Numerous reports published by news media outlets, researchers, advocates, and official government sources have explored the link between temporary work visa programs and human trafficking, finding that trafficking cases are common, especially among workers with H-2A and H-2B visas. This section references just a few of the major reports.

A recent report published by the nonprofit anti-trafficking organization Polaris, analyzed data collected by Polaris on their Trafficking Hotline that allows victims to call for help and information. The report, *Labor Trafficking on Specific Temporary Work Visas: A Data Analysis 2018-2020*, found that out of nearly 16,000 victims of human trafficking they identified through their Trafficking Hotline, more than half "were foreign nationals holding legal visas of some kind, including temporary work visas."[70] More specifically Polaris describes that "there were 9,811 victims of labor trafficking who were either U.S. citizens, legal permanent residents or foreign nationals whose status in the United States was identified to the Trafficking Hotline. A full 55.2 percent of these victims were foreign nationals on visas or with legal status as asylees or refugees."[71]

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[69] See, for example, Table 1 in Daniel Costa, "Wages Are Still Too Low in H-2B Occupations: Updated Wage Rules Could Ensure Labor Standards Are Protected and Migrants Are Paid Fairly," *Working Economics Blog* (Economic Policy Institute), March 18, 2021.
[70] Polaris, *Labor Trafficking on Specific Temporary Work Visas: A Data Analysis 2018-2020*, July 2022.
[71] Polaris, *Labor Trafficking on Specific Temporary Work Visas: A Data Analysis 2018-2020*, July 2022.

A study on human trafficking in the United States published by the Urban Institute, a think tank, in 2014 found that the most common industries where workers were victimized were "agriculture, hospitality, domestic service in private residences, construction, and restaurants." As noted earlier in this testimony, H-2A visas are used exclusively in agriculture, and some of the most common H-2B industries include hospitality, construction, and restaurants and the food industry. The Urban Institute also found that "The majority of victims (71 percent) entered the United States on a lawful visa," and that "The most common temporary visas were H-2A visas…and H-2B visas."[72]

The U.S. Government Accountability Office, a federal agency that "provides Congress, the heads of executive agencies, and the public with timely, fact-based, non-partisan information that can be used to improve government and save taxpayers billions of dollars,"[73] published a report in 2015 (which was reissued in 2017), examining in part "how well federal departments and agencies protect H-2A and H-2B workers."[74] The title of report suggests what the GAO found, despite the agency's caveats about how it was working with limited data: *H-2A and H-2B Visa Programs: Increased Protections Needed for Foreign Workers*. The GAO found that between 2009 and 2013, there were 186 H-2A and H-2B workers who were approved for T visas due to being victims of trafficking. GAO also noted that "According to [their] interviews with federal and NGO officials, the incidence of abuse may be underreported."[75]

Another recent example is what has been referred to as Operation Blooming Onion in Georgia, which may have involved tens of thousands of workers, and where "24 people conspired for three years to smuggle Mexican and Central American workers and forced them to work in brutal conditions on farms located across the world, including the southern, middle and northern regions of Georgia," which the acting U.S. Attorney for the Southern District of Georgia referred to as a case of "modern-day slavery."[76] In that case, H-2A workers who were allegedly trafficked "primarily labored on onion farms, digging with their bare hands, and paid only 20 cents for each bucket. The conspirators forced the workers, despite making very little, to pay for transportation, food, and housing." The acting U.S. attorney also noted that the case likely involved "the misuse of the H-2A-program en-masse." Furthermore, according to the indictment:

> *if a worker stepped out of line, the conspirators threatened them with guns, torture and deportation. The conspirators kept the workers in cramped, unsanitary quarters and fenced work camps with little or no food, limited plumbing and without safe water. The conspirators are accused of raping, kidnapping and threatening or attempting to kill some of the workers or their families, and in many cases, sold or traded*

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[72] Colleen Owens, Meredith Dank, et al., *Understanding the Organization, Operation, and Victimization Process of Labor Trafficking in the United States*, Urban Institute, October 2014.
[73] U.S. Government Accountability Office, "What GAO Does."
[74] U.S. Government Accountability Office, *H-2A and H-2B Visa Programs: Increased Protections Needed for Foreign Workers*, GAO-15-154, reissued May 30, 2017.
[75] U.S. Government Accountability Office, *H-2A and H-2B Visa Programs: Increased Protections Needed for Foreign Workers*, GAO-15-154, reissued May 30, 2017.
[76] Drew Favakeh, "Operation Blooming Onion: Federal indictment reveals 'modern-day-slavery' in Georgia," *Savannah Morning News*, December 1, 2021.

the workers to other conspirators As a result of workplace conditions, at least two workers died, according to the indictment.[77]

The reports listed here are just a small sampling of the reports that have been made public over the years that involve temporary work visa programs,[78] and serve as proof that much more must be done to protect migrant workers from trafficking in the H-2A and H-2B visa programs.

Recommended congressional Action on H-2 visas

While there is a pressing need for the Biden administration to immediately take action to reform the H-2A and H-2B visa programs, reforms that are passed by Congress and signed into law by the president would endure for longer and not be as easily reversed by a future presidential administration. This section discusses some of the key legislative reforms that would improve the H-2 visa programs, and the next section discusses needed reforms to improve all U.S. temporary work visa programs more generally.

Congress should improve the H-2B program by passing the Seasonal Worker Solidarity Act

In terms of the H-2B visa program, Rep. Joaquin Castro (D-Texas) recently reintroduced legislation to reform and improve the H-2B visa. Rep. Castro's Seasonal Worker Solidarity Act (SWSA) would, among other things, require that employers pay H-2B workers no less than the local average wage for the occupation, as well as eliminate loopholes that employers use to circumvent paying fair wages in the current H-2B program, improve the process for recruitment of U.S. workers, improve and enhance enforcement of labor standards, and provide H-2B workers with a quick path to permanent residence that they control on their own.[79] (The SWSA would codify into statute and implement many of the key needed regulatory reforms discussed later in this testimony.) In general, the SWSA is the best and most comprehensive reform bill on H-2B visas; it would convert an abusive and dysfunctional temporary work visa program into one that is fair to all workers and provides a quick pathway to permanent residence and citizenship, allowing migrant workers to fully integrate into American life.

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[77] Drew Favakeh, "Operation Blooming Onion: Federal indictment reveals 'modern-day-slavery' in Georgia," *Savannah Morning News*, December 1, 2021.
[78] See also, for example, Liam Stack, "Indian Guest Workers Awarded $14 Million," *New York Times*, Feb. 18, 2015; Jessica Garrison, Ken Bensinger, and Jeremy Singer-Vine, "The New American Slavery: Invited to the U.S., Foreign Workers Find a Nightmare," *BuzzFeed News*, July 24, 2015; Meredith Stewart, *Culture Shock: The Exploitation of J-1 Cultural Exchange Workers*, Southern Poverty Law Center, 2013; Janie Chuang, *The U.S. Au Pair Program: Labor Exploitation and the Myth of Cultural Exchange*, Harvard Journal of Law and Gender (Vol. 36, 269-343, 2013); U.S. Department of Justice, "Miami Beach Sex Trafficker Sentenced to 30 Years in Prison for International Trafficking Scheme Targeting Foreign University Students" (press release), U.S. Attorney's Office, Southern District of Florida, March 24, 2017; Holbrook Mohr, Mitch Weiss, and Mike Baker, "AP Impact: US Fails to Tackle Student Abuses," *Associated Press*, Dec. 6, 2010; last updated Nov. 21, 2015.
[79] Office of Rep. Joaquin Castro, "Congressman Castro introduces H-2B visa reform bill to strengthen protections for seasonal workers," Press Release, April 22, 2022.

Congress should repeal and no longer pass legislative riders to expand and deregulate the H-2B program through annual appropriations bills

Another issue facing Congress with respect to H-2B are the legislative riders included in appropriations bills that fund the U.S. government. In each year since fiscal year 2017, Congress has given the executive branch the discretionary legal authority to roughly double the number of H-2B visas available, allowing them to add up to 64,716 supplemental visas each year. This authority was provided to DHS through appropriations legislation to fund the operation of the U.S. government. Those appropriations laws included language (known as a "rider") giving the executive branch the legal authority to expand the H-2B program during the fiscal year that the appropriations bill corresponds to. The Democrats and Republicans in the congressional appropriations committees who included and supported the language to expand H-2B failed to specify the level of increase they wanted for the H-2B program—passing the buck instead to the executive branch, by directing DHS, in consultation with DOL, to determine how many additional H-2B visas are appropriate, if any. DHS has interpreted the statute to allow it to issue up to 64,716 supplemental visas.[80] (In total it has been seven years since Congress first increased the size of the H-2B program through an appropriations rider. In fiscal year 2016, the first rider provided for a "returning worker" exemption—i.e., exempting H-2B workers from the cap if they were previously in H-2B status in the previous three fiscal years—rather than the discretionary authority to increase the cap by up to 64,716 that has persisted since.)[81]

A number of other changes to the H-2B program have been made through appropriations riders since 2015 as well, including riders to prevent DOL from enforcing key H-2B regulations that protect workers.[82] For example, one rider prohibited DOL from enforcing rules against worker discrimination in the H-2B program (known as the rule on corresponding employment), as well as one requiring employers to guarantee that H-2B workers would be allowed to work for at least three-fourths of the workdays promised on their job contracts (known as the three-fourths guarantee). There were also riders that prohibited DOL from conducting audits and oversight of employers to ensure they conducted the required recruitment of U.S. workers, and a rider that permitted H-2B employers to set the wage rates for H-2B workers according to wage surveys that they provide, instead of paying wage rates that are higher according to data provided by DOL (the rider on employer-provided wage surveys). Together these riders allowed H-2B employers to treat their workers unfairly and underpay them with impunity. As of fiscal year 2022, the riders on preventing DOL enforcement of the corresponding employment and three-fourths guarantee rules are

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[80] Andorra Bruno, *The H-2B Visa and the Statutory Cap*, Congressional Research Service, R44306, updated February 28, 2020.

81 For a more detailed explanation, see Andorra Bruno, *The H-2B Visa and the Statutory Cap*, Congressional Research Service, R44306, updated February 28, 2020.

82 Daniel Costa, "The substance and impact of the H-2B guestworker program appropriations riders some members of Congress are trying to renew," *Working Economics Blog* (Economic Policy Institute), June 17, 2016. For more background on employer-provided H-2B wage surveys and how they are used to pay H-2B workers lower wage rates, see Daniel Costa, "H-2B crabpickers are so important to the Maryland seafood industry that they get paid $3 less per hour than the state or local average wage," *Working Economics Blog* (Economic Policy Institute), May 26, 2017.

still in effect, as well as the rider permitting the broad use of employer-provided wage surveys to set H-2B wage rates.

This is not an ideal way to make immigration policy. The *New York Times* editorial board once alluded to this about H-2B, arguing that the program is so problematic that Congress should not expand it with budget riders,[83] and there have been bipartisan statements from leaders in Congress arguing that the budget riders usurp the authority of the relevant committees of jurisdiction in Congress.[84] Nevertheless, members of Congress have buckled to industry pressure and included the rider language in successive years. Congress should now repeal the H-2B riders, allowing DOL to enforce all worker protections in the H-2B regulations, and ending the ad hoc expansions of the H-2B cap.

Congress should pass legislation that legalizes the undocumented farm workforce and provides access to green cards for H-2A workers, and avoid making the H-2A program available for year-round jobs through appropriations riders

The single most meaningful piece of legislation that Congress could pass to improve conditions for all farmworkers—migrants, U.S. workers, and H-2A workers, is a broad and quick pathway to citizenship for farmworkers who are unauthorized immigrants. By immediately providing labor rights to unauthorized immigrants, a broad legalization would thereby immediately raise standards for all farmworkers and empower workers to come forward and report lawbreaking employers, which in turn will raise wages, consistent with previous legalizations.

When it comes to H-2A workers, at present, they have no viable pathway to remain permanently in the United States, despite often returning to the United States year after year—sometimes for more than a decade—to work in temporary and seasonal jobs. H-2A reform legislation should be introduced and passed that would create new green cards that would be available to H-2A workers, who should be allowed to self-petition for them after 12 months of accrued employment in H-2A status. Such legislation would honor and reward the contributions of H-2A workers and allow them and their families to become a permanent part of American society and integrate fully.

In addition, Congress should avoid making the H-2A program available for year-round agricultural jobs through appropriations riders. Similar to how riders to omnibus appropriations bills have been used to expand and deregulate the H-2B program, there have been recent proposals in Congress to allow H-2A jobs—which currently must only offer temporary or seasonal work—to become eligible for year-round agricultural occupations.

According to an analysis I published in 2019, there were just over 419,000 year-round jobs in agriculture, mostly in greenhouse and nursery production (155,000) and animal production

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83 New York Times Editorial Board, "Why Guest Workers Are Easily Exploited," *New York Times*, July 1, 2016.
84 See, for example, Senate Committee on the Judiciary, "Durbin, Grassley Criticize DHS Decision to Expand H-2B Visa Program Without Necessary Reforms," Press Release, March 31, 2022, and Senators Chuck Grassley and Dianne Feinstein, "Grassley, Feinstein: Process To Change H-2B Program Lacked Transparency," Press Release, May 1, 2017.

and aquaculture (264,000).[85] Farm employers have been clamoring for years for Congress to allow them to hire temporary H-2A workers for many of these 419,000 permanent, year-round jobs, especially on dairies. Since they haven't had the requisite support to pass legislation that would accomplish this, members of Congress have attempted multiple times to circumvent the regular legislative process by pushing to make the change through legislative riders on annual omnibus appropriations bills.[86]

However, using a problematic temporary work visa program where workers are virtually indentured to their employers in order to fill permanent, year-round jobs should give pause to all members of Congress—it makes no sense, unless the goal is to keep workers employed in permanent jobs from having equal rights and fair pay. If migrant workers are filling true labor shortages in permanent, year-round jobs, then those workers should always get permanent immigrant visas that put them on a path to citizenship.

Recommendations for reforming temporary work visa programs more broadly

The bargaining power of workers is undercut when more than 2 million temporary migrant workers—1.2% of the U.S. labor force—are underpaid by employers and cannot safely complain to DOL or sue employers that exploit them because their visa status is owned and controlled by their employer. To remedy this, a number of key reforms have been proposed and should be considered, both to protect workers and also to modernize the U.S. system for labor migration writ large. These reforms would help develop a strong evidence base for migration policymaking that is nimble enough to respond to the demands of a modern economy with needs that are constantly changing.

While many key improvements to temporary work visa programs including H-2A and H-2B can be accomplished by the executive branch through regulations—most notably by ensuring that migrant workers are paid fairly by improving prevailing wage rules in some visa programs and creating new wage rules in the programs that lack them—the reality remains that the most transformative and lasting solutions will require congressional action. An added benefit of these more durable solutions is that they will set a useful baseline of protections for temporary migrant workers, both in normal times and during emergencies like pandemics, and during both periods of high unemployment and tight labor markets. In addition, improving labor standards for temporary migrant workers will lift the floor for all workers, which will increase bargaining power and raise wages, including during times of high unemployment.

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[85] Daniel Costa, "The Farm Workforce Modernization Act allows employers to hire migrant farmworkers with H-2A temporary visas for year-round jobs: Impacts are unknown and other wage-setting formulas should be considered," *Working Economics* blog (Economic Policy Institute).
[86] See for example, Congresswoman Lucille Roybal-Allard, "Appropriations Committee Approves Fiscal Year 2020 Homeland Security Funding Bill," Press Release, June 11, 2019.

Congress should reform temporary work visa programs by passing laws to update, simplify, and standardize the rules for all of them, in ways that make them consistent with basic human and labor rights. The following sections briefly discuss the key reforms that are necessary.

Congress should regulate foreign labor recruiters to protect migrant workers

Congress could begin its reforms by requiring employers to recruit and offer jobs to qualified U.S. workers before being allowed to recruit workers abroad, ensuring transparency in the recruitment process abroad for potential migrant workers who may participate in visa programs, and requiring that employers be held accountable for the actions of labor recruiters abroad.

There is at least one example of legislation that could serve as a starting point for achieving the reforms necessary to ensure transparency and accountability in recruitment for migrants who are abroad, although it would need to be improved upon. The comprehensive immigration reform legislation that passed the Senate in 2013 contained a section on foreign labor recruitment, which, if it had become law, would have created a new program requiring foreign labor contractors who recruit migrant workers to register with DOL and to disclose certain information about recruited workers, employers, subcontractors, and job terms, and to post a bond.[87] The provisions would have also prohibited discriminating or retaliating against workers, banned the charging of recruitment fees to workers, and implemented a new complaint and investigation process along with administrative fines and a private right of action, allowing either the government or an aggrieved person to bring a civil action to enforce the rights of migrant workers.

Congress should require that all temporary migrant workers are paid fairly according to U.S. wage standards

And next, in cases where employers hire migrant workers after proving they were unable to recruit U.S. workers at prevailing wages—in order to preserve U.S. wage standards and ensure that temporary migrant workers are paid a fair wage that is commensurate with the value of their labor—the law should require that all workers with temporary visas are paid no less than the local average or median wage for their job.

There are some key legislative proposals that would achieve this for particular visa programs. In terms of jobs that require at least a college degree, the H-1B and L-1 Visa Reform Act, a bipartisan proposal originally introduced by Sens. Richard Durbin (D-Ill.) and Chuck Grassley (R-Iowa), would reform the H-1B program by requiring employers to first recruit U.S. workers for open positions, and then require employers to pay H-1B workers at least the local median wage, and would provide DOL with additional authority to ensure compliance with the

[87] See Subtitle F—Prevention of Trafficking in Persons and Abuses Involving Workers Recruited Abroad, in Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. (2013). For a summary of the provisions, see Daniel Costa, *Future Flows and Worker Rights in S. 744: A Guide to How the Senate Immigration Bill Would Modify Current Law*, Economic Policy Institute, November 2013.

program.[88] Employers would also be required to pay temporary migrant workers with L-1 visas the local median wage (the L-1 visa program currently has no wage rule). The bill is co-sponsored by Democratic Sens. Richard Blumenthal of Connecticut, Sherrod Brown of Ohio, and Bernie Sanders of Vermont, and a bipartisan version has been introduced in the House of Representatives, co-sponsored by Democratic Reps. Bill Pascrell of New Jersey and Ro Khanna of California.[89]

Another piece of legislation, proposed by Sens. Durbin, Blumenthal, and Amy Klobuchar (D-Minn.) and former Senator (now Vice President) Kamala Harris, would facilitate the fair recruitment of recent foreign graduates of U.S. universities with degrees in the science, technology, engineering, and math (STEM) fields. The Keep STEM Talent Act would allow STEM graduates to obtain green cards—and bypass years of being indentured on temporary visas—if employers simply go through the DOL labor certification process and offer to pay the fair market wage.[90]

In terms of the H-2B visa program, Rep. Joaquin Castro's aforementioned Seasonal Worker Solidarity Act (SWSA) would, among other things, require that employers pay H-2B workers no less than the local average wage for the occupation, as well as eliminate loopholes that employers use to circumvent paying fair wages in the current H-2B program.[91]

Congress should prohibit temporary migrant workers from being indentured to their employers through their visa status and allow workers to self-petition for permanent residence

Another priority for Congress would be to pass a law firmly establishing that temporary migrant workers will no longer be tied and indentured to their employers through their visa status. Congress should also limit the time that temporary migrant workers are in a temporary/nonimmigrant status by allowing them to self-petition for permanent residence after a short provisional period,[92] but preferably no longer than 18 months. The aforementioned Seasonal Worker Solidarity Act, for example, would allow H-2B workers to change employers and to self-petition for permanent residence after accruing 18 months of work in H-2B status.

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[88] H-1B and L-1 Visa Reform Act of 2020, S. 3370, 116th Cong. (2020). See also Rep. Bill Pascrell, "Pascrell, Grassley, Durbin, Gosar, Khanna, Pallone, Gooden Lead Overhaul to H1-B, L-1 Visa Programs: Bipartisan, Bicameral Reforms Will Protect American Workers and Improve Fairness for Skilled Labor Applicants" (press release), May 22, 2020.
[89] H-1B and L-1 Visa Reform Act of 2020, H.R. 6993, 116th Cong. (2020).
[90] Sen. Richard Durbin, "Durbin, Blumenthal, Harris, Klobuchar: Keep International Student Talent in America: The Keep STEM Talent Act Would Retain International Graduates with Advanced STEM Degrees" (press release), June 6, 2019.
[91] Office of Rep. Joaquin Castro, "Congressman Castro introduces H-2B visa reform bill to strengthen protections for seasonal workers," Press Release, April 22, 2022.
[92] See, for example, Demetrios G. Papademetriou et al., *Aligning Temporary Immigration Visas with U.S. Labor Market Needs: The Case for a New System of Provisional Visas*, Migration Policy Institute, July 2009.

Congress should appropriate more funding to enforce labor standards and bar employers from hiring through visa programs if they violate labor and employment laws

Because of how perpetually underfunded it has been, Congress should appropriate much more funding to DOL to enforce this updated work visa system[93] and strengthen the department's mandates to conduct adequate oversight, including random audits of employers, and pass laws permanently banning any employer from hiring through temporary work visa programs if that employer has violated labor and employment laws. Investigative news reports have revealed that even when DOL sanctions an employer for labor violations committed against temporary migrant workers, the employers are often required to pay only nominal fines and are allowed to continue hiring new workers through visa programs.[94]

Congress should pass the POWER Act to protect workers of all immigration statuses from the threat of employer retaliation and deportation

Congress should also prioritize reintroduction and passage of the Protect Our Workers from Exploitation and Retaliation (POWER) Act, perhaps the single most important piece of legislation aimed at protecting workers of all immigration statuses from the threat of employer retaliation and deportation. The POWER Act was last introduced in 2019 by Rep. Judy Chu (D-Calif.) and Sen. Robert Menendez (D-N.J.) and is supported by various unions and migrant worker advocacy organizations. The POWER Act would expand access to humanitarian "U" visas for migrant workers who report workplace violations (U visas are currently available to victims of certain qualifying crimes who are cooperating in a related investigation or prosecution),[95] increase the number of U visas available, and extend eligibility to more labor-related crimes.

The POWER Act would also strengthen the investigative powers of labor standards enforcement agencies. And it would permit postponing the deportation of migrant workers who file a bona fide workplace claim or are a material witness to one, so they can remain in the country to pursue the claim; they would also be eligible for employment authorization so they can work during that time.

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[93] Daniel Costa, "Immigration Enforcement Is Funded at a Much Higher Rate Than Labor Standards Enforcement—and the Gap Is Widening," *Working Economics Blog* (Economic Policy Institute), June 20, 2019; Ihna Mangundayao, Celine McNicholas, and Margaret Poydock, "Worker protection agencies need more funding to enforce labor laws and protect workers," *Working Economics* blog (Economic Policy Institute), July 29, 2021.
[94] Ken Bensinger, Jessica Garrison, and Jeremy Singer-Vine, "Employers Abuse Foreign Workers. U.S. Says, by All Means, Hire More," *BuzzFeed News*, May 12, 2016.
[95] National Immigration Law Center, "The POWER Act: Protect Our Workers from Exploitation and Retaliation Act," last updated November 2019.

Congress should improve transparency in temporary work visa programs to protect workers and aid anti-trafficking efforts

While the reforms discussed in the preceding sections would go a long way toward protecting temporary migrant workers, other systemic reforms are also urgently needed to more broadly protect labor standards and modernize the immigration system.

For example, there should be much more transparency in the system. Too little is known about how temporary work visa programs are being used, in part because data on visas are collected on paper forms and applications rather than electronically,[96] and even most of the digitized information collected is not made public or requires lengthy and costly Freedom of Information Act requests to obtain. Migrant worker advocates have pressed for years for more and better government data and transparency in work visa programs to ensure that migrants are being paid fairly, and that the immigration system is not being co-opted in ways that allow employers to discriminate and segregate the workforce. More data would also serve as a tool that could aid the organizations and advocates who are fighting human trafficking.[97] Bipartisan legislation has been introduced to achieve this, most recently the Visa Transparency Anti-Trafficking Act,[98] but opposition by employers has caused it to stall.

Congress should create an independent commission on employment-based migration to make the system more flexible and data-driven and depoliticize the adjustment of numerical limits

Last but not least, temporary work visa programs and the U.S. labor migration system writ large must be reformed to be more flexible and data-driven. For example, most numerical limits (i.e., quotas or caps) for permanent and temporary work visas were set by law in 1990 and have not been changed since, despite vast fluctuations in economic conditions. A more rational system would have annual caps that adjust to changing conditions—increasing when necessary to alleviate proven labor shortages and decreasing during economic slowdowns and recessions.

The best proposal to do this is through the creation of an independent, permanent commission on employment-based migration, which would be a high-level body staffed by expert researchers with integrity and technical competence, and who are tasked with studying immigration and the labor market and providing timely and reliable data and analysis to policymakers and the public. The commission could work to develop much better measures of labor market shortages, assessment methodologies, and processes to efficiently

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[96] See discussion of truckloads of paper applications for temporary work visas arriving at USCIS, in Miriam Jordan, "Visa Applications Pour in by Truckload Before Door Slams Shut," *New York Times*, April 3, 2017.
[97] See, for example, Jeremy McLean, *The Case for Transparency: Using Data to Combat Human Trafficking Under Temporary Foreign Worker Visas*, Justice in Motion, September 2020.
[98] Rep. Lois Frankel, "Frankel, Deutch, Blumenthal, & Cruz Introduce Bipartisan, Bicameral Bill to Bring Transparency to Temporary Worker Visa Programs & Combat Human Trafficking" (press release), July 23, 2019; Visa Transparency Anti-Trafficking Act of 2019, H.R. 3881, 116th Cong. (2019); Visa Transparency Anti-Trafficking Act of 2019, S. 2224, 116th Cong. (2019).

adjust migrant worker flows to match employers' needs while protecting U.S. labor standards.[99]

Adjusting annual visa caps requires congressional action, which can be contentious, influenced by lobbying and opaque political considerations rather than facts, and too slow to keep up with changing economic conditions. A commission would report regularly to Congress and the president, proposing new quotas on an annual or semi-annual basis, and issue public reports citing the evidence for its recommendations, which would be based on methodologies that are credible and transparent. The commission would consider the many trade-offs inherent in immigration policymaking in its recommendations, and Congress would ultimately decide which policies to adopt or reject. But basing quotas on evidence and data would have the effect of depoliticizing the process of setting numbers and provide an evidence base for decisions that can be inspected by all.

Models for such a commission already exist, both in the United States and abroad. In the United States, for example, it would be difficult to imagine Congress making decisions about trade policy without the advice of the International Trade Commission. Both immigration and trade are vital to the U.S. economy, but Congress cannot be expected to have the relevant expertise to make fully informed decisions about either. In the United Kingdom, the Migration Advisory Committee (MAC) is an independent governmental body that studies labor shortages and makes recommendations to Parliament about when to facilitate more migration and for which occupations. The MAC is staffed with notable economists and labor market experts who study what they call "top-down" labor market indicators, such as growth in wages, employment, and unemployment, and job vacancy data, but MAC staff also interview both employers and unions to get a sense of what's happening on the ground—what the MAC calls "bottom-up" indicators—which serve to better inform the MAC when crafting its recommendations.[100]

A number of bipartisan groups and research institutes have called for an independent commission on employment-based migration or some version of it, including The Independent Task Force on Immigration and America's Future (co-chaired by Lee Hamilton and Spencer Abraham), the Council on Foreign Relations' Independent Task Force on U.S. Immigration Policy (co-chaired by Jeb Bush and Thomas McLarty III), the Brookings-Duke Immigration Policy Roundtable, the Brookings Institution, the Economic Policy Institute, and the Migration Policy Institute. Versions of a commission have been introduced multiple times in proposed legislation[101] and should be considered again, either as a standalone proposal or as an integral component of a comprehensive immigration reform package.

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[99] See, for example, Ray Marshall and Ross Eisenbrey, "Commission Needed to Solve Immigration," *The Hill*, June 10, 2010.
[100] See, for example, Martin Ruhs and Philip Martin, "On Migration, the US Should Copy the UK," *Financial Times*, Feb. 18, 2013; Daniel Costa and Philip Martin, *Temporary Labor Migration Programs: Governance, Migrant Worker Rights, and Recommendations for the U.N. Global Compact for Migration*, Economic Policy Institute, Aug. 1, 2018.
[101] See, for example, legislation coauthored and introduced by former Reps. Solomon Ortiz (D-Texas) and Luis Gutierrez (D-Ill.), which had 103 total cosponsors. See Section 501 in the Comprehensive Immigration Reform for America's Security and Prosperity Act of 2009 (CIR ASAP), H.R. 4321, 111th Cong. (2009). CIR ASAP was later reintroduced in 2013 by Reps. Raul Grijalva (D-Ariz.) and Filemon Vela, Jr. (D-Texas), as the CIR ASAP Act of 2013, H.R. 3163, 113th Cong. (2013).

Recommended regulatory and executive actions for reforming the H-2B visa program

Finally, while more durable congressional reforms are preferable, there are nevertheless are a number of actions that the Biden administration can and should take immediately to reform the H-2B program in order to better protect workers, many of which have been proposed by migrant worker advocates in the past. Below is a list and discussion of some of the reforms that would be the most meaningful and improve outcomes in the H-2B program. These executive reforms would ensure that H-2B workers are paid fairly and have the freedom to come forward to report abuses by employers, and they would also help prevent employers with records of violating labor and employment laws from hiring through the H-2B program.

The Biden administration should improve the SeasonalJobs.gov platform and establish a complaint mechanism so that U.S. workers are not overlooked for seasonal jobs

Although the H-2B provisions in the Immigration and Nationality Act state that H-2B workers must be "coming temporarily to the United States to perform other temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in this country"[102]—meaning at the national, and not just local level—the reality is that for years, program rules have not ensured that unemployed workers in the United States have a fair and first shot at H-2B jobs. This was documented and explained in a December 2015 news report, which found that in the H-2B and H-2A programs:

> *[C]ompanies across the country in a variety of industries have made it all but impossible for U.S. workers to learn about job openings that they are supposed to be given first crack at. When workers do find out, they are discouraged from applying. And if, against all odds, Americans actually get hired, they often are treated worse and paid less than foreign workers doing the same job, in order to drive the Americans to quit.*[103]

The April 2015 H-2B regulations promulgated by the Obama administration were an attempt by the administration to remedy many of the deficiencies in terms of recruitment, and the Trump administration modified the H-2B recruitment process to one that is entirely conducted online, via the SeasonalJobs.gov website.[104]

While moving H-2B recruitment exclusively online has ostensibly taken recruitment to the national level, the reality is that little is done by DOL to ensure that employers have adequately tested the U.S. labor market for available workers or hired U.S.-based applicants for the job opportunities they advertise. A prime example is the Trump Organization's

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[102] 8 USC §1101(a)(15)(H)(ii)(b)
[103] Jessica Garrison, Ken Bensinger, and Jeremy Singer-Vine, "All You Americans Are Fired," *BuzzFeed News,* December 1, 2015.
[104] Department of Homeland Security and the Employment and Training Administration of the U.S. Department of Labor, *Modernizing Recruitment Requirements for the Temporary Employment of H-2B Foreign Workers in the United States*, 84 Fed. Reg. 62431 (November 15, 2019).

practices which were reported on by both the *New York Times* and *Washington Post*.[105] In 2016, the New York Times report detailed the hiring practices at Trump's Mar-a-Lago resort:

> *Since 2010, nearly 300 United States residents have applied or been referred for jobs as waiters, waitresses, cooks and housekeepers there. But according to federal records, only 17 have been hired.*
>
> *In all but a handful of cases, Mar-a-Lago sought to fill the jobs with hundreds of foreign guest workers from Romania and other countries.*

When asked why so many of the U.S.-based applicants were not hired for open positions, then-presidential candidate Donald Trump responded that "The only reason they wouldn't get a callback is that they weren't qualified, for some reason. There are very few qualified people during the high season in the area."[106]

As this example shows, U.S. employers can entirely bypass the U.S. workforce by claiming that U.S.-based applicants are unqualified—for what are usually jobs requiring few skills or experience—and there is no formal complaint mechanism for U.S. workers to complain to DOL that they have been overlooked for jobs that have been posted.

To remedy these issues, DOL should improve the SasonalJobs.gov website so that it is more user-friendly and up to date, and establish a complaint mechanism so that U.S. workers can notify DOL when they are not hired for positions they applied for that were posted on the SeasonalJobs.gov. In addition, DOL should conduct random audits of employers to determine whether they have hired U.S.-based applicants. DOL should also establish a formal channel to receive input from advocates and unions about jobs posted on SeasonalJobs.gov, for instance in cases where wage rates may seem inconsistent with local labor market realities, or where large numbers of U.S. workers are unemployed and seeking seasonal positions.

DOL should not approve H-2B labor certifications for jobs in industries with high unemployment rates

As noted above, the recruitment requirements for H-2B remain minimal, enforcement is lax, and therefore employers can still easily game the system with impunity. That's likely part of the explanation for how, in early 2021—despite the fact that unemployment in many of the top H-2B industries at the time ranged from roughly 10% to 17%—DOL certified many more H-2B jobs than the number of visas available under the annual cap.[107] While the Office of Foreign Labor Certification (OFLC), which approves or rejects applications for H-2B labor certifications, looks at H-2B certifications on a case by case basis, it should instead consider

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[105] Charles V. Bagli and Megan Twohey, "Donald Trump to Foreign Workers for Florida Club: You're Hired," *NY Times*, February 25, 2016; David A. Fahrenthold and Lori Rozsa, 'Apply by fax': Before it can hire foreign workers, Trump's Mar-a-Lago Club advertises at home — briefly," *Washington Post*, August 7, 2017.
[106] Charles V. Bagli and Megan Twohey, "Donald Trump to Foreign Workers for Florida Club: You're Hired," *NY Times*, February 25, 2016.
[107] See discussion in Daniel Costa, "Claims of labor shortages in H-2B industries don't hold up to scrutiny President Biden should not expand a flawed temporary work visa program," *Working Economics* (Economic Policy Institute blog), March 9, 2021.

broader labor market realities when assessing applications, given the national scope of the H-2B program, and the fact that unemployment in H-2B industries is often higher than the national unemployment rate. If for example, the national unemployment rate in the construction industry is at 12%, OFLC should view applications for H-2B jobs in construction with heightened scrutiny, and either reject them or require further proof from employers that they have adequately conducted a national search for U.S. workers. In order to implement this, OFLC should develop objective metrics with which to assess labor market realities in H-2B industries.

New rules and a screening procedure are needed to prevent lawbreaking employers from hiring through the H-2B program

In addition to the systemic flaws in the H-2B program, the enforcement data from the Wage and Hour Division (WHD) prove that H-2B workers are being employed in industries where millions of workers have been robbed regularly by employers. But at present, no laws or regulations prevent employers from hiring through the H-2B program if they have been found to have committed any labor, wage and hour, civil rights, or anti-discrimination laws. Employers can be barred by DOL from the H-2B program for violating H-2B laws or regulations, but such examples are rare, and some repeat violators continue to be able to hire through H-2B.[108]

Due to the high prevalence of wage and hour violations in major H-2B industries, there is a strong case for DOL to begin screening employers through the H-2B application process to identify and prohibit those that have violated labor and wage and hour laws from hiring H-2B workers. Given the present and likely future reality that WHD will continue to be vastly underfunded and understaffed,[109] such a screening process on the front end of the H-2B application process could act as a useful and efficient tool to prevent cycles of abuse without WHD having to go through a lengthy and costly investigation on the back end, after workers have arrived in the United States and been robbed or otherwise exploited. This would also benefit employers with clean records by allowing them to hire more workers under the H-2B cap.

One possible model that could be adapted is currently operated by USCIS, namely, their Electronic Registration Process for employers hiring through another visa program, H-1B. USCIS describes the H-1B Electronic Registration Process as a system whereby employers "and their authorized representatives, who are seeking to employ H-1B workers subject to the cap, complete a registration process that requires only basic information about the prospective petitioner and each requested worker."[110] After that, USCIS takes the "properly

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[108] See, for example, Ken Bensinger, Jessica Garrison, and Jeremy Singer-Vine, "The Pushovers: Employers Abuse Foreign Workers. U.S. Says, By All Means, Hire More." *Buzzfeed News*, May 12, 2016.
[109] See for example, Ihna Mangundayao, Celine McNicholas, and Margaret Poydock, "Worker protection agencies need more funding to enforce labor laws and protect workers," *Working Economics* blog (Economic Policy Institute), July 29, 2021; and section on WHD funding and enforcement in Daniel Costa, Philip Martin, and Zachariah Rutledge, *Federal labor standards enforcement in agriculture: Data reveal the biggest violators and raise new questions about how to improve and target efforts to protect farmworkers*, Economic Policy Institute, December 15, 2020.
[110] USCIS, "H-1B Electronic Registration Process," U.S. Department of Homeland Security.

submitted electronic registrations" and "[o]nly those with selected registrations will be eligible to file H-1B cap-subject petitions."[111]

While the H-1B Electronic Registration Process is mainly designed to streamline processes for employers, the model could be adapted by DOL as part of the application process at the labor certification stage. For example, DOL could set up a preregistration process in which employers list basic information about their business and the purported need for H-2B workers (as is already done via the DOL labor certification attestation forms). As part of that new process, employers could be required to attest, under penalty of perjury and of being banned from hiring through H-2B, that they have not been found to have violated any labor, wage and hour, civil rights, or anti-discrimination laws during the past five years. DOL could then attempt to verify by cross-referencing enforcement data and other relevant records, and ultimately certify employers that have not been found to have violated the applicable laws. Employers that are certified by DOL could then continue on with the labor certification process.[112]

Employers should be required to pay housing and transportation costs for U.S. workers who apply for seasonal jobs

One major difference between the H-2A and H-2B visa programs is that while employers are required to provide for all costs related to transportation and housing for H-2A workers, they are not required to do the same for H-2B workers. In the H-2B program, employers are only required to pay for transportation to and from the worker's country of origin into the United States, and back, after the job has ended. In the H-2A program, employers also either provide transportation to workers or pay for daily transportation costs to and from the worksite. U.S. workers who are employed by employers with H-2A workers also are entitled to housing and transportation costs is they are working in similar jobs for the same employer.

The H-2B statute's national standard for the protection of U.S. labor standards means employers *should be* required to recruit nationwide for available U.S. workers and offer to pay for housing and transportation for both U.S. and H-2B workers willing to do the job; however it does not. For example, if someone from Puerto Rico—a region with high unemployment—wants to work at a resort on Mackinac Island in Michigan, which has a small labor pool, or someone from Fresno, California, wants to work in a donut shop at the Outer Banks in North Carolina, employers should have to offer them free housing and transportation before being allowed to hire an H-2B worker. Otherwise, employers have not effectively recruited nationwide. Under the current H-2B rules—where employers do not have to offer to pay for transportation and housing—the absurd result is that employers are able to recruit workers from abroad through the H-2B program, even during times of high unemployment in major H-2B industries, despite the program being intended for use only when a labor shortage exists.

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[111] USCIS, "H-1B Electronic Registration Process," U.S. Department of Homeland Security.

[112] This process could also take place at the USCIS petition stage like the H-1B Electronic Registration Process, but that would cause DOL to certify H-2B jobs that would not be able to be filled if employers were later prohibited from filing H-2B petitions, and DOL likely has access to the relevant enforcement data for verifying employer attestations, making DOL the ideal agency to conduct the registration process.

Thus, H-2B rules should be amended to require that these housing and transportationcosts be covered by employers. Such a rule change would lead to the H-2B recruitment requirements becoming a truly national search that allows U.S. workers to access H-2B jobs anywhere in the United States.

H-2B wage regulations should require employers to pay the highest of the local, state, or national average wage for the occupation and eliminate the use of employer-provided wage surveys for setting H-2B wage rates

The H-2B visa program has a prevailing wage rule that exists for the purpose of establishing a minimum, legally required wage that jobs must be advertised at in the United States when recruiting U.S. workers—a requirement that must be fulfilled before employers can access the H-2B program—in order to determine if a labor shortage exists. The purpose of the H-2B prevailing wage requirement is also to safeguard U.S. wage standards in H-2B occupations and protect migrant workers from being legally underpaid according to U.S. wage standards.

In most cases, since 2015, the DOL's H-2B wage methodology[113] has required that employers advertise H-2B jobs to U.S. workers at the local average wage for the specific occupation and pay their H-2B employees that wage—according to data from the DOL's Occupational Employment and Wage Statistics (OEWS) survey. While at first glance this appears to be a reasonable wage rule, in practice, the available evidence makes clear that the H-2B wage rule is undercutting wage standards at the national level in H-2B occupations and is therefore not consistent with the law establishing the H-2B program.

To illustrate, see **Table 4** below, which shows the top 15 H-2B occupations in fiscal year 2019 by Standard Occupational Classification code, according to the number of H-2B jobs certified by DOL. For context, the top 15 H-2B occupations accounted for 84% of all certified H-2B jobs in 2019. The column to the right of the number of certified jobs is the nationwide average hourly wage for all certified H-2B workers in each of the occupations, according to DOL disclosure data. To the right of that are the 2019 average hourly wage rates for all workers in the occupation nationwide, according to DOL's OEWS survey, which is used to set H-2B wage rates, making it an apples-to-apples comparison (2019 data were used for H-2B and OES because more recent data are not as easily comparable due to changes in data reporting). The final two columns show the difference between the average hourly certified H-2B wage and the average hourly OEWS wage for all workers in the entire country—the dollar amount and in percentage terms. In other words, these numbers reveal the amounts by which certified H-2B wages are undercutting national-level wage standards in H-2B occupations.

Table 4 clearly shows that the H-2B program is allowing employers to legally undercut U.S. wage standards.

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[113] Department of Homeland Security and the Employment and Training Administration of the U.S. Department of Labor, *Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program*, Final Rule, 80 Fed. Reg. 24145 (April 29, 2015).

Table 4.

Average certified wages for H-2B jobs are still too low

2019 national average certified H-2B wage, average OES wage, and dollar amount and percent below OES wage for the top 15 H-2B occupations

H-2B Rank	SOC Code	Occupation	H-2B jobs certified	H-2B average hourly wage	OES national average hourly wage	Amount below national average hourly wage	Percent below average hourly wage
1	*37-3011*	*Landscaping and Groundskeeping Workers*	66,151	$14.18	$15.75	$1.57	11.1%
2	*45-4011*	*Forest and Conservation Workers*	11,283	$12.34	$15.96	$3.61	29.3%
3	*37-2012*	*Maids and Housekeeping Cleaners*	9,869	$11.78	$13.05	$1.27	10.8%
4	*51-3022*	*Meat, Poultry, and Fish Cutters and Trimmers*	8,486	$10.98	$14.02	$3.04	27.7%
5	*39-3091*	*Amusement and Recreation Attendants*	8,014	$9.62	$11.85	$2.23	23.2%
6	*35-3031*	*Waiters and Waitresses*	4,104	$13.11	$13.04	-$0.07	-0.5%
7	*47-2061*	*Construction Laborers*	3,369	$16.18	$20.31	$4.13	25.5%
8	*35-2014*	*Cooks, Restaurant*	3,299	$13.62	$13.97	$0.35	2.6%
9	*53-7062*	*Laborers and Freight, Stock, and Material Movers, Hand*	2,274	$13.26	$15.64	$2.38	17.9%
10	*35-3023*	*Fast Food and Counter Workers*	2,255	$10.46	$11.32	$0.86	8.2%
11	*39-2021*	*Animal Caretakers*	2,226	$12.58	$13.17	$0.60	4.7%
12	*51-9198*	*Helpers--Production Workers*	1,728	$12.78	$14.86	$2.08	16.3%
13	*47-2051*	*Cement Masons and Concrete Finishers*	1,610	$15.48	$23.53	$8.05	52.0%
14	*35-9011*	*Dining Room and Cafeteria Attendants and Bartender Helpers*	1,238	$11.12	$12.18	$1.06	9.5%
15	*35-9021*	*Dishwashers*	1,184	$11.24	$11.89	$0.64	5.7%
Total jobs certified in top 15 H-2B occupations in 2019			*127,090*				

Note: H-2B and OES wage data are adjusted to 2020 dollars. H-2B wage data are the weighted average hourly wage of all workers in a respective occupation. H-2B wage data on Fast Food and Counter Workers (SOC code 35-3023) are the combined wage data of Combined Food Preparation and Serving Workers, Including Fast Food (SOC code 35-3021) and Counter Attendants, Cafeteria, Food Concession, and Coffee Shop workers (SOC code 35-3022). A negative value in the amount or percent below national average hourly wage columns represents an H-2B job that was, on average, certified at a higher wage rate than the corresponding OES national average hourly wage (there is only one instance of this, in the Waiters and Waitresses occupation).

Source: EPI analysis of the Bureau of Labor Statistics' 2019 Occupational Employment Statistics, and of H-2B 2019 fiscal year disclosure data from the Office of Foreign Labor Certification's Performance Data

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While, as noted above, H-2B wages are set at the local level according to each job, we must instead look at the impact of the H-2B program on the average wages of H-2B occupations at the national level, because the H-2B statute sets a *national* standard for the protection of U.S. labor standards. The H-2B statute clearly states that H-2B workers can be hired only "if unemployed persons capable of performing such service or labor cannot be found in this country."[114] In order to determine whether there are "unemployed persons" in the United States capable of doing a job before an employer can hire an H-2B worker, employers *should* be required to offer at least the local, state, or national average wage for the occupation (whichever is higher), recruit U.S. workers nationwide, and offer to pay for housing and transportation for both U.S. and H-2B workers. But under the H-2B recruitment and wage regulations, that's never actually been the case.

Table 4 shows that in all but one of the top 15 H-2B occupations in fiscal 2019, the average hourly wage certified nationwide for H-2B workers was lower than the OEWS average hourly wage for all workers in the occupation. The biggest wage differential was found in the cement masons and concrete finishers occupation: The national average hourly wage was just over $8.00 higher than the average wage certified for H-2B workers. The next biggest difference was in the construction laborers occupation, where the national average wage was just over $4.00 higher than the average wage certified for H-2B workers. If, for example, an employer hired an H-2B construction worker to work for 40 hours per week for 36 weeks (approximately nine months) at $4.00 per hour less than the national average wage—due to local wage variations, as the H-2B wage rule allows—the employer would save, and an H-2B worker would be underpaid by, $5,760.

In the top two occupations of landscaping and groundskeeping workers and forest and conservation workers—which combined accounted for over half (51.5%) of all H-2B certified jobs in 2019—the average H-2B wage was $1.57 and $3.61 lower per hour than the national average wage, respectively. Employers in the seafood industry, who every year are the loudest voices calling for an increase in the H-2B cap, collectively paid their H-2B workers $3.04 less per hour than the national average wage in the meat, poultry, and fish cutters and trimmers occupation.

An easy way to fix this so that the H-2B wage rule no longer undercuts existing U.S. wage standards and so that it is consistent with the statute that establishes the program would be to require that employers pay at least the highest of the local, state, or national average wage for the occupation according to DOL's OEWS data. DOL could even require a higher wage—for example, the 75th-percentile wage instead of the average—in order to incentivize additional recruitment of U.S. workers. The Biden DOL has the legal authority to make these changes—and given the popularity of the H-2B program among employers, even during times of high unemployment,[115] they should consider doing it quickly in order to protect wage standards in H-2B occupations and ensure that migrant workers in H-2B are not exploited as a lower-cost alternative to hiring unemployed U.S. workers.

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[114] 8 USC §1101(a)(15)(H)(ii)(b)

[115] Daniel Costa, "Claims of labor shortages in H-2B industries don't hold up to scrutiny: President Biden should not expand a flawed temporary work visa program." Working Economics (Economic Policy Institute blog), March 9, 2021.

There's an additional element of the current H-2B wage rule that allows employers to undercut wage standards in H-2B: employer-provided private wage surveys. Employers have the ability, under the current rules, to cherry-pick the data source they like in order to establish the legal minimum wage rates for their H-2B employees through nongovernmental wage surveys that DOL approves. This element of the H-2B wage rule—using private wage surveys to set wage rates—has been the subject of recent litigation by advocates on behalf of seafood workers.[116] One can rightly assume that employers never go through the trouble of using one of these private wage surveys to increase the minimum wage they'll pay their H-2B workers—they only use them to lower it. I've written about one example where the employer was highlighted by the local Washington DC news station, WAMU.[117] In that example, seafood employers were able to pay their workers $3.00 per hour less than what the local and state average wage for the occupation would have required, but many more examples exist and have been identified by advocates in DOL disclosure data.

As part of reforming the H-2B prevailing wage rule, President Biden can and should eliminate the use of employer-provided wage surveys, as his predecessor President Obama once proposed through a DOL regulation in 2011, but never implemented.[118]

H-2B visas should be allocated through a prioritization scheme rather than a random lottery

In almost every fiscal year since the early 2000s, there have been more applications made by employers for H-2B workers than the number of available visas. USCIS deals with this by allocating H-2Bs to employers via a random lottery. Instead, USCIS should develop and implement a prioritization scheme for allocating H-2B visas. The best and likely easiest method would be to issue visas to employers offering to pay the highest salaries to their H-2B workers. USCIS could also consider other factors, for example by prioritizing visas for employers that are direct employers rather than labor contractors that use an outsourcing and fissured business model. In addition it could manage the cap by limiting the number of visas going to any single employer, which would benefit small businesses seeking to hire a small number of H-2B workers, rather than the large firms that employ hundreds of H-2B workers at a time.

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[116] Texas RioGrande Legal Aid, "Louisiana Seafood Workers Sue to Invalidate U.S. Labor Rule That Allows Employers to Pay Rock-Bottom Wages," Press Release, April 28, 2021.
[117] Daniel Costa, "H-2B crabpickers are so important to the Maryland seafood industry that they get paid $3 less per hour than the state or local average wage," *Working Economics* blog (Economic Policy Institute blog), May 26, 2017.
[118] See discussion in Daniel Costa and Ross Eisenbrey, "EPI experts submit public comments supporting the Department of Labor's sweeping changes to H-2B guestworker program," Economic Policy Institute, May 17, 2011.

DHS and DOL should create an affirmative process for workers to apply for and obtain prosecutorial discretion and work authorization when they are involved in labor disputes

The H-2B's visa status which ties workers to a single employer and makes them vulnerable to employer retaliation necessitates the creation of an affirmative process for workers to apply for and obtain prosecutorial discretion and work authorization when they are involved in labor disputes with employers. At present, H-2B workers face too much risk when coming forward to avail themselves of federal agencies for protection when their employer breaks the law, and the current extensive backlogs and lengthy wait times for U visas for victims of crime make U visas an unrealistic option for many H-2B workers.

To remedy this, the Biden administration should provide clear written guidance on how workers can come forward to request status protection and work authorization and establish a mechanism for making such affirmative requests. DOL recently issued new guidance on how it can support immigrant workers and "provide workers experiencing a worksite labor dispute with guidance on how to seek the department's support for their requests to the Department of Homeland Security for immigration-related prosecutorial discretion."[119] While this is a welcome first step toward a process that encourages workers to come forward, the Department of Homeland Security should follow up quickly with a corresponding process that is straightforward and transparent and allows workers to obtain prosecutorial discretion and work authorization when they are involved in a labor dispute.

Regulations should improve job portability and provide a 90-day grace period for H-2B workers

Because the H-2B program empowers employers to legally exert an unreasonable amount of control over migrant workers by virtue of controlling their visa status, H-2B workers are, in effect, captive workers. This means that if an H-2B worker isn't paid the promised wage or is forced to work in an unsafe workplace, the worker is unlikely to speak up or go to the authorities. Complaining can result in getting fired, which leads to becoming undocumented and possibly deported. It also means not being able to earn back the money that was invested to obtain the temporary job.

During the pandemic, both the Trump and Biden administrations introduced new regulatory provisions to permit a limited form of "portability" for H-2B workers to change employers or take on new jobs without having to leave the United States and obtain a new visa,[120] but the

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[119] U.S. Department of Labor, Office of the Solicitor, "US Department of Labor posts process for seeking its support for immigration-related prosecutorial discretion during labor disputes." Press Release, July 6, 2022.
[120] U.S. Department of Homeland Security, Temporary Changes to Requirements Affecting H-2B Nonimmigrants Due to the COVID-19 National Emergency, Final Rule, 85 Fed. Reg. 28843 (May 14, 2020); Department of Homeland Security and Employment and Training Administration (U.S. Department of Labor), Exercise of Time-Limited Authority to Increase the Fiscal Year 2022 Numerical Limitation for the H-2B Temporary Nonagricultural Worker Program and Portability Flexibility for H-2B Workers Seeking To Change Employers, Temporary Rule, 87 Fed. Reg. 4722 (January 28, 2022).

specifics of how this new portability operates has been criticized by worker advocates as mostly benefiting employers and falling short when it comes to protecting workers.[121]

The Biden administration should improve on this portability and make it more meaningful for employers by publishing information in real-time about available H-2B jobs, so that workers and advocates can easily find new opportunities that are available to H-2B workers who are presently in the United States. In order to provide enough time for H-2B workers to find new employment, especially in cases of abuses and lawbreaking perpetrated by employers,USCIS should allow H-2B workers to have a 90-day grace period on their visas. H-2B workers should also be allowed to access information about their own immigration status from USCIS, so that they are not forced to rely on their recruiters' and employers' promises about visa petitions and extensions.[122]

USCIS should allow H-4 spouses of H-2A and H-2B workers to be eligible for employment authorization

As noted above in this testimony, many temporary work visa programs technically allow migrant workers to bring their spouses and children, including the H-2A and H-2B programs, where the spouses of H-2 workers are eligible for H-4 visas that allow them to accompany the primary H-2 beneficiary. However, H-4 spouses are not authorized to work, making it difficult, if not impossible, for spouses and children to accompany H-2 workers because of the high cost of living in the United States and low pay H-2 occupations. USCIS has the requisite legal authority to make all H-4 spouses eligible for employment authorization documents (EADs),[123] and should issue a regulation allowing H-4 spouses to apply for EADs. This will promote family unity. However, H-4 spouses should not be allowed to work for the same employer as the H-2 spouse, because, although H-4 visas are not tied to a single employer, an employer that employs both H-2 spouses would have an excessive level of control over the visa status of both spouses and whether they would be allowed to remain in the United States. Employers of H-2B workers could also use H-4 visas to circumvent the H-2B cap.

DOL should update the three-fourths guarantee for H-2B workers by requiring employers to guarantee 100% of the work hours on job contracts

The current rule only requiring employers to pay for three-fourths of the work hours promised on job contracts is inadequate and unfair to H-2B workers recruited to the United States to work in low-wage jobs. H-2B workers should be able to count on the fact that employers will provide them with full time work and pay for 100% of the work hours

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[121] Migration that Works coalition, "MTW's Recommendations to DHS Towards Ensuring Mobility for H2 Workers," Statement, May 17, 2022.
[122] For more discussion, see the recent proposal on the ability of H-2A and H-2B workers to change jobs and employers from the Migration that Works coalition: "MTW's Recommendations to DHS Towards Ensuring Mobility for H2 Workers," May 17, 2022.
[123] See discussion in Daniel Costa, "American Caesar? Not Even Close: The president has the statutory authority he needs to expand deferred action," *Working Economics* blog (Economic Policy Institute), August 7, 2014.

promised on job contracts.[124] Otherwise, considering the very low wages in H-2B occupations, H-2B workers may not earn enough to justify coming to the United States to work, and they may be unable to calculate how much they are likely to earn while employed in the United States—despite often paying illegal recruitment fees to obtain H-2B jobs—which may also prevent them from making an informed decision about whether to migrate to the United States.

DOL and DHS should provide H-2B workers with real-time access to data about their own immigration status, as well as on H-2B employers and recruiters

H-2B workers are in a vulnerable situation if they are unable to access to information about their own immigration status and that of current or prospective employers. At present, employers control and have acess to this information, leading to a power imbalance. DOL and DHS should thus make efforts to be much more transparent and make relevant information available quickly, if not immediately, and easily accessible to H-2B workers, including in a language that they can understand. DOL and DHS should also post information about any employers seeking to hire through the H-2B program, and which currently employ H-2B workers. Information posted should include, at a minimum, employer and recruiter names, job titles, worksite locations, wages and working conditions, and dates of need.

[124] See further discussion in Daniel Costa and Ross Eisenbrey, "EPI experts submit public comments supporting the Department of Labor's sweeping changes to H-2B guestworker program," Economic Policy Institute, May 17, 2011.

Chairwoman ADAMS. Thank you, Mr. Costa. We will now hear from Teresa Romero. You have 5 minutes ma'am.

STATEMENT OF TERESA ROMERO, PRESIDENT, UNITED FARM WORKERS

Ms. ROMERO. Chair Adams, Ranking Member Keller, Chair Scott, Ranking Member Foxx, and distinguished members of the Subcommittee, thank you for the opportunity to testify today. My name is Teresa Romero, and I am the President of the United Farm Workers, the UFW.

Today I am testifying on behalf of the UFW and the UFW Foundation. We are proud to represent farm workers. Every day, farm workers work in difficult and dangerous conditions to feed our Nation. They care for dairy cows to ensure our milk production, tend livestock for our meat, and plant and then harvest fruits and vegetables for our daily nourishment.

Without farm workers, our food industry and security would collapse. We welcome this hearing on the H–2A visa programs. We are deeply troubled by the many abuses of the H–2A, and domestic workers associated with the H–2A program, and believe this hearing provides an opportunity to expose the inherently flawed nature of these programs.

The challenges of the H–2A program cannot be understood in isolation but instead must be considered in the context of our broken immigration system. Discriminatory labor law exclusions, and widespread violations of farm workers' limited rights. Unfortunately, the H–2A regulations are inadequate to protect both H–2A and domestic workers.

There is a tremendous power imbalance between H–2A workers and their employers. As I have explained in my written testimony, H–2A farm workers rely on their employer for the visa, housing, transportation, and would lose their opportunity to work in the U.S. if they lose their job. Challenges facing H–2A domestic workers began during the recruitment process with widespread fraud, illegal fees, gender and age discrimination, and more.

Recruitment fees and other travel costs, as well as coercion, leave workers indebted and reluctant to enforce their workplace rights, as they are desperate to repay their debt, and fear other possible repercussions to them and to their families. The Operation Blooming Onion shows the H–2A program presents tremendous dangers farm workers.

The allegations in the case are devastating, and include criminal charges of multiple deaths, rape, and forced labor. This case demonstrates the inherent flaws of the H–2A program, and the government's inability to enforce the H–2A—the modest H–2A protections that do exist.

The government still does not know how many potential victims there may be. The violations that were exposed are not isolated instances. Additional government investigations and indictments, Polaris's data, and our own experiences made that crystal clear. Our government is running a program with multiple workplace abuses, deaths, and rapes. The H–2A program must not be allowed to continue as is.

Congress and the administration have the obligation to make meaningful reforms. First, Congress must pass urgently needed legislation, beginning with a Farm Workforce Modernization Act, a bipartisan compromise that will help stabilize agricultural labor system and address some of the H–2A program's flaws.

We thank the many subcommittee members who supported this bill. In addition, Congress must end the discriminatory treatment of agricultural workers under the Fair Labor Standards Act, by passing the Fairness for Farm Workers Act.

DOL has announced work to begin creating OSHA heat standards, but the process is lengthy, and farm workers need protections from heat now. In the last few years at least three H–2A workers have died in Georgia from heat. Miguel Angel, an H–2A worker in Georgia asked for help, but none was provided until it was too late.

Congress must pass the Asuncion Valdivia Heat Illness and Fatality Prevention Act to protect workers from extreme heat. The administration must engage in additional rulemaking to strengthen protections and ensure accountability in the H–2A program. This rulemaking must ensure stronger and effective equipment and antitrafficking protections.

Joint employer liability for farm worker, farm labor contractors and State side employers, and freedom of association in collective bargaining agreements at H–2A workplaces. These protections are key to ensuring that workers have the tools necessary to assert the protections, including the ability to raise their voices without fear of retaliation or blacklisting.

Let us work together to make sure that we can continue feeding America. Thank you very much.

[The prepared statement of Teresa Romero follows:]

Statement of Teresa Romero, President, UFW
House Education and Labor Subcommittee on Workforce Protections
Second Class Workers: Assessing H2 Visa Programs Impact on Workers
July 20, 2022

Chairwoman Adams, Ranking Member Keller, Chairman Scott, Ranking Member Foxx and distinguished members of the Subcommittee, thank you for the opportunity to testify today.

My name is Teresa Romero and I am the president of the United Farm Workers (UFW). Today I am testifying on behalf of the UFW and the UFW Foundation. The UFW is the nation's first successful and largest farm workers union. Our mission is to help protect the rights and interests of farm workers by creating a safe and just food supply. The United Farm Workers Foundation (UFW Foundation), a sister organization of the UFW, is a dynamic nonprofit organization established in 2006 whose core purpose is to empower communities to ensure human dignity. With offices and staff across Arizona, California, Georgia, Oregon, Washington, and Michigan, the UFW Foundation operates in some of the nation's leading agricultural areas, serving over 100,000 farm workers annually, providing critical services and engaging its members and constituents in systemic change to break the cycle of poverty.

We welcome this hearing on the H-2 visa programs. We are deeply troubled by the many abuses of both H-2A and domestic workers associated with the H-2A program and believe this hearing provides an important opportunity to expose the inherently flawed nature of this program. With a better understanding of the highly problematic H-2A program, we hope that Congress and the Administration will move forward to implement fundamental, needed protections for the H-2A program and impacted workers.

The challenges of the H-2A program cannot be understood in isolation, but instead must be considered in the context of our broken immigration system, long-standing discriminatory labor law exclusions, and widespread violations of farmworkers' limited rights. The H-2A program is one piece of this broken system. I will begin my testimony with an overview of the farm labor system to help provide the needed background to discuss the H-2A program and policy solutions.

I. The Farm Labor System

a. Farm worker demographics

Farm workers are essential to our nation's food security. Every day, farm workers care for livestock, including dairy cows for our milk and other animals for our meat. Farm workers also plant, tend and harvest the fruits and vegetables that we all rely on for our daily meals. Without farm workers, our nation's food system and food security would be devastated.

The agricultural industry and our nation count on approximately 2.4 million farm workers to perform the challenging and skilled work that ensures we have adequate food on our tables.[1] More than half of the farm workforce lacks immigration status or citizenship, and therefore experience limited labor and political rights.[2] According to Department of Labor (DOL) estimates, the domestic farm worker population includes roughly 56% work authorized individuals, including 36% U.S. citizens and 19% legal permanent residents, along with roughly 44% undocumented workers.[3] The vast majority of farm workers are Latino, with about 2/3 of farm workers born in Mexico.[4] Even though many farm workers are undocumented or born abroad, they have extensive time living and working in the U.S., with DOL data showing that approximately 85% of foreign-born farm workers have lived in the U.S. for at least 10 years; 71% first came to the U.S. at least 15 years prior to their NAWS interview, and the average foreign-born farm worker first came to the U.S. 21 years before their NAWS interview.[5] H-2A workers are not included in the NAWS survey, but are estimated to make up roughly 10% of the total farm labor population.[6]

Our nation's farm workers face many challenges in their living conditions. Even while farm workers are performing our nation's essential work, far too many farm workers and their families live near or below the federal poverty level. According to the Department of Labor's most recent data, 20% of farm worker families earn below the poverty level.[7] This is nearly two times the poverty rate of the general U.S. population.[8] For individual farm workers interviewed in

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[1] *See* Daniel Costa, Phil Martin, and Zachariah Rutledge, "Federal labor standards enforcement in agriculture," Economic Policy Institute (2020), available at https://www.epi.org/publication/federal-labor-standards-enforcement-in-agriculture-data-reveal-the-biggest-violators-and-raise-new-questions-about-how-to-improve-and-target-efforts-to-protect-farmworkers/.

[2] Id.

[3] U.S. Department of Labor, *Findings from the National Agricultural Workers Survey (NAWS 2019-2020)*; published January 2022, available at chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.dol.gov/sites/dolgov/files/ETA/naws/pdfs/NAWS%20Research%20Report%2016.pdf. Note that the NAWS survey does not include H-2A workers.

[4] Id. at 4.

[5] Id. at 5.

[6] *See* Daniel Costa, Phil Martin, and Zachariah Rutledge, "Federal labor standards enforcement in agriculture," Economic Policy Institute (2020), available at https://www.epi.org/publication/federal-labor-standards-enforcement-in-agriculture-data-reveal-the-biggest-violators-and-raise-new-questions-about-how-to-improve-and-target-efforts-to-protect-farmworkers/. See also U.S. Department of State, Nonimmigrant Visa Issuances by Visa Class and by Nationality, FY 2020 NIV Detail Table, https://travel.state.gov/content/dam/visas/Statistics/Non-Immigrant-Statistics/NIVDetailTables/FY20NIVDetailTable.xlsx

[7] U.S. Department of Labor, *NAWS 2019-2020*, p. 42-43.

[8] Andrew DePietro, "U.S. Poverty Rate by State in 2021," Forbes, Nov. 4, 2021, available at https://www.forbes.com/sites/andrewdepietro/2021/11/04/us-poverty-rate-by-state-in-2021/?sh=f773a9b1b38f

2019 and 2020, the mean and median personal incomes for the previous year were in the range of $20,000 to $24,999 and the mean and median total family incomes in the previous year were in the range of $25,000 to $29,999.[9] Given these income levels, farm workers often struggle to feed their own families even as they labor to ensure that other families have food on their tables. Farm worker poverty also means that many farm workers live in substandard housing with crowded conditions. Many farm workers have experienced even greater economic insecurity in the face of the COVID pandemic.

b. Labor Conditions: Lack of legal status and a shameful history of excluding the agricultural industry from basic labor laws make farm workers vulnerable to a range of abuses.

1. Racist exclusions of farm workers from basic labor protections

The history of agriculture in the United States is a history of racism.[10] During the "New Deal" period of labor reforms in the 1930s, President Roosevelt and his allies entered into a "grand compromise" with southern congressmen to obtain their support for legislation. This grand compromise included exclusions of farm and domestic work from the protections being afforded to other workers and was widely understood to be a mechanism for excluding Black workers from the laws' protections, thereby preserving the southern plantation style economic system.[11] Members of Congress at the time were explicit that they did not believe Black people deserved the same protections as white people. The exclusion of farm workers from basic workplace protections persists, with farm workers still excluded from FLSA's overtime protections, many child labor protections, the National Labor Relations Act, many OSHA standards and more. These exclusions have contributed to the poor working conditions facing many farm workers and deprived workers of key tools to help prevent, detect and resolve violations. For example, freedom of association and collective bargaining rights would help provide farm workers, including H-2A workers and U.S. workers in corresponding employment, the ability to communicate about their concerns, demand better conditions, and assert their rights without fear of retaliation.

2. Immigration Status and Widespread Labor Violations

Our nation's racism and history of discrimination against farm workers has contributed to agricultural work being perceived of as undesirable work by many. As a result, many of the country's most vulnerable individuals work as farm workers, including a predominantly

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[9] U.S. Department of Labor, *NAWS 2019-2020*, p. 41.

[10] Testimony of Teresa Romero, "From Excluded to Essential: Tracing the Racist Exclusion of Farmworkers, Domestic Workers, and Tipped Workers from the Fair Labor Standards Act" presented before the House Education and Labor's Workforce Protections Committee on May 3, 2021. This paragraph includes excepts from my testimony.

[11] Lindner, Marc, Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal, 65 Texas Law Review 1335 (1987) at 1336. See also Perea, J. F., Echoes of slavery: Recognizing the racist origins of the agricultural and domestic worker exclusion from the National Labor Relations Act. Ohio State Law Journal, 72(1), 95-138 (2010). See also the testimony I presented at your subcommittee's hearing titled "From Excluded to Essential: Tracing the Racist Exclusion of Farmworkers, Domestic Workers, and Tipped Workers from the Fair Labor Standards Act" on May 3, 2021.

immigrant workforce, as described above. The lack of immigration status and citizenship means farm workers are often too fearful of retaliation and immigration enforcement to draw attention to themselves by complaining about workplace violations or seeking improved conditions. Lawfully present U.S. farm workers recognize that they can easily be fired and replaced by more exploitable workers if they speak up for their rights. In this way, our nation's racist exclusion of farm workers from key labor protections has perpetuated the vulnerability of agricultural workers, including by depriving them of the political power needed to improve their circumstances.

The vulnerability of farm workers has contributed to pervasive and widespread violations of the limited labor protections available to most farm workers. A 2020 EPI analysis of recent data from the Department of Labor's Wage and Hour Division revealed that the division found employment law violations on approximately 70% of the farms that it investigated.[12] Yet Wage and Hour Division resources and investigations are extremely limited, likely revealing only a small percentage of the wrongdoing that occurs. According to the EPI report, the chance that a farm will be investigated is only about 1.1% per year, and the data reviewed in the report did not include all possible workplace violations, such as those identified by the EEOC or state and local labor agencies.[13]

Farm workers risk their own health and safety to ensure our nation's food supply and security. Every day, farm workers face extreme weather and other dangerous conditions. Agricultural workers face poisoning by pesticides, as well as serious injuries and even death on the job. The fatality injury rate for the agricultural sector is the highest rate for all sectors at 25.3 per 100,000.[14] Farm work requires long days of difficult, repetitive tasks, often in uncomfortable positions, resulting in musculoskeletal injuries. And there are numerous other dangerous conditions, such as working with heavy machinery and at heights, among many other daily challenges.

Women farm workers face unique challenges impacting their health and safety, such as significant risks related to sexual harassment and assault, which are all too common in agriculture.[15] Other workplace violations, such as lack of access to toilets, also present unique difficulties for farmworker women.

The dairy industry is an industry that offers year-round employment and could be an attractive job for workers if the wages and working conditions were improved. Unfortunately, many dairy

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[12] *See* Daniel Costa, Phil Martin, and Zachariah Rutledge, "Federal labor standards enforcement in agriculture," Economic Policy Institute (2020), https://www.epi.org/publication/federal-labor-standards-enforcement-in-agriculture-data-reveal-the-biggest-violators-and-raise-new-questions-about-how-to-improve-and-target-efforts-to-protect-farmworkers/

[13] Id.

[14] Bureau of Labor Statistics, U.S. Dep't of Labor, Number and Rate of Fatal Work Injuries, by Industry, 2020, https://www.bls.gov/charts/census-of-fatal-occupational-injuries/number-and-rate-of-fatal-work-injuries-by-industry.htm.

[15] Ariel Ramchandani, "There's a Sexual-Harassment Epidemic on America's Farms," The Atlantic, January 29, 2018, available at https://www.theatlantic.com/business/archive/2018/01/agriculture-sexual-harassment/550109/

jobs involve dangerous conditions, long hours, and low pay.[16] The dangerous conditions have led to multiple deaths in the last years, including several as a result of drowning in manure pits.[17]

Farm work also involves exposure to extreme weather, the dangers of which have been exacerbated by climate change. Farm worker communities are tragically familiar with the impacts of climate change and the dangerous heat they often face in the workplace. Agriculture had the highest average rate of heat-related deaths of all industry sectors, with 35 times the risk of heat related death compared to other industry sectors.[18] In recent years, multiple H-2A farm workers have died of heat-related causes. Farm workers also have faced the dangers of wildfires: while most people flee wildfires, farm workers must often continue to show up to work, working under dangerous fire and smoke conditions to perform essential work.[19]

Agricultural workplaces became even more hazardous during the COVID pandemic. Farm workers were determined to be essential workers, and they continued to work even as many other workers sheltered at home. Farm workers paid the price, with high rates of COVID illness, a major concern since most farm workers—52%—lack access to health insurance.

II. The H-2A Program

The current H-2A program was created in the 1986 IRCA legislation, at which time the H program was divided into the temporary, seasonal agricultural H-2A visa program and the temporary, seasonal nonagricultural H-2B visa program. The current DOL regulations largely reflect the protections put into place during the Reagan administration, many of which were based on lessons learned from the infamous Bracero program, which Congress ended in 1964, in part due to concerns about its impact on farm workers.[20] Unfortunately, the H-2A regulations are woefully inadequate to protect both H-2A workers and domestic workers.

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[16] See, e.g., Olivia Heffernan and Maggie Gray, "Death of a Dairy Farm Worker Exposes Dangerous Conditions and Labor abuse," Documented, June 1, 2022, available at https://documentedny.com/2022/06/01/farm-workers-rights-abuse-labor-undocumented/ ("She [deceased worker's wife] said he had been working 11-to-12-hour days, seven days a week, receiving a weekly wage of $620 — roughly $7.70 an hour — and a pizza. New York's upstate minimum wage was $12.50 an hour in 2021 and is $13.20 an hour in 2022. For the 15 months he worked, we estimate Joj was underpaid by about $28,500.").

[17] See e.g., Tim Craig, "Deaths of farmworkers in cow manure ponds put oversight of dairy farms into questions," Washington Post, September 24, 2017, available at https://www.washingtonpost.com/national/deaths-of-farmworkers-in-cow-manure-ponds-put-oversight-of-dairy-farms-into-question/2017/09/24/da4f1bae-8813-11e7-961d-2f373b3977ee_story.html?utm_term=.9c057ce5f408; U.S. Department of Labor OSHA News Release–Region 8, ""US Department of Labor cites Colorado dairy farm operator for violations after vacuum truck driver suffers fatal injuries in unguarded manure pit," September 29, 2021, available at https://www.osha.gov/news/newsreleases/region8/09292021

[18] See Gubernot, D. M., Anderson, G. B., & Hunting, K. L. (2015). Characterizing occupational heat-related mortality in the United States, 2000-2010: an analysis using the Census of Fatal Occupational Injuries database. *American journal of industrial medicine*, *58*(2), 203–211. https://doi.org/10.1002/ajim.22381

[19] Teresa Cotsirilos, "The Farmworkers in California's Fire Zones," Food and Environment Reporting Network, Nov. 23, 2021, available at https://thefern.org/2021/11/the-farmworkers-in-californias-fire-zones/

[20] See e.g., Phil Martin, "Mexican Braceros and U.S. Farmworkers," Wilson Center, July 10, 2020, available at https://www.wilsoncenter.org/article/mexican-braceros-and-us-farm-workers. Note that there have been H-2A rule changes under the Bush administration, which gutted H-2A protections to the detriment of both domestic and H-2A farmworkers, resulting in the loss of approximately $121.2 million in wages for all H-2A workers in a 12-month period. The Trump administration also sought to make harmful changes to the H-2A program by eliminating worker protections, streamlining the application process to the detriment of workers, and lowering wages. The UFW and

An ever-growing segment of the agricultural workforce is present in the country on precarious H-2A temporary work visas. Despite agricultural employer complaints about how difficult the program is to use, the program has grown almost 4-fold since FY 2011, with over 317,000 positions certified by the DOL in FY 2021 as compared to 77, 246 positions in FY 2011.[21] From FY 2020 to FY 2021, the number of applications received grew by 17%, with similar growth for the first two quarters of FY 22.[22] Indeed, many employers have successfully grown their businesses using the H-2A program. A manager for one labor placement firm shared that "virtually all growers who get a year under their belt tell me they wish they had started using the program 10 years ago. H-2A visas topped to 200,000 in 2017. That is double the number of visas in 2013, which tells you something about the growing popularity of the program."[23] And the H-2A program has no cap—there is no limit to the number of workers that an employer can petition for. In fact, approximately 96% of positions requested were approved by DOL in FY21. The rapid growth of the H-2A program is alarming given the serious abuses of both domestic and H-2A workers in the program.

As the Operation Blooming Onion investigation and indictment have shown, the H-2A program presents tremendous dangers for farm workers. The allegations in the Blooming Onion case are devastating and include criminal charges for multiple deaths, rape, and forced labor. The Blooming Onion case demonstrates not just the inherent flaws of the H-2A program, but also the government's inability to effectively enforce the modest H-2A protections that do exist. It is deeply troubling that no government agency appears to know how many potential victims there may be as a result of the Defendants' actions. The Blooming Onion indictment makes reference to at least 100 victims, but it appears that the Defendants petitioned for over 70,000 workers over multiple years. This case reveals how little is known about the well-being of the hundreds of thousands of H-2A workers that come to the U.S. each year, trusting our government to protect their rights. Unfortunately, the violations exposed in Operation Blooming Onion are not isolated instances. We and other advocates have seen countless other violations of workers' rights resulting from the vulnerability of the workforce and the lack of accountability in the H-2A program. A federally administered program with multiple deaths, rapes, trafficking, criminal indictments and rampant workplace abuses must not be allowed to continue as is. Congress and the Administration have an obligation to make meaningful reforms.

A. Program flaws

UFW Foundation successfully sued the DOL to enjoin and vacate the Trump wage rule. The remainder of the Trump rule is still pending with the DOL. For an overview of H-2A regulations, see the Farmworker Justice report, No Way to Treat a Guest," available at

[21] H-2A Temporary Agricultural Program - Selected Statistics, Fiscal Year (FY) 2021 EOY, Office of Foreign Labor Certification, Employment and Training Administration, U.S. DOL, available at https://www.dol.gov/agencies/eta/foreign-labor/performance.

[22] Id., H-2A Temporary Agricultural Program - Selected Statistics,FIscal Year (FY) 2022 Q1-Q2, Office of Foreign Labor Certification, Employment and Training Administration, U.S. DOL, available at https://www.dol.gov/agencies/eta/foreign-labor/performance

[23] Frank Giles, "More Farms Growing with H-2A Help," Growing Produce, March 18, 2019, available at https://www.growingproduce.com/fruits/more-farms-growing-with-h-2a-help/

The H-2A program is fundamentally flawed due to the dependence of H-2A workers on their employers for their visa status and work. The H-2A visa places a worker's legal status entirely in the hands of their employer. The unequal power and control in the H-2A employer/employee relationship not only harms H-2A workers, but also leads employers to discriminate against U.S. workers, creating downward pressure on their wages and working conditions.

Abuse and vulnerability of H-2A workers begins in their countries of origin. Many H-2A workers come from countries with emerging economies where employment opportunities are scarce and available jobs pay significantly less than jobs in the U.S. Because there are a greater number of potential workers than there are job opportunities and because recruiters control access to these limited job opportunities, the recruitment process is rife with abuse. Reports and worker stories have long exposed the many abuses that take place during international recruitment, including fraud, illegal recruitment fees, discrimination and other abuses.[24] Recruitment fees are all too common, with one report finding that 58% of workers interviewed reported paying recruitment fees.[25] H-2A workers who arrive indebted from recruitment fees, travel costs and other expenses are reluctant to enforce their workplace rights as they are desperate for work to repay their debt, and also understand that they or their families may face other repercussions if they do not successfully complete their contract.

Existing DOL and DHS regulations do not protect workers from recruitment abuses, and have even had the opposite effect. The existing rules disincentivize workers from reporting illegal recruitment fees, as they fear, often rightly so, that they may lose their visa and opportunity to work in the United States. And for workers who are in the U.S., the DHS regulation requiring employers to report workers as having absconded is regularly used by employers who threaten to report workers to immigration in order to keep workers compliant and submissive.

H-2A workers' dependency on their employers and desperation to keep their jobs makes H-2A workers vulnerable to labor violations, all too frequently rising to the level of human trafficking and slavery.[26] Polaris's recent reports reveal alarming statistics about trafficking in the H-2A program, with multiple reports noting that the visa category with the most reported trafficking

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[24] See, e.g., Polaris, "Labor Exploitation and Trafficking of Agricultural Workers During the Pandemic," June 23, 2021, available at chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/viewer.html?pdfurl=https%3A%2F%2Fpolarisproject.org%2Fwp-content%2Fuploads%2F2021%2F06%2FPolaris_Labor_Exploitation_and_Trafficking_of_Agricultural_Workers_During_the_Pandemic.pdf&clen=10855098&chunk=true; Centro de los Derechos del Migrante, "Ripe for reform: Abuse of Agricultural Workers in the H-2A Visa Program,"2020, available at chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/viewer.html?pdfurl=https%3A%2F%2Fcdmigrante.org%2Fwp-content%2Fuploads%2F2020%2F04%2FRipe-for-Reform.pdf&chunk=true

[25] Centro de los Derechos del Migrante, Inc. Recruitment revealed: Fundamental flaws in the H-2 temporary worker program and recommendations for change, available at http://www.cdmigrante.org/wp-content/uploads/2018/02/Recruitment_Revealed.pdf.

[26] Maria Pérez, Drew Favakeh and Abraham Kenmore, "'Beyond troubling': Current, former government officials tied to human trafficking probe in Georgia," Maria Pérez, Drew Favakeh and Abraham Kenmore, USA Today, April 19, 2022; Polaris, "Labor Trafficking and H-2A Visas: Employer Essentials," 2021, available at chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/viewer.html?pdfurl=https%3A%2F%2Fpolarisproject.org%2Fwp-content%2Fuploads%2F2021%2F10%2FEssential-Guide-for-H2A-Visa-Sponsors.pdf&clen=3860495&chunk=true (last visited 3/31/22)

cases workers is the H-2A program.[27] Operation Blooming Onion is one stark example of such trafficking cases.

There is widespread evidence of other violations as well. Centro de los Derechos del Migrante, a binational nonprofit that advocates on behalf of migrant workers, surveyed returned H-2A workers in Mexico and found that all of the 100 H-2A workers interviewed reported at least one serious violation of their worker rights, with 94% reporting three or more violations.[28]

Compounding these labor violations is the fact that growers are increasingly relying on farm labor contractors (FLCs) to recruit, hire, supervise, transport and/or house H-2A workers. Much of the H-2A program's recent growth has been driven by the increased use of the H-2A program by H-2A Labor Contractors. According to research by USDA, the share of H-2A employers who were farm labor contractors (FLCs) increased tremendously from 2010-2019—from 15 to 42 percent.[29] As a result of this rapid growth, in some industries FLCs overtook individual employers in terms of the number of labor certifications approved by DOL.[30]

The rapid growth of farm labor contractors in the H-2A program is very troubling. Labor contractors are often small, poorly capitalized, small entities or individuals that have little bargaining power with the growers to whom they provide labor, often bidding down their fees for job opportunities.[31] If workers seek relief for any workplace violations, the farm labor contractor is often unable to afford the required remedies given their thin margins. Many of the growers that hire FLCs deny responsibility for farm workers working on their farms, and they often use the FLCs as a shield to accountability for any potential immigration or labor violations. A recent study by the Economic Policy Institute includes data supporting the high incidence of abuses associated with farm labor contractors. The 2020 study found that while labor contractors constituted only 14% of agricultural employment, they represented 24% of all wage violations investigated by the Wage and Hour Division in the agricultural sector.[32] In California and Florida, FLCs accounted for about half of all labor violations detected in those states.[33]

While DOL has included some additional requirements for farm labor contractors in the H-2A program (referred to as H-2ALCs), the requirements are inadequate to protect farm workers, both domestic and H-2A.

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[27] Polaris, "Labor Trafficking on Specific Temporary Work Visas Report," July 2022, available at https://polarisproject.org/labor-trafficking-on-specific-temporary-work-visas-report/; see also Polaris, "Human Trafficking on Temporary Work Visas: A Data Analysis 2015-2017," June 2018, p. 20, available at https://polarisproject.org/human-trafficking-on-temporary-work-visas-a-data-analysis-2015-2017/.
[28] Centro de los Derechos del Migrante, *Ripe for Reform: Abuse of Agricultural Workers in the H-2A Visa Program* (2020), https://cdmigrante.org/wp-content/uploads/2020/04/Ripe-for-Reform.pdf.
[29] Castillo, Marcelo, Skyler Simnitt, Gregory Astill, and Travis Minor. August 2021. "Examining the Growth in Seasonal Agricultural H-2A Labor," EIB-226, U.S. Department of Agriculture, Economic Research Service. p. 2.
[30] Id at pp 10-11.
[31] See Maria Perez, What led to a migrant worker's death from heatstroke?, USA TODAY (Dec. 17, 2021), https://www.usatoday.com/in-depth/news/investigations/2021/12/17/migrant-guest-workers-risks-farm-labor-contractors/8808652002.
[32] Daniel Costa et al., Federal labor standards enforcement in agriculture, ECONOMIC POLICY INSTITUTE (Dec. 15, 2020), https://www.epi.org/publication/federal-labor-standards-enforcement-in-agriculture-data-reveal-the-biggest-violators-and-raise-new-questions-about-how-to-improve-and-target-efforts-to-protect-farmworkers/.
[33] Id.

The recent Blooming Onion H-2A investigation and criminal indictment in Georgia highlights the challenges associated with farm labor contractors. Of the 24 defendants, only two of those Defendants were fixed-site business owners; the rest were farm labor contractors or recruiters.[34] The growers who benefitted from the labor of these trafficked workers have not been held responsible for their treatment.

Workplace violations also undermine worker safety and health by forcing workers to live in unsafe housing, eat substandard food, and work in dangerous conditions. For workers who are already working to the limits of their endurance, a heat wave can result in illness or even death. This danger is exacerbated when workers lack access to rest and shade, and even water is limited. Sadly, multiple H-2A workers, including at least 3 in Georgia over the last few years, have died of heat stress. Miguel Angel Guzman Chavez was one such worker. Miguel was a 24 year-old farm worker who came to the U.S. under the H-2A guestworker program. He died from heat on June 21, 2018, five days after he arrived in the U.S. from Mexico. Our staff on the ground in Georgia and other states share that multiple H-2A workers have complained to them about the lack of access to drinking water in the fields and heat illness.

Along with frequent violations of their rights, the vulnerable H-2A workforce typically faces increased demands regarding hours, work pace, and productivity. This in turn harms the working conditions of U.S. workers who work alongside H-2A workers or are competing for jobs. And because the H-2A program often becomes the predominant source of labor in many crops or geographic localities, the wages and working conditions of H-2A workers can impact the broader industry, not just H-2A workplaces.

The fact that H-2A workers are captive workers also results in discrimination against domestic workers. Witness Mr. Ty Pinkins with the Mississippi Center for Justice will speak to the experience of African American workers in Mississippi who faced outrageous and sickening acts of discrimination. While the experience facing Mr. Pinkins' clients may not be the same as discrimination facing other domestic workers, the fact is that discrimination is rampant in the H-2A program. Discrimination begins during the recruitment of H-2A workers. H-2A employers engage in blatant gender, age, and national origin discrimination—typically hand-picking their ideal worker demographic—as demonstrated by the fact that H-2A workers are predominantly young, Latino men.[35] In fact, some advertisements for H-2A workers blatantly discriminate against women and older workers with specific requests for men between certain age ranges.[36] As a result, U.S. workers that don't meet employers' desired characteristics –older workers, women, parents, and workers from different races and nationalities— face discrimination.[37]

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[34] Indictment, U.S. v Patricio et al., CR 521-0009, S.D. Ga, 2021; see also "In 'modern-day slavery' bust, arrests largely spared farmers. Here's why." Lautaro Grinspan, Atlanta Journal and Constitution, 12/20/21.
[35] See Migrant Women's USMCA Complaint, filed 3/23/2021 and amended versions, available at https://cdmigrante.org/migrant-worker-women-usmca/ and chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/viewer.html?pdfurl=https%3A%2F%2Fcdmigrante.org%2Fwp-content%2Fuploads%2F2021%2F03%2FUSMCA-Amended-Peition-and-Appendices_March-23-2021_reduced.pdf&chunk=true
[36] Id. at Appendix G.
[37] Jordan, Miriam, "Black Farmworkers Say They Lost Jobs to Foreigners Who Were Paid More," New York Times, Nov. 12, 2021.

There are additional reasons for employer preferences for H-2A workers, including that they are not currently covered by the main law that protects agricultural workers, the Migrant and Seasonal Agricultural Worker Protection Act, which allows farm workers to sue in federal court to enforce their housing, transportation and working arrangements.[38] Also, H-2A employers do not need to pay the Federal Unemployment Insurance or Social Security taxes on H-2A worker wages, resulting in savings of about 8%.[39]

III. Solutions

A. Legislation

There are several pieces of legislation pending in Congress that will go a long way towards addressing our broken farm labor system and the inequity that has persisted for too long.

First, Congress must pass the Farm Workforce Modernization Act ("FWMA"), H.R.1603. The FWMA is a bipartisan compromise that will help stabilize our agricultural labor system and address some of the H-2A program's flaws. FWMA passed the House in both the 116th and the 117th Congress, and with overwhelming support, including 30 Republicans. FWMA includes important new protections for the H-2A program, including recruitment protections that will create greater transparency and accountability; coverage of H-2A workers by the Migrant and Seasonal Agricultural Worker Protection Act; and, for the first time, a path to lawful permanent residency and green cards for H-2A workers that recognizes the valuable contributions of H-2A workers. Despite the concessions we made to reach this agreement, we believe the FWMA will improve the lives of farm workers and address significant flaws in the H-2A program, including worker abuses and displacement of domestic workers.

I also want to note our strong opposition to the year round H-2A rider that was recently included in the House DHS FY 23 appropriations bill. This rider would fundamentally change the H-2A program to allow unlimited access to year round employment in the H-2A program. Not only does this amendment expand the exploitative H-2A program without fixing any of the problems we have discussed and without providing the current workforce an opportunity to earn legal immigration status, it also harms bipartisan efforts to pass the FWMA. While the FWMA does include limited year-round visas, this provision was only accepted as part of a compromise that included legalization and new H-2A protections, as well as caps and additional protections for the year-round visas.

We also call on Congress to begin to address the structural racism and inequity facing farm workers. Congress must pass the Fairness for Farm Workers Act. The Fairness for Farm Workers Act would end the discriminatory treatment of agricultural workers regarding overtime

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[38] 29 U.S.C. 1801 et seq.

[39] See Calvin, Linda, Philip Martin, and Skyler Simnitt July 2022. Adjusting to Higher Labor Costs in Selected U.S. Fresh Fruit and Vegetable Industries, EIB-235, U.S. Department of Agriculture, Economic Research Service, p. 21, available at chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.ers.usda.gov/webdocs/publications/104218/eib-235.pdf?v=1595.3

pay and minimum wage in the Fair Labor Standards Act. The legislation would phase in overtime pay over a period of 4 years and would give smaller employers additional time to adjust to these changes. California, Washington and other states have already taken action to ensure that farm workers are provided the same right to overtime pay as other workers, and Congress must ensure farm workers and employers across the country are on the same playing field as other workers and employers.

Congress must also pass legislation addressing the hazardous nature of agricultural work. As discussed earlier, there is no federal heat standard that ensures the safety and health of workers who are exposed to dangerous heat conditions in the workplace. California, Oregon, Minnesota, and Washington, as well as the U.S. military, have already adopted their own heat stress standards successfully. Although the DOL has announced work to begin creating an OSHA heat standard, the process is lengthy, and farm workers need protection from the heat urgently. Congress must pass the Asunción Valdivia Heat Illness and Fatality Prevention Act, which would protect all U.S. farm and indoor and outdoor workers from death and illness caused by extreme heat. Farm workers —deemed essential by the federal government during the global pandemic— deserve protections from heat-related death and illness. We also urge support for legislation and regulations that seek to protect farm workers, their families and their communities from the harmful effects of pesticides, such as the Protect America's Children from Toxic Pesticides Act, S. 3283.

1. Administrative regulations, policy and programs

A. Regulations

Given the many abuses in the H-2A program, the Administration must engage in rulemaking to strengthen protections for workers and ensure greater accountability in the H-2A program. International recruitment violations, lack of employer accountability, and captive workers are key problems that the government must address in order to protect both domestic and H-2A farm workers. Congress made clear in the INA that the Department of Labor must ensure that U.S. workers' wages and working conditions are not adversely affected by the hiring of temporary foreign workers.[40] We recommend the following protections to improve conditions for both domestic and H-2A workers: 1) stronger and more effective recruitment and anti-trafficking protections, 2) joint employer liability of farm labor contractors and the fixed site employers who benefit from the labor of H-2A workers, and 3) freedom of association and collective bargaining agreements at H-2A workplaces. These protections are key to protecting against labor trafficking and to ensuring that workers have the tools to assert their protections, including the ability to raise their voices without fear of retaliation or blacklisting. Without these protections, labor requirements will continue to exist on paper, but be meaningless for many workers.

The pending Trump rule is not an adequate vehicle for DOL to make needed changes. New rulemaking must be undertaken to undertake substantial reform of the H-2A program. We

[40] 8 USC 1188(a)(1)(B).

appreciate DOL's tweet recognizing the need for additional rulemaking in the H-2 programs "to promote worker voice and worker protections" and their intent to engage in such rulemaking.[41]

B. Policies and Programs

The Administration can also take immediate action to begin addressing H-2A abuses. DOL's enforcement must prioritize joint employer liability and include coordination with community-based groups, who have trusted relationships with farm workers on the ground. In addition, DOL, DHS and the State Department must work together, coordinating effectively and in real time, to enforce H-2A and other labor protection for H-2A and domestic farm workers. This coordination must include rapid responses for workers who speak up to assert their rights to ensure they do not face retaliation or immigration repercussions. DOL's recently announced policy[42] of supporting workers who assert their labor rights by issuing letters of recommendation to DHS for prosecutorial discretion is an important step forward, but must be accompanied by a realistic and efficient DHS process to ensure workers are given prompt access to work authorization and protection from deportation. In circumstances involving potential forced labor or trafficking or other life-threatening situations, DHS and DOL must establish a centralized, coordinated process to ensure a prompt interagency response to provide appropriate and rapid relief to workers and to ensure that employers who violate the law are not permitted to continue using the H-2A program.

USDA has also recently announced a pilot program "to promote a safe, healthy work environment for both U.S. workers and workers hired from Northern Central American countries under the seasonal H-2A visa program."[43] The UFW looks forward to partnering with the USDA and working collaboratively with stakeholders to seek to "improve working conditions for both U.S. and H-2A workers and ensure that H-2A workers are not subjected to unfair recruitment practices."[44]

We thank you again for this opportunity to share our experiences and recommendations and look forward to working together to address this serious problem.

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[41] DOL tweet, June 9, 2022, available at https://twitter.com/WHD_DOL/status/1534913251502268421?s=20&t=ngpFKeWEVtCBE-C73hN74w.

[42] DOL, Office of the Solicitor, News Release, "US Department of Labor Posts Process For Seeking Its Support for Immigration-Related Prosecutorial Discretion during Labor Disputes," July 6, 2022, available at https://www.dol.gov/newsroom/releases/sol/sol20220706.

[43] USDA News Release, "U.S. Department of Agriculture to Invest up to $65 Million in Pilot Program to Strengthen Food Supply Chain, Reduce Irregular Migration, and Improve Working Conditions for Farmworkers," June 10, 2022, available at https://www.usda.gov/media/press-releases/2022/06/10/us-department-agriculture-invest-65-million-pilot-program

[44] Id.

Chairwoman ADAMS. Thank you, Ms. Romero. I want to recognize now Leon Sequeira. Mr. Sequeira, you have 5 minutes.

STATEMENT OF MR. LEON SEQUEIRA, ATTORNEY

Mr. SEQUEIRA. Thank you. Good morning, Chairwoman Adams, Ranking Member Keller, and members of the Committee. I appreciate the opportunity to testify today. I regularly advise employers on the complexities of the H–2A and H–2B programs, and represent them in the course of government audits, investigations and litigation.

I am testifying today in my personal capacity, and not on behalf of any client. The H–2A and H–2B programs, and the employers who utilize them are highly regulated by numerous Federal and State agencies.

Employers of guest workers are overwhelmingly good people who treat their employees with respect and gratitude, and who do their best to follow the law.

It is important to recognize that these guest worker programs were designed by Congress to be, first and foremost, U.S. worker protection programs. That is no employer can hire a temporary foreign worker unless the Federal Government first determines that employment of the foreign worker will not harm the wages and working conditions of U.S. workers.

That rigorous determination process takes several months to complete and requires the employer to receive approval from three Federal agencies, and at least one State agency.

The approval process also requires, among other things, that the employer pay a special government-mandated wage rate, provide other benefits, and hire any able U.S. worker who wants the job.

Once an application is approved, and sometimes even before, employers are routinely subjected to compliance audits and investigations by numerous State and Federal agencies to ensure that they are complying with the rules of the program. In conjunction with the extensive enforcement efforts, Federal agencies also provide comprehensive outreach and educational materials advising workers of their rights.

These efforts begin before the workers even leave their home country. At the U.S. Consulate abroad, workers are interviewed by State Department officials to ensure that they have received required information from the employer, and that the workers are provided with antitrafficking information, including a phone hotline to report any issues they encounter during their employment.

When workers arrive in the United States these efforts continue. Workers will see specific government-mandated posters at their worksite advising them of applicable protections, and providing again, a phone hotline to report any concerns to the Department of Labor.

In addition, the Department of Labor, and numerous State agencies regularly conduct site visits to meet with workers and educate them about their rights. Attached to my written testimony is a list of just some of the many educational brochures and pamphlets distributed by government agencies to guest workers.

On top of all the government efforts to educate and protect workers, there are also countless nonprofit groups, advocacy organiza-

tions, labor unions, and legal advocacy groups that ensure guest workers are protected. In fact, in the H–2A program, these advocates are even guaranteed access to farm housing to meet with workers where they live.

Despite all of these efforts, there will be employers that do not follow the requirements of these programs. When that happens, no one will dispute those employers should be held liable for violations, and affected workers should be made whole. The Department of Labor enforcement data confirms that only a small fraction of employers violate the guest worker program requirements.

For example, in 2019, the department approved more than 12,000 H–2A applications. That same year there were 431 enforcement cases by the Department of Labor that involved an H–2A violation. That is just 3 percent of all approved applications. Based on my experience, most H–2A violations involve technical and paperwork violations that have no impact on worker wages and working conditions.

Certainly, egregious violations occur from time to time, but the Department of Labor's enforcement data confirms those cases are the exception and not the rule. I will conclude with one final point. H–2A and H–2B workers are critically important to the farms and seasonal businesses that rely on them.

As I already noted, because the Federal Government approves the employment of every guest worker, their employment by definition cannot harm U.S. worker wages or working conditions.

By contrast, the Department of Labor has recognized the biggest threat to U.S. worker wages actually comes from competition by large numbers of people who are illegally present in the country. Last year about 350,000 guest workers entered the U.S. legally and returned home at the end of the season.

In just the past 8 months, more than 440,000 people are known to have illegally crossed the border without being apprehended. The H–2A and H–2B programs are not perfect. No government program is, and we should all be able to agree on reasonable measures to help improve these programs.

I would hope that we could also agree that the country's borders should be secure, and the people coming to work in the United States should do so through an orderly and legal process that protects them, and protects U.S. workers. Thank you again for the opportunity to testify, and I look forward to your questions.

[The prepared statement of Mr. Sequeira follows:]

U.S HOUSE COMMITTEE ON EDUCATION & LABOR

SUBCOMMITTEE ON WORKFORCE PROTECTIONS

Hearing on

"Second Class Workers: Assessing H2 Visa Programs Impact on Workers"

July 20, 2022

WRITTEN TESTIMONY OF LEON R. SEQUEIRA

Good morning Chairwoman Adams, Ranking Member Keller, and members of the Subcommittee. I appreciate the invitation to testify today about the H-2A and H-2B guestworker programs.

I am an attorney in private practice and a significant part of my work involves providing advice and counsel to employers of H-2A and H-2B guestworkers. My clients range in size from small family farms with only a handful of employees to large businesses and family farming operations with thousands of employees. Let me begin by noting that I am testifying today in my personal capacity and not on behalf of any client.

I have worked on employment and immigration policy and related issues for nearly 20 years, including as a staffer in the U.S. Senate, as an Assistant Secretary of Labor in the George W. Bush administration, and for more than a decade advising clients in private practice.

The H-2A and H-2B programs were created by Congress in 1986 through an amendment to Immigration and Nationality Act that divided the predecessor single H-2 visa program into two programs for employers with a temporary or seasonal need for labor. *See* 8 U.S.C. § 1101(a)(15)(H)(ii), (b); Pub. L. 99-603, 100 Stat. 3359 (1986). The H-2A program is for employers with a temporary need for *agricultural* labor and the H-2B program is for employers with a need for temporary *non-agricultural* labor.

Congress designed the H-2A and H-2B programs, first and foremost, as domestic worker protection programs. That is, before any employer can employ a foreign guestworker, the U.S. government must first determine that employment of the foreign worker will not have an adverse impact on any U.S. workers or their working conditions.

Therefore, by definition, if an employer hires an H-2A or H-2B guestworker, the U.S. government has already conclusively determined that the guestworker does not harm U.S. workers or working conditions. Certainly, some people may have complaints about foreign guest worker programs for one reason or another, but it is simply not true that the H-2A and H-2B guestworker programs harm U.S. workers by taking U.S. workers' jobs or putting downward pressure on wages and working conditions.

In the H-2A and H-2B programs, Congress built-in processes to ensure that employment of foreign workers does not harm U.S. workers.

First, the U.S. Department of Labor sets the hourly wage rate that every employer must pay to the guestworker, and to any U.S. worker performing the same job. In the H-2A program, this wage is called the Adverse Effect Wage Rate. The H-2A wage rate is set by the Department of Labor each year for various regions around the country based on wage survey data collected by USDA. Currently, the H-2A wage rate varies from $17.51 an hour in California to $11.99 per hour in the Southeast, or just over $15 per hour on average nationwide.

In the H-2B program, the Department of Labor requires that employers apply to the Department to obtain a "prevailing wage determination" for the particular job. DOL assigns specific wages to each non-farm occupation by geographic location based on data collected and analyzed by the Bureau of Labor Statistics through the Occupational Employment and Wage Statistics program.

The second way that the Department of Labor ensures that employment of an H-2A or H-2B guest worker will not adversely affect U.S. workers is by evaluating the labor market and certifying in writing that there are not a sufficient number of U.S. workers who want to take the job that the employer is trying to fill.

The Department of Labor makes that determination after a period of required advertising of the job both by the state department of labor in the state where the work will take place, as well as through nationwide online advertising by the U.S. Department of Labor. Any able, qualified and available U.S. worker who applies for the employer's job must be hired. Only after the employer reports the results of the recruitment efforts and after the Department evaluates the employer's compliance with all other application requirements, including proving that the job opportunity is temporary, does the Department of Labor issue a labor certification to the employer.

Any U.S. workers hired in response to the employer's advertising are deducted from the total number of positions for which the employer is seeking certification. Thus, if an employer has 20 positions to fill and 2 U.S. workers are hired, then the Department of Labor would certify that the employer has 18 positions eligible to be filled by guestworkers. And if an employer's application fails to meet the standards for approval, it will be denied. After obtaining a labor certification from the Department of Labor, the employer then has to apply to the Department of Homeland Security and prove again that it is offering a temporary job and has been unable to hire a sufficient number of U.S. workers.

In sum, the federal government actually checks twice – through two different application processes to two federal agencies – to ensure that an employer has a legitimate need to hire temporary foreign labor and that employment of the foreign worker will not harm U.S. workers.

In Fiscal Year 2021, there were more than 16,300 H-2A applications filed and about 95% were certified by the Department of Labor. In the H-2B program that year, there were about 9,800 applications filed and about 87% were certified. Over the past five years, there has been more than a 59% increase in H-2A applications. In the H-2B program during that time there has been a 35% increase in applications. The increase in interest in both programs reflects the continuing

extreme shortage of available U.S. workers willing to fill temporary and seasonal jobs. This trend has existed for decades and has only exacerbated during the pandemic.

In addition to the definitive government determination that the employment of guestworkers does not adversely affect U.S. workers, simple math makes clear that guestworkers are a miniscule part of the overall economy, though vitally important to numerous businesses with seasonal labor needs. There are 158 million people employed in the U.S. economy today. In fiscal year 2021, the combined number of H-2A and H-2B visas issued by the State Department was just under 353,000 – or just 0.22 percent of all workers in the economy.

Nearly 258,000 of the 353,000 are H-2A workers. According to the USDA Farm Labor Survey of wages paid by farmers – which is the utilized to set the H-2A wage rate – there are about one million hired farmworkers in the U.S. in any given year. Other USDA reports indicate there are about 2.4 million farmworkers in the U.S.[1] In 2021, 258,000 individuals received an H-2A visa, so H-2A workers make up anywhere from about 10 to 25 percent of farm employment. But the employment of the H-2A farm workers has not adversely affected domestic wages. The mandatory wage rage in the H-2A program has increased dramatically in recent years, far outpacing the general rate of inflation. In some states, H-2A wages have increased more than 40% in the past five years, with some states seeing 15 or 20% increases in a single year.

Likewise, studies have shown that the employment of H-2B workers does not depress the wages of U.S. workers and that H-2B workers do not take jobs from their U.S. counterparts. Rather, employment of H-2B workers correlates with higher employment and higher wages in the local economy. *See* Madeline Zavodny, PhD, *The Economic Impact of H-2B Workers*, U.S. Chamber of Commerce, 2010.

Rather than being treated less-favorably than domestic workers, guestworkers are afforded numerous benefits and protections that other U.S. workers in the economy do not receive. For example, the Department of Labor requires employers to pay guestworkers costs to travel to the U.S. to begin work. Federal law does not otherwise require employers to pay costs for workers who accept employment beyond commuting distance from their home.

In the H-2A program, the Department of Labor requires employers to provide free housing to workers. In addition, employers are also required to provide free daily transportation to and from the worksite. All of these benefits are significant financial investments for agricultural employers that other workers in the economy typically do not receive. Indeed, even local U.S. farmworkers have to pay for their own housing and daily transportation to and from work. The Department of Labor also requires H-2A and H-2B employers to guarantee that workers will be paid for three-fourths of the work hours described in the application – another benefit that other employers in the economy are not required to provide to their workforce.

Some critics even claim that H2 workers are somehow "trapped" and cannot leave their employer, but such claims are simply not true. Guestworkers are free to change from one H-2

[1] The discrepancy is likely the result of the way in which data is collected, analyzed and reported. That is, each farm employer reports the number of workers they hire, and many farmworkers are employed by more than one farm during the year.

employer to another, and thousands do so every year. Of course, there is an orderly process involved in transferring from one employer to another. Any employer of a guestworker must possess an approved labor certification and must file the appropriate transfer paperwork with the Department of Homeland Security to hire an H-2 worker, but scores of employers and workers complete that process every year. No H-2A or H-2B guestworker is required to continue working some place they do not want to work.

H-2A and H-2B workers may be the most protected workers in the entire economy. No fewer than four federal Departments (and several more agencies within those Departments) enforce the specific requirements of federal laws pertaining just to the employment of guestworkers. These agencies routinely conduct random and complaint-based audits and investigations of employers: the Department of Labor, the Department of Homeland Security, the Department of State, and the Department of Justice. In addition, various state agencies also regularly enforce state law requirements pertaining to guest workers. And, of course, other general employment and health and safety laws (both federal and state) also apply to H-2A and H-2B employers and workers.

Besides the efforts aimed at employers to ensure compliance, guestworkers themselves are repeatedly educated about their rights, beginning with a written disclosure of the terms of employment before they can even obtain a visa. Then, as part of the visa issuance process, the State Department provides every recipient of a visa with a booklet explaining their rights and providing a phone hotline to report complaints. The pamphlets are printed in more than four dozen languages. *See* https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/temporary-workers.html.

At the worksite, employers are required to display Department of Labor posters advising workers of their rights and providing a phone hotline number to report complaints. Attached at the end of my testimony is a list of just some of the many materials the federal government provides to guestworkers advising them of their rights while working in the United States. In addition, so-called "outreach workers" from labor unions, advocacy groups and even plaintiffs' lawyers also have access to guestworkers to advise them of their rights. Indeed, in the H-2A program, employers are even required to guarantee access for outreach workers to visit guestworkers in their employer-provided housing.

In addition to all of these efforts by multiple U.S. Government agencies, employers and outreach workers to educate workers about their rights, state government agencies also conduct their own outreach, education and enforcement efforts to advise guestworkers of their rights and how to file complaints. For example, Washington State, which has one of the largest populations of H-2A guestworkers, regularly conducts outreach and enforcement efforts visiting farms and distributing literature to workers explaining their rights. *See* H-2A Guest Workers' Guide to Washington State Workplace and Safety and Rights https://www.lni.wa.gov/forms-publications/F101-197-000.pdf.

And workers themselves possess what is perhaps the best protection of all to ensure they can get help or advice whenever they want if they believe their employer is not following the law – a cell phone. Virtually every guestworker has at least one cell phone and can easily seek out advice or

assistance from these various state and federal government agencies and outreach workers if they have concerns about their employment situation.

There is no shortage of people and government agencies ready to assist guestworkers in asserting their rights. But that is not to say that even with all of these precautions in place, some workers end up working for employers who do not follow the law. Employers who willingly ignore their obligations to workers should be investigated and should be held liable. The Department of Labor regularly recovers back wages for workers who were shorted pay, and the Department imposes civil money penalties against employers who violate the rules, and even debars from the program employers who commit egregious violations. Enforcement data from the Department of Labor confirms that these processes work.

Every year, the Wage and Hour Division of the Department of Labor conducts more than a thousand investigations of H-2 employers and analysis of that data by the Employment Policy Institute reveals a relatively small number of employers is responsible for the vast majority of violations. *See* Daniel Costa, et al., *Federal Labor Standards Enforcement in Agriculture*, Employment Policy Institute, 2020. In addition, the Employment and Training Administration at the Department of Labor conducts their own audits of hundreds, if not thousands of H-2A and H-2B employers each year, although they do not publicly report the results of their audits.

In 2019, there were 431 cases with H-2A violations and 4,994 workers who received back pay averaging $485. In 2019, there were more than 12,600 H-2A applications approved by the Department of Labor and there were nearly 205,000 individuals obtained an H-2A visa. Thus, employers with H-2A violations were 3 percent of all H-2A applications and just over 2 percent of H-2A workers were due back wages. When that enforcement data is placed in context, it readily apparent that the overwhelming number of employers follow the law, treat their employees with respect with and provide the pay and benefits those employees are due.

There will always be cases of employers who do not comply with the requirements of the H-2A or H-2B programs. Just like employers in any other sector of the economy or in any other area of life, there are always a small number of people who do not follow the rules. This is true even in Congress. Just because some members of Congress violate the law, we do not (or most of us do not) automatically conclude that all members of Congress are crooks.

Guestworkers who come to the U.S. legally, who are paid government mandated wages, live in housing with government-mandated standards (for H-2A), who have travel costs and transportation paid, who pay taxes and who return home at the end of the season are critically important to the seasonal businesses that rely on them. Their employment does not harm U.S. workers.

By comparison, there are millions of people who have entered the U.S. illegally and who compete with U.S. workers in the economy. According to data from Customs and Border Protection, so far in just eight months of fiscal year 2022, more than 1.5 million people have been caught illegally crossing the border with another 440,000 people known to have gotten away. That means in just eight months nearly 2 million people have illegally crossed the border in the U.S. – that we know about. Who knows how many additional scores of people made it

into the U.S. undetected? Just the number of illegal border crossers known to have gotten away in the last eight months far exceeds the total number of H-2A and H-2B guest workers who are legally admitted – and then return home – each year.

The Department of Labor has recognized that it is the illegally documented workforce that poses the greatest threat the wages and working conditions of U.S. workers – not guestworkers who are in the country legally on a temporary work visa. Notably, the Department of Labor recognized this more than a decade ago when there were estimated to be about 12 million workers illegally present in the U.S. That was long before anyone could have imagined the chaos that now exists at our southern border with huge numbers of people illegally crossing the border each month and the population of people illegally present in the U.S. estimated by some to be 15 million or more. As the Department of Labor concluded in a 2008 rulemaking discussing studies by the GAO, scholars such as Philp Martin, PhD, and comments from farmworker advocacy organizations, "all of the information available to the Department strongly indicates that the presence of large numbers of illegal, undocumented workers in the agricultural sector poses a much greater potential threat to the wages of U.S. workers than guest workers do." 73 Fed. Reg. 77110, 77170 (Dec. 18, 2008).[2]

While the H-2A and H-2B guestworker programs are far from perfect – no government program ever is – they are the only means the U.S. government has provided to employers to fill temporary and seasonal positions when there are insufficient numbers of U.S. workers willing, able and available to take available jobs. These guestworker programs are a critical lifeline to thousands of farms and businesses across the country with a temporary or seasonal need for labor each year.

The H-2A and H-2B guestworker programs are highly regulated and provide good jobs enabling workers to learn skills, gain experience and earn a significant amount of money to support their families abroad. It is worth noting that the general minimum wage in Mexico has been rapidly increasing in recent years, but in 2022 is only about $8.41 per day – or about $1.05 per hour for an 8-hour work day. The average H-2A wage rate is nearly fifteen times the Mexican minimum wage, so it is no wonder that workers from Mexico and beyond want to come to the U.S. to work. But U.S. government policy should ensure that job seekers enter the country and return home at the end of the season through a regulated, orderly and legal process. The H-2A and H-2B programs establish just such a process that provides important protections to both foreign and U.S. workers.

Should this committee want to explore balanced ways to improve the operation of the H-2A and H-2B programs for the benefit of workers and for employers, there would be many in the employer community willing to participate in that effort. Thank you again for the opportunity to testify today.

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[2] The Department further explained, "[t]he U.S. Supreme Court has also noted the threat that undocumented workers pose to the wages and working conditions of U.S. workers. *See Sure-Tan* v. *NLRB*, 467 U.S. 883, 892 (1984) ("acceptance by illegal aliens of jobs on substandard terms as to wages and working conditions can seriously depress wage scales and working conditions of citizens and legally admitted aliens * * *")." 73 Fed. Reg. 77110, 77170 (Dec. 18, 2008).

The State Department provides visa recipients with a booklet explaining their rights.

Know Your Rights
https://travel.state.gov/content/dam/visas/LegalRightsandProtections/Wilberforce/Wilberforce-ENG-100116.pdf
https://travel.state.gov/content/dam/visas/LegalRightsandProtections/Wilberforce/Wilberforce-SPA-1242017.pdf

The Department of Labor also advises guestworkers of their rights through videos played on continuous loop in consulates. https://www.dol.gov/agencies/whd/resources/videos/know-your-rights

The Department of Labor distributes numerous flyers, booklets, cards and brochures to H-2A and H-2B guestworkers advising them of their rights and providing a phone hotline to report complaints.

Key Protections for H-2A Workers
https://www.dol.gov/sites/dolgov/files/WHD/h2a/key-protections-h2a_Spanish.pdf;
https://www.dol.gov/sites/dolgov/files/WHD/h2a/key-protections-h2a.pdf

Key Protections for H-2B Workers
https://www.dol.gov/sites/dolgov/files/WHD/posters/key-protections-h2b.pdf

Employee Rights for H-2B Workers COVID-19
https://www.dol.gov/sites/dolgov/files/WHD/posters/H2B_COVID.pdf
https://www.dol.gov/sites/dolgov/files/WHD/posters/H2B_COVID_SPA.pdf

H-2A for U.S. Workers
https://www.dol.gov/sites/dolgov/files/WHD/publications/WH1401.pdf
https://www.dol.gov/sites/dolgov/files/WHD/publications/WH1401SPA.pdf

Protections for US Workers Under the H-2B Program
https://www.dol.gov/sites/dolgov/files/WHD/publications/WH1400.pdf

H-2A Worker Rights Card
https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/H2AEnglish.pdf
https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/H2ASpanish.pdf

H-2B Worker Rights Card
https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/WH1399.pdf
https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/WH1399SPA.pdf

Farm Worker Rights
https://www.dol.gov/sites/dolgov/files/WHD/publications/Farm_Worker_Rights_Flyer.pdf

The Department of Labor of also requires H-2A and H-2B employers to post specific notices at the worksite advising employees of their rights and providing a phone number to report complaints.

Employee Rights Under the H-2A Program
https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/WHD1491Eng_H2A.pdf
https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/WHD1491Span_H2A.pdf

Employee Rights Under the H-2B Program
https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/H2B-eng.pdf
https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/H2B-span.pdf

Chairwoman ADAMS. Thank you. We will now hear from Ty Pinkins. You have 5 minutes.

STATEMENT OF MR. TY PINKINS, CONSUMER PROTECTION ATTORNEY, MISSISSIPPI CENTER FOR JUSTICE

Mr. PINKINS. Chairman Adams, Ranking Member Keller, and members of the Subcommittee. I am pleased to appear before this

committee. Thank you for the opportunity to speak with you today about the guest worker program and its impact on local workers.

My name is Ty Pinkins. I am a veteran, served 21 years in the Army. I am a lawyer and Equal Justice Works Fellow at the Mississippi Center for Justice. More important than all of that, I am a son of the Mississippi Delta.

My work as a lawyer today in the Delta focuses on ensuring low-income community members have access to legal representation, which they could not afford if it were not for services offered by the Mississippi Center for Justice.

That is certainly the case with regard to local farm workers. I am here today because across the Mississippi Delta, farm owners participating in the H–2A program are in blatant violation of the promises they made to the Federal Government.

The H–2A program has grown exponentially across the Nation in recent years. There has been relatively little public discussion of what impact this growth has had on farming communities.

Many have simply accepted the assurances of agribusinesses that the H–2A program needs to be expanded and streamlined because according to the H–2A proponents, there simply are not any Americans left willing and able to perform the demanding physical labor required of most farm jobs.

I am here to tell you that this is a myth. While the number of Americans working in agriculture has declined, there are still many areas across the country where U.S. citizens depend on farm work for their livelihoods, and the Mississippi Delta is one of them.

Agriculture remains the dominant industry in the Delta, as well as the major source of jobs for local community members, the majority of whom are black. Each morning thousands of Delta residents, almost all of them citizens, go to work at those demanding farm labor jobs.

As in generations past, their efforts are essential to keeping the Delta the productive agriculture area that it has been for centuries. In many cases, those local farm workers are carrying forward a family legacy, because their parents and grandparents worked these same fields for generations.

A May 28th article in the New York Times, as well as a lengthy article recently published in the Mississippi Today, described how the rapid expansion of the H–2A program is transforming the farm labor market in Mississippi in much the same fashion as it is across the country. These changes have been extremely detrimental to local farm workers.

Despite all the laws and regulations designed to protect American workers against unfair competition from H–2A workers, local farm workers in the Delta have been displaced as area farmers each year import more and more foreign workers.

Absent major changes in the way the H–2A program is administered, and its rules enforced, there will not be another American generation of local black farm workers in the Delta. Instead, their jobs will have all gone to H–2A workers who are far more susceptible to employee abuse.

In accordance with the Department of Labor regulations, farm owners make three specific promises to the Federal Government when applying to participate in H–2A program. First, no H–2A

should be admitted to the U.S. to fill a job unless no qualified U.S. worker is available.

In order to further this policy when requesting to participate in H–2A programs, farm owners must promise the Federal Government that they will contact former U.S. workers they employed during the previous farming season and invite them to return to the job before those farm owners reach out to foreign H–2A workers.

Furthermore, farm owners must put forth at least the same kind and degree of effort to recruit U.S. workers to fill those positions as they do to hire foreign H–2A workers. Second, farm owners who do in fact bring in H–2A workers, must pay them what is called adverse effect wage rate, which differs by State, and is subject to change each year. Mississippi's adverse effect wage rate for H–2A farms is $12.45 an hour.

Third, to the extent H–2A workers are employed, their wages and working conditions cannot undermine those of local American farm workers.

Many business owners participating in the H–2A program promised the Federal Government that if they employ an H–2A worker, and a U.S. local worker is performing the same job function, the employer must provide to the U.S. worker at least the same benefits, wages, and working conditions that are being provided to the H–2A workers.

Many of the dozens of farms throughout the Delta participating in the H2A program employ a range of discriminatory practices against local black farm workers. On behalf of several Delta farm workers, the Mississippi Center for Justice and Southern Migrant Legal Services have filed suits against several Delta farms for, among other things, discriminatory wage practices.

With that I will conclude my comments and thank you for any questions that you may have.

[The prepared statement of Mr. Pinkins follows:]

Testimony of Tyrone C. Pinkins
Before the United States House of Representatives
Committee on Education and Labor
Subcommittee on Workforce Protections

July 20, 2022

Chairwoman Adams, Ranking Member Keller, and members of the Subcommittee: I am pleased to appear before this Committee. Thank you for the opportunity to speak with you today about the guest worker program and its impact on local workers.

Let me begin with a brief overview of my background of and commitment to serving in low income communities in the Mississippi Delta. My name is Ty Pinkins, I am a Veteran—served twenty-one years in the Army. I am a lawyer, and Equal Justice Works Fellow at the Mississippi Center for Justice. But, more important than all that, I am a son of the Mississippi Delta.

I was born and raised in Rolling Fork—a small, rural town deep in the Delta, where I started chopping cotton at thirteen years old to help my parents make ends meet.

I cherish my unconventional upbringing. It prepared me for challenges like multiple deployments to war zones, finishing college while serving in the Army, attending law school, and thereafter, returning home to the Mississippi Delta to provide legal services in low-income communities like the one in which I was raised.

My work as a lawyer in the Delta focuses on ensuring low-income community members have access to legal representation, which they could not afford if it were not for the services offered by the Mississippi Center for Justice. And that is certainly the case with regard to local farmworkers. I am here today because across the Mississippi Delta, farm owners participating in the H-2A program are in blatant violation of the promises they made to the federal government.

The H-2A program has grown exponentially across the nation in recent years. There has been relatively little public discussion of what impact this growth has had on farming communities. Many have simply accepted the assurances of agribusinesses that the H-2A program needs to be expanded and "streamlined," because, according to H-2A proponents, there simply aren't any Americans left willing and able to perform the demanding physical labor required of most farm jobs. I'm here to tell you that this is a myth. While the number of Americans working in agriculture has declined, there are still many areas across the country where U.S. citizens depend on farm work for their livelihoods. And the Mississippi Delta is one of them.

Agriculture remains the dominant industry in the Delta, as well as the major source of jobs for local community members, the majority of whom are Black. Each morning, thousands of Delta residents, almost all of them U.S. citizens, go to work at those demanding farm labor jobs. As in generations past, their efforts are essential to keeping the Delta the productive agricultural area that it has been for centuries. In many cases, these local farmworkers are carrying forward a family legacy, because their parents and grandparents worked these same fields for generations.

A May 28th article in the *New York Times,* as well as a lengthy article recently published in the *Mississippi Today,* described how the rapid expansion of the H-2A program is transforming the farm labor market in Mississippi in much the same fashion as it is across the country. These changes have been extremely detrimental to local farmworkers. Despite all the laws and regulations designed to protect American workers against unfair competition from H-2A workers, the local farmworkers in the Delta have been displaced as area farmers each year import more and more foreign workers. Absent major changes in the way the H-2A program is administered and its rules enforced, there won't be another generation of local Black farmworkers in the Delta. Instead, their jobs will all have gone to H-2A workers who are far more susceptible to employer abuse.

In accordance with Department of Labor regulations, farm owners make three specific promises to the federal government when applying to participate in the H-2A program. First, no H-2A should be admitted to the U.S. to fill a job unless no qualified U.S. worker is available. In order to further this policy, when requesting to participate in the H-2A program, farm owners must

promise the federal government that they will contact former U.S. workers they employed during the previous farming season and invite them to return to the job before those farm owners reach out to foreign H-2A workers. Furthermore, farm owners must put forth at least the same kind and degree of effort to recruit U.S. workers to fill those positions as they do to hire foreign H-2A workers.

Second, farm owners who do in fact bring in H-2A workers must pay them what's called the Adverse Effect Wage Rate, which differs by state and is subject to change each year. Mississippi's Adverse Effect Wage Rate this year for H-2A farms is $12.45/hr.

And, third, to the extent H-2A workers are employed, their wages and working conditions cannot undermine those of local American farmworkers. Meaning, business owners participating in the H-2A program promise the federal government that if they employ an H-2A worker and a local U.S. worker is performing the same job function, the employer must provide to the U.S. worker at least the same benefits, wages, and working conditions that are being provided to the H-2A worker.

Many of the dozens of farms throughout the Delta participating in the H-2A program employ a range of discriminatory practices against local Black farmworkers. On behalf of several Delta farmworkers, the Mississippi Center for Justice and Southern Migrant Legal Services have filed suits against several Delta farms for, among other things, discriminatory wage practices.

The farming season in Mississippi begins in February and runs through November. H-2A workers are generally brought in for that time period. The entire season involves planting and harvesting crops like cotton, corn, soybeans, rice, etc. Mississippi Farmers have for years, season after season, brought in white South Africans as H-2A workers without affirmatively reaching out to the local Black American workers from the previous season, as mandated by federal regulations.

Hard-working Americans in the Mississippi Delta, have been doing farm work for decades—driving tractors, combines, and cotton pickers. Planting crops in the Spring, harvesting those

crops in the Fall. For generations, their families worked on those farms, passing down essential skills, and traditions of hard work. They know the seasons, they know the geography, they know the equipment, and they know the crops. Local community members literally know the soil in the Delta.

However, that's not the case with the workers who are brought in under the H-2A program. They arrive without an adequate understanding of the different seasons, equipment, and crops. So, how do farm owners overcome this employee training hurdle? Many farm owners begin by forcing local Black workers to train and mentor foreign H-2A workers on how to operate the equipment, understand the seasons, and plant and harvest crops. All this while the local workers (who are doing the teaching) are being paid as low as $7.25/hr. (the federal minimum wage) while the farms pay the H-2A workers at least the Adverse Effect Wage Rate of $12.45/hr., or in many cases, an even higher rate of up to $16/hr.

Next, after they have been adequately trained, the farm owners put H-2A workers on the same type of equipment: tractors, cotton pickers, and combines, that their local Black workers are operating . . . in the same fields . . . at the same time. The only difference is that the H-2A workers are still being paid up to $16/hr., while the local Black workers who trained them, and are now working alongside them, are paid at $7.25 or $8.00/hr.

What happens when local workers ask for a raise? Everyone wants to be paid fairly for an honest day's work. Well, when local workers ask for a raise, ask to be paid equal to their South African counterparts, one of three things happen: they are either ignored, flat out told "no", or threatened with being fired.

Farm owners in the Delta are blatantly ignoring the H-2A regulations that they promised to abide by when they applied to hire foreign workers. Some farmers seek to justify this situation by claiming that they can't find any local Black people to work on their farms because Black people in the Delta are lazy and don't want to work. This is patently untrue.

Local Black workers have been the backbone of the Delta farm economy for generations. And they would like to continue in these jobs. But these loyal, hard-working local Black workers are increasingly discovering that the farmers for whom they have worked for decades no longer want their services. They see their jobs being outsourced to the same H-2A workers who they trained.

Those local Black workers who are still able to find jobs with H-2A farms are forced to accept wages far below those paid to the foreign workers. Local farmworkers, paid at or near the federal minimum wage, sometimes put in over 100 hours of work in a week, only to bring home less than $400 in pay, while their H-2A counterparts earn $1500 or more. This is the sort of discrimination that is supposed to be illegal under the H-2A program. But in the Mississippi Delta, it is the norm at H-2A farms.

Contrary to what some farm owners believe, Black people in the Delta are not lazy. What they want is to be paid fairly for the work they do, and to be treated with dignity and respect. What they want is a federal government and federal agencies that are going to enforce regulations designed to protect their rights. What they don't want is to be treated like second class citizens—forced to train their replacements—while simultaneously being cheated out of the wages the law mandates that they be paid.

Unfortunately, in the administration of the H-2A program, the federal and state governments have largely failed U.S. farmworkers—especially in the Mississippi Delta. Enforcement of the regulations designed to protect U.S. workers occurs only occasionally, if at all. The required recruitment of U.S. farmworkers has proven to be a largely meaningless exercise, typically brushed aside by farm owners. And the state and federal governments have acquiesced in employers' imposition of hiring requirements that exclude many qualified American workers. In the Mississippi Delta, the end result, all too often, has been the displacement of long-time Black U.S. farmworkers by white South African H-2A workers. Those local Black workers, able to still find work at H-2A farms, are almost always paid less than the H-2A's—even though all of the workers perform the same jobs.

There is no indication that these trends are abating. The Department of Labor certified 193,200 jobs to be filled with H-2A workers in the first two quarters of Fiscal Year 2022, up 16 percent from the 166,000 jobs certified during the first two quarters of Fiscal Year 2021. This puts DOL on pace to certify considerably more H-2A positions this year than the 317,600 certified in all of Fiscal Year 2021.

Lawlessness abounds within the H-2A program. DOL's Wage and Hour Division, in May 2022, reported that 735 investigations found farms with H-2A violations in Fiscal Year 2020 and Fiscal Year 2021. At these H-2A farms, the Wage and Hour Division assessed $9 million in back wages for 13,408 workers, and assessed an additional $9.5 million in civil money penalties.

Thank you for the opportunity to speak with you today about the guest worker program and its impact on local workers. I am happy to answer any questions you may have.

Chairwoman ADAMS. Thank you, Mr. Pinkins. Under Committee Rule 9(a), we will now question witnesses under the 5-minute rule. I will be recognizing subcommittee members in seniority order. Again, to ensure that the member's 5-minute rule is adhered to, staff will be keeping track of the time.

Please be attentive to time, wrap up when your time is over, and mute your microphone. As Chair, I now recognize myself for 5 minutes. Mr. Pinkins, Mr. Sequeira's testimony downplays the impact

that H–2 workers have on U.S. workers. Specifically, on page 5 of his written testimony he states in there I quote, "Mere employment does not harm U.S. workers."

Do you think that local farm workers in the Mississippi Delta would agree?

Mr. PINKINS. No. I think they would certainly disagree. Downplaying the impact this has on U.S. workers ignores a few things. While the national unemployment rate sits at 3.2 percent, the unemployment rate in some of the poorest counties in the Mississippi Delta hovers around 14 percent.

Additionally, the poverty rate in some Mississippi counties is as high as 40 percent. When you add that to the fact that in many cases farm workers earning $7.25 an hour salary is the only income coming into a household of about four people, you understand the impact that this has on a single-income household of that nature.

Chairwoman ADAMS. Okay. Thank you, sir. Ms. Romero, in your testimony you described the history of racism against farm workers in this country and how they have been excluded from basic labor protections. What can be done by Congress to address these racist exclusions for farm workers?

Ms. ROMERO. Thank you very much, ma'am. You know the Farm Worker First Modernization Act would give an opportunity to farm workers to work and be here in this country with a path to legalization. We need to make sure that all the exclusions and protections for farm workers are considered to make sure that now we pass the Fairness of Farm Workers Act that will protect and give the same rights to these workers that other workers have.

When you have in most states where workers cannot earn overtime pay, it is just unfair. We need to treat farm workers as we treat any other labor force in this country.

Chairwoman ADAMS. Thank you, ma'am. I want to submit for the record the AFL–CIO and Farm Worker Justice statements related to H–2 visas, without objection, so ordered.

[The information from Ms. Adams follows:]

AFL-CIO

STATEMENT FOR THE RECORD

House Workforce Protections Subcommittee
HEARING: Second Class Workers: Assessing H2 Visa Programs Impact on Workers
Wednesday, July 20, 2022

America's unions believe that seasonal jobs should be safe, good jobs, where all workers are treated fairly. The pandemic has exposed the systemic undervaluing of work that is now understood to be essential, and highlighted the need for new approaches that reject entrenched patterns of discrimination and promote opportunity and rights for all. After decades of experience with the abusive model of guestworker programs that degrade labor standards and constrain the rights of migrant and U.S. workers alike, change is long overdue.

As currently structured, our work visa programs serve to create a large, on-demand pool of captive and disposable workers who are entirely disenfranchised. The need for more robust worker protections in the H-2B program is clear, as is the obligation to hold seasonal employers accountable for high standards in their recruitment and employment practices.

Any policy that creates tiered rights in our labor market is unjust and bad for workers. The Biden Administration has committed to empowering working people, but the H-2 programs currently to do quite the opposite. We are alarmed to see the repeated expansion of programs that fuel occupational segregation, particularly in this economy where women, immigrants and workers of color have already suffered disproportionately.

The imperative to enhance worker safeguards grows more urgent as the Administration seeks to encourage H-2 recruitment out of countries in the region that have been destabilized by disasters and political unrest. Rather than misdirecting forced migrants into abusive temporary work visas that separate them from their families, we urge the Administration to continue to improve asylum processing and make much needed Temporary Protected Status (TPS) country designations as we undertake fundamental reform of the H-2 visa programs.

Expanding work visa programs rife with abuse is both bad policy and bad politics. Temporary work visas are not what vulnerable migrants need or deserve, and they legally empower employers to pit workers against each other to drive down standards. We cannot allay U.S. worker fears of displacement or replacement while programs that legitimize those fears persist and expand.

We urge Congress and the Administration to resist further calls for H-2B expansion and instead take immediate steps to prevent the well-documented patterns of abuse that pervade the program. Now is the time to ensure that the H-2B program promotes good jobs, worker empowerment, employer accountability, fair recruitment, and racial and gender equity by enacting much-needed reforms.

American Federation of Labor and Congress of Industrial Organizations
815 Black Lives Matter Plaza NW • Washington, DC 20006 • 202-637-5000 • aflcio.org

ELIZABETH H. SHULER
PRESIDENT

FREDRICK D. REDMOND
SECRETARY-TREASURER

The Seasonal Worker Solidarity Act (H.R. 7549), introduced by Representative Castro, would fundamentally reform the H-2B visa program to ensure fair pay, safe working conditions, and just treatment of all workers in affected industries, and we urge your strong support. H.R. 7549 advances a new model of work visa that will respond to real labor market needs, elevate labor standards, end captive employment, respect family unity, ensure access to justice, and afford migrant workers a path to citizenship. The bill also includes the vitally important provisions of the Power Act, which extend protections to immigrant workers and guestworkers who experience workplace violations or take action to enforce our labor laws.

Below, we outline a blueprint for pro-worker reform to the H-2B program:

Good Jobs

America's unions expect Congress and the Administration to use every lever possible to improve conditions for all workers in our country, including those in seasonal industries. H-2B reform must be pursued through this lens.

Employers should be required to offer and pay the higher of the local or national prevailing wage for the relevant occupation. Strong wage provisions are needed to support real nationwide recruitment efforts and to help ensure family-sustaining wages for work that our country deemed essential throughout the pandemic. Inadequate H-2B wage rate determinations have allowed artificial suppression of wages and conditions, discouraging U.S. workers from seeking positions in seasonal industries. This fosters low road business models that cannot survive without access to H-2B visas for migrant workers whose contributions have been systematically devalued.

In a labor market where employers utilize work visa programs to realize cost savings, paying H-2B workers below median wages undermines labor standards and worker organizing. The design flaws in the H-2B program contribute to the erosion and fissuring of work at unionized firms by creating perverse financial incentives for employers to outsource to H-2B contractors or replace U.S. workers with lower-paid guestworkers. In the absence of effective regulation and enforcement that conform to the statute's prevailing wage requirements, misuse of the H-2B program proliferates, with far-reaching consequences.

In addition to strengthening prevailing wage requirements, DOL should stop certifying weekly wages and review the BLS Occupational Employment and Wage Statistics (OEWS) methodology in order to more accurately reflect dynamic labor market changes in wages. Congress must also lift the appropriations riders that allow the use of employer-provided private wage surveys, which only serve to lower wages even below the OEWS rates.

Visas should be allocated to employers who pay the highest wages and treat their workers well. When demand for H-2B visas exceeds supply, visas should be given first to those employers who are maintaining high standards by paying above average wages, or at the 75th percentile for occupation in the location according to the OEWS. This will create a more virtuous incentive system and reduce the pattern of the program being used to erode pay and conditions.

Health and safety protections at H-2B workplaces must be enhanced. Workers in seasonal industries have long been on the frontlines of national and local emergencies, including severe

weather events and the pandemic. Consequently, DOL should require that H-2B employers maintain conditions that are in line with the highest standards of evolving public health laws. This includes ensuring that group housing, transportation and lodging meets health and safety standards and Centers for Disease Control (CDC) guidelines.

H-2B employers should be required to have a plan for preventing and responding to COVID-19, heat stress, and other exposure risks, and OSHA must investigate complaints and carry out worksite inspections to ensure migrant workers are working in safe environments. H-2B workers must have access to free vaccines, testing, prompt medical care and workers' compensation protections if they experience COVID-19 symptoms or test positive for the virus. Seasonal and migrant workers support our critical infrastructure and our country is obliged to take active steps to protect their lives and health. To ensure that regulations are enforced, H-2B workers must have clear, language accessible means to report OSHA violations when they occur.

Employers should be required to comply fully with the provisions of job contracts, including all hours promised. Workers do not get to pick and choose the provisions of job contracts with which they comply, and neither should employers. H-2B workers make decisions to leave their homes and families for work opportunities in the United States based on the terms they are offered, and employers should be held accountable for all promises made in the recruitment process.

Worker Empowerment

Immigrant and nonimmigrant workers face real and practical barriers to organizing and ensuring that their workplaces are safe and fair. Fear of immigration enforcement and employers' threats of status-based retaliation chills the enforcement of workplace rights, adversely affecting all workers. Concrete measures such as the following are needed to address the realities that enable rampant abuse and retaliation against worker organizing.

H-2B workers and their families should have a path to citizenship. Any worker whose labor is vital to the nation must be able to earn a path to permanence. H.R. 7549 would make H-2B workers eligible for green cards after 18 months of H-2B employment, and would also retroactively extend eligibility to thousands of returning H-2B workers who have been making vital contributions to our economy over the past decade. Creating a pathway to citizenship for H-2B workers will stabilize our workforce, expand rights, reduce shortages, and unite families.

Undocumented workers and guestworkers who are engaged in labor disputes and/or enforcement of their workplace rights should have a streamlined process to request and obtain temporary immigration status and work authorization so that they can engage in protected activity and vindicate their rights without fear of immigration-related retaliation. To prevent the chilling effect on worker organizing and ensure workers access to full remedies, temporary, renewable immigration benefits must be extended in a timely fashion and for a duration of not less than two years. Petitions for relief should be filed with USCIS, which should establish an internal unit with sufficient staffing and expertise to evaluate and act on such requests expeditiously.

Across the country, there is very real fear in our worksites – our organizers see it every day. Given the way immigration enforcement has been weaponized over time, that fear is entirely justified. It is critical that we protect workers who take action to keep our workplaces safe and fair. We welcome the guidance recently issued by DOL and NLRB clarifying the process for workers to request needed protections. Providing immigrant and nonimmigrant workers with concrete and timely protections against deportation when they cooperate with labor enforcement agencies will directly empower them to assert their rights without fear, including their right to form or join a union.

H-2B workers need enhanced job portability. Employer control of guestworkers' visa status is at the core of the power imbalance that enables exploitation within our work visa programs. H-2B workers should be afforded a 60-day grace period of unemployment without losing status or work permits. This would make it more realistic for them to walk away from abusive employers and apply for alternative employment within their visa category. Currently, other visas such as H-1B, L-1 and TN visas have a 60-day grace period, which affords visa holders autonomy and options. Without time to search for and secure new employment, visa portability will not be practically accessible for H-2B workers.

H-2B workers must have meaningful access to justice. To ensure that workers are able to access rights they have on paper, they must have legal counsel and effective channels to through which to pursue justice. H-2B workers should be able to access federally funded legal services and should have a private right of action when they experience abuses. In addition, the standards for workplace crimes in the U Visa program should be broadened and the cap lifted so that exploited workers are to secure needed protective visas.

Members of unions affiliated with U.S.-based unions should be exempted from the H-2B cap. Unions aspire to be helpful in connecting qualified workers to available positions in seasonal industries. Exempting union members affiliated with US-based unions from the cap would benefit reputable employers, ensure H-2B workers have representation, and protect unions' wage and training standards, which are harmonized across borders.

Workers and unions should have access to real-time data on H-2B employers and recruiters. Transparency of information is a core principle of open government and also a key form of worker empowerment. Agencies should post, within 5 days of receipt, information about any employers seeking to hire through the H-2B program. Information posted should include the employer name, recruiter name(s), job title, worksite location, wages and working conditions, and date of need in any and all languages relevant to the likely workforce.

Asymmetries in power and information make workers vulnerable to abuse and exploitation. Providing accessible and timely information is one simple yet impactful way to ensure that workers can make informed choices and build effective organizing campaigns. Knowing which employers are seeking to use work visa programs and under what conditions also helps promote compliance with relevant labor provisions.

H-2B workers should receive training on their rights before they depart from their origin countries and within one week of arrival at U.S. worksites. These workers' rights trainings

should be developed and conducted with input from DOL, the International Labor Organization, unions, worker centers and other civil society organizations. Any U.S. government funding to support rights training for H-2B workers in the U.S. or abroad must involve parties outside the recruitment chain with expertise in workers' rights. Workers must understand their rights and know how to file complaints or otherwise take action when those rights are violated.

H-4 spouses should be granted work authorization, as long as they do not work for the same employer as their H-2B spouse. Denying H-4 spouses the opportunity to seek employment creates gender disparities and conditions that push people into the shadow economy. H-4 spousal work authorization would not be tied to an employer, so H-4 workers would have agency in the labor market – freedom to form a union, leave a job they don't like, or file a claim against a bad employer without jeopardizing their visa status.

Employer Accountability

Most reasonable people assume that employers with a record of serious labor violations would be prevented from using our work visa programs – it's only common sense. However, the facts tell a different story, revealing that some of the biggest users of the H-2B visa program have egregious records on workers' rights[1]. This shameful pattern must end. The following provisions will help prevent the program from perpetuating cycles of worker exploitation and make more visas available for employers who operate with fair labor practices.

DOL should create an H-2B employer registry and prohibit employers who violate labor laws from utilizing the visa program. As a threshold issue, migrants seeking employment in the U.S. through formal labor migration pathways should be able to expect that they will not be placed with employers that have a record of abusing workers' rights. DOL has the authority to debar abusive employers, and should use it assertively. Employers wishing to hire workers through the H-2B program should be required to demonstrate that they meet basic requirements for labor standards and employment practices. Establishing an H-2B employer registry overseen by the Department of Labor would allow the Administration to appropriately screen the labor rights records of employers before they use the visa program, and generate public information vital to unions and worker advocates. In registering, employers would:

- Consent to a screen of labor and employment practices that looks back 5 years —only those with clean records would be approved, and any subsequent violation would lead to revocation of eligibility and any violation of the Trafficking Victims Protection Act would result in permanent debarment
- Commit to labor neutrality and access to job sites for worker advocates
- Disclose all recruiters in their supply chains
- Pay a registration fee to support rights and skills training for U.S. and migrant workers in H-2 industries
- Establish an employer bond to repay any recruitment fees illegally charged to workers

Employers that utilize this visa program access a public benefit, and therefore must adhere to high labor standards.

[1] Immigration - Laborers' International Union of North America (liuna.org)

DOL should no longer issue H-2B labor certifications for work in labor surplus areas or occupations, or for work in non-seasonal industries. The H-2B labor certification process should be responsive to labor market realities. The fact that DOL certified the same number of H-2B jobs for the first quarter of 2021 that it did for the first quarter of 2019 and 2020, despite a doubling of the unemployment rates in most H-2B industries, makes clear that corrective measures are needed. Employer demand for captive workers is not an accurate proxy for real need in our labor market. Instead, using objective labor market data, DOL should stop issuing H-2B labor certifications for jobs that are not seasonal, as well as for work in areas or occupations with a labor surplus, where unemployment is 6% or above.

USCIS should not issue H-2B visas to employers who are engaged in labor disputes. To ensure that work visas programs are not used to undermine worker organizing and labor law enforcement, USCIS should engage in deconfliction with DOL, EEOC, and NLRB to ensure that they do not bring H-2B workers into jobsites where there are active labor disputes.

DOL needs appropriate resources and staffing to enforce worker protections in the H-2B program, including protections against discrimination in recruitment. The drastic, long-term underfunding of the DOL and NLRB has resulted in a lack of capacity to timely respond to complaints and near impunity for employers who violate workers' rights. Enforcement resources should reflect the importance of guaranteeing a level playing field with safe and fair conditions in seasonal industries. However, funding for WHD and OSHA have remained flat over the past decade, while the number of workers they are responsible for protecting has increased sharply.[2]

Meaningful enforcement to bring integrity to the H-2B program will require resources. Employer processing fees should be increased to levels needed to fund robust enforcement. Given the short-term nature of the visas, DOL should create an expedited investigation process for H-2B violations to ensure that all relevant witness testimony and evidence is collected.

DOL should enhance enforcement efforts and stiffen the penalties for employer violations. Employers found to have violated recruitment requirements, engaged in fraud, discriminated against workers, or otherwise violated labor and employment law should be barred from using the H-2B program. The Laborers' International Union of North America has documented substantial abuses by construction and landscaping companies that together have received tens of thousands of H-2B visas over the past few years. To continue to allow such a large number of visas to be issued to employers with a demonstrated record of labor violations undermines the integrity of the program and reduces the number of visas available to legitimate and law-abiding seasonal employers.

Employers should be held accountable for the actions of labor contractors, recruiters, and agents of recruiters. Ultimately, employers must bear the responsibility to ensure that workers are treated fairly throughout the recruitment and employment process. There must be joint liability between labor contractors, staffing agencies, or other third party employers and the ultimate beneficiaries of the labor.

[2] https://www.epi.org/blog/worker-protection-agencies-need-more-funding-to-enforce-labor-laws-and-protect-workers/

In addition, Congress should:

- ***Limit the duration of H-2B eligible job orders to 7 months*** to prevent the misuse of the program for year-round employment;
- ***Cap at 100 the number of visas that any single employer can receive*** to prevent large employers from squeezing out small businesses; and
- ***Only issue visas to direct employers***, ending the use of the program as a vehicle for outsourcing and fissuring employment dynamics.

Fair Recruitment

H-2B dynamics over recent years make clear that employers in many industries have developed a dependence on the visa program for their staffing model. H-2B visas are meant to be used only when no U.S.-based workers are available, yet there are currently no serious requirements for employers to conduct a nationwide search. More attention is needed to identify and address the barriers that keep qualified U.S. workers from accessing seasonal jobs. Moreover, foreign labor recruitment lacks effective regulation and oversight. Fraudulent labor recruiters often charge unauthorized fees that drive migrant workers into debt, making them vulnerable to abuse and exploitation before they even begin their employment. The following measures are needed to prevent recruitment abuses.

Employers should be required to undertake both local and national recruitment efforts before looking abroad. Statute requires that H-2B visas can only be utilized when no workers are available in the U.S. Given the persistent and racially disparate pockets of unemployment or underemployment around the country and decreased levels of workforce participation, seasonal employers should be required to recruit workers at both a local and a national level before accessing H-2B visas. Such a requirement would help to address escalating workforce disruptions. For example, workers displaced from employment by the hurricane in Puerto Rico should be able to learn of and apply for job opportunities in other parts of the country. Like H-2B workers, their transportation costs should be covered by the employer if they are hired to help alleviate local labor shortages for seasonal work, and they should also be offered similar housing arrangements.

When low local unemployment rates require recruitment in a national market, wage rates must also be responsive to that national market. Unless wages are set by a collectively bargained agreement, employers should be required to offer the local area prevailing wage or the national prevailing wage for the relevant SOC code, whichever is higher.

International recruiters and U.S. recruitment agents should be required to register with DOL and designate which employers they are working for. This information must be publicly disclosed and available to prospective workers. DOL should have the right to deny authorization to any organization or individual that has violated program regulations, misled workers, or failed to accurately supply full required information.

Seasonaljobs.gov should be enhanced to serve as an effective portal for job seekers both inside and outside the United States. Facilitation of viable recruitment efforts on a national level will require a highly functional national jobs database. In addition to providing notice of available

positions to relevant job search sites, DOL should also use this national platform to notify unions of available positions around the country in occupations relevant to their membership.

DOL should ensure that seasonaljobs.gov serves as a national platform for standardized job postings that has the capacity to reach current and prospective U.S. workers with real time information in a way that is easy to navigate and language appropriate. Unions and advocates with localized expertise on market wage rates and workforce availability should also have opportunities to review job orders and provide input as to the appropriateness of the classification and designated wage, in order to prevent the misclassification of occupations, which is a common means of wage suppression in temporary work visa programs.

Unions representing workers in relevant occupations should receive notice of seasonal job openings and be able to dispatch members in response. In order to ensure that H-2B employers do not bypass available U.S. workers, unions must be better apprised of relevant job opportunities and have the opportunity to notify employers when they have qualified workers available to fill positions. DOL should create an automated function on seasonaljobs.gov whereby interested unions can sign up to be notified when job openings in the relevant SOC code or geographic area are posted to the site. DOL should also audit employers to ensure compliance with domestic recruitment requirements, including outreach to unions.

The ban on recruitment fees should be enforced in ways that do not penalize workers. Agencies must work together to correct the disincentive for H-2B workers to report recruitment fees by reversing the policy of denying visas to workers because of recruitment fee payment. Instead of penalizing workers, agencies should ensure that employers reimburse workers for any recruitment fees paid and bring enforcement actions against employers who fail to do so. If recruitment fees are not reimbursed or the worker otherwise faces retaliation, the worker should still be granted entry with work authorization. If no similar H-2B position is available, USCIS should grant humanitarian parole and work authorization for at least a year so the worker can seek employment and recoup the fees that he or she was forced to pay.

Gender and Racial Equity

U.S. anti-discrimination laws prohibit discrimination in hiring and employment on the basis of race, color, sex, religion and national origin. Yet recruiters and employers openly express preferences related to national origin, gender and age when hiring through the H-2B and other work visa programs. In this way, guestworker programs have been quietly re-segregating entire sectors of the U.S. workforce based on racialized and gendered notions of work.

H-2B employers should be prohibited from discriminating against U.S. applicants based on their criminal backgrounds. Prospective H-2B employers should be required to document that they have in place policies to prevent any form of discrimination in recruiting U.S. workers, including by verifying that they do not screen out applicants based on their criminal record, unless expressly required for the specific position. If they are found to have imposed such barriers to employment for applicants, they should be barred from the program.

Due to the disparate impact of the criminal justice system on people of color, the use of criminal background checks in employment is inherently an issue of employment discrimination. In 2012,

the Equal Employment Opportunity Commission (EEOC) issued guidelines specifically addressing the risks of racial discrimination through the overly broad application of criminal background checks in employment decisions. As described by the EEOC guidelines, the overly broad application of facially neutral criminal background check requirements to employment decisions creates a risk of unlawful employment discrimination.

U.S. workers need not only to be aware of potential job opportunities, but also to have a realistic chance of being hired when they apply. Many of the workers who been harmed by inadequate recruitment requirements in the H-2B program are those who have already been unjustly marginalized in the workforce.

H-2B employers should be prohibited from imposing unnecessary experience requirements for entry-level positions. Unnecessary experience requirements create a real barrier for young workers seeking to enter the labor market or secure seasonal employment. DOL must take steps to prevent this practice and sanction employers who impose experience requirements for Job Zone One positions. On the job training should be provided for any job requiring little or no prior experience including all O*NET Job Zone 1 jobs[3].

H-2B employers should be required to conduct language-appropriate recruitment for non-English speakers. One fundamental aspect of effective recruitment and safe employment is the need for the information to be shared in languages other than English. Given the linguistic reality of workers in many H-2B occupations, limiting information to English-language content serves as a barrier to workers of color and a potential threat to worker rights.

DOL should establish an Equal Opportunity Advocate to expose and address discrimination in the H-2 visa programs. This position would have the charge to produce reports and recommend and implement policies to promote equity in seasonal jobs.

Migrant worker women must be protected from discrimination throughout the recruitment and employment process. DOL should include a non-discrimination statement on every job posting on seasonaljobs.dol.gov, clarify complaint mechanisms and publish data that workers can use to make employment decisions. Targeted enforcement initiatives should prioritize the inspection of H-2 employers to detect sex discrimination and violations that adversely and disproportionately impact women.

Domestic recruitment should prioritize affirmative efforts in communities of color with high levels of unemployment. State Workforce Agencies with areas of high unemployment near H-2B temporary employment positions should be responsible for identifying barriers to availability of these jobs to unemployed workers. When unemployed workers cannot access job opportunities because of lack of transportation, employers should be required to offer to arrange transportation to work or offer housing accessible to the work location.

[3] See https://www.onetonline.org/help/online/zones#

Conclusion

The AFL-CIO strives to ensure that all working people are treated fairly, with decent paychecks and benefits, safe jobs, dignity, and equal opportunities and protections. We cannot do that while our country maintains a subclass of millions of exploitable workers. The right way to use immigration policy to help workers is by expanding rights and ensuring that all working people, regardless of immigration status, have access to the full protection of labor and employment laws. This requires reform of both our work visa programs and our approach to enforcement at the workplace.

Immigration enforcement should complement, rather than conflict with, a strong, well-resourced and effective system of labor standards enforcement. However, our nation currently spends a shocking twelve times more on immigration enforcement than it does to enforce the laws meant to protect more than 160 million workers in job sites around the country. This disproportionate focus has created an environment in which employers violate labor laws with impunity, while immigrant workers and guestworkers feel like they have a target on their backs. It is high time to rebalance our enforcement priorities.

Working people rely on each other to ensure justice in our workplaces and our communities, but all too often, the threat of immigration enforcement is used as a weapon to crush worker organizing and prevent people from exercising their basic workplace rights. When immigrant workers are scared into silence, violations go unchecked—and that makes us all less safe at work. We cannot reasonably expect to end wage theft and exploitation without protecting those workers who have the courage to take a stand. This why we urge passage of H.R. 7549, and also why we continue to call on USCIS to create a process to extend concrete protections and work authorization to workers who take action to help enforce our labor laws.

Immigration reform is a key part of the AFL-CIO's Workers First Agenda, and we urge Congress to utilize any possible vehicle to enact a long overdue path to citizenship for all those whose labor helps our country to prosper. While legislative efforts continue, we have also called on the Biden Administration to take immediate and assertive steps to ease the suffering in our workplaces and prevent the threat of deportation from being used as a weapon to keep working people from asserting their rights on the job.

Rather than turning away asylum seekers or expanding abusive temporary labor programs, now is the time to restore and bolster our humanitarian systems. Successive waves of immigrants and refugees have always helped to build, serve, and feed our nation. Today is no different. Humanitarian pathways are a source of strength and vitality for our country, our workforce and our unions and we urge the Administration to announce TPS designations for all eligible countries, stand up robust resettlement efforts and keep our doors open to working people from all over the world.

We cannot have a just recovery while we maintain a workforce with tiered rights, so we once again urge Congress to take swift and decisive action to reform the abusive H-2 visa programs and extend permanent protections to all working families. The labor movement will continue to push for both legislative and executive action to ensure that all workers have the status to assert our rights on the job and in the community. The best way to strengthen our democracy and our economy is by empowering all workers, with no exclusions.

Chairwoman ADAMS. Thank you. I am going to recognize now—I have got some time. I am going to yield it back, but I want to recognize the Ranking Member for questioning the witnesses. You are recognized, Mr. Keller.

Mr. KELLER. Thank you. We cannot ignore the elephant in the room, which is that President Biden's border crisis is a manmade disaster. Illegal aliens and drugs are flooding into our country at record levels, with no end in sight. The open border undermines the lawful guest worker programs we are discussing today.

Mr. Sequeira, how does the current environment of an open border and unenforced immigration laws affect the H–2A and H–2B visa programs?

Mr. SEQUEIRA. Thank you, Mr. Keller. I think there really are two impacts that come to mind. The first is that employers who go through all the trouble to apply, and to legally hire workers through these guest worker programs and pay an enormous amount of money to consultants and attorneys, as well as the additional benefits and wages that have to be provided, end up being audited by the Department of Labor or other, and nitpicked over small violations.

Meanwhile, as workers flood across the border and are hired by other employers, they are rarely audited. Employers generally in the program think that there is a real imbalance and an unfairness in the fact that they legally hire workers, yet all the enforcement efforts of the U.S. Government are focused against them, rather than others.

Second, I would say from the worker perspective many workers, as they who come legally in these programs, who see folks come in illegally, and there are no repercussions for them, will oftentimes decide well why am I going through all the trouble to go get a visa if I can just come into the country illegally and work.

Mr. KELLER. Okay. Also, Mr. Sequeira, we have heard today about bad actors in H–2 programs. Based on your experience, and on the available data, are most employers doing their best to comply with the extensive requirements of these programs?

Mr. SEQUEIRA. In my experience they are. Again, I do quite a bit of audit work, helping employers navigate audits by various government agencies, and the overwhelming number of violations are inadvertent violations with no harm to workers' wages and working conditions.

The programs are full of scores of technical violations and very minute detailed obligations that have to be met, including having your Federal employee ID number on a paycheck stub, for instance. Most of the violations are of that nature. I do not want to say that there are never serious violations, there certainly are. The overwhelming majority of employers do their best to comply with the law and do so successfully.

Mr. KELLER. I would say the employers that are doing it properly want to make sure that the ones that are not and treating people poorly are held accountable?

Mr. SEQUEIRA. Absolutely. The employers who rely on these programs to supplement their domestic workforce rely on these programs, and they want to continue to have access to them, and they

have got no compassion for employers who flout the law, and intentionally deprive their workers of their rights.

Mr. KELLER. Also, Mr. Sequeira, the H–2 programs have wage requirements intended to ensure that H–2 workers do not negatively impact the wages of American workers. What are these requirements, and what does the research say about them?

Mr. SEQUEIRA. Well, Congress designed the program specifically to ensure that U.S. workers would not be adversely affected, and that determination has to be made before an employer ever receives approval to hire these workers. The Department of Labor assigns specific wages, both in H–2A, and H–2B that the Department has determined are sufficient to not adversely affect U.S. workers.

There is no scholarship that shows otherwise. Again, because the basic premise of the program is you cannot hire these workers unless you pay a wage that does not adversely affect them. There is by definition no adverse effect.

Mr. KELLER. The wages we are talking about are set by the Federal Government, not by the people hiring the H–2 individuals?

Mr. SEQUEIRA. That is correct, and nationwide they vary by region in the H–2A program, and nationwide they average above $15 an hour. In the H–2B program, they vary by occupation, and specific locality, but I have many clients that are paying H–2B wages close to $20, in some cases, more.

Mr. KELLER. When people talk about these H–2A and H–2B individuals that are coming under these visas, getting mistreated, and not getting paid a proper wage. That wage is not set by them, it is set by the government?

Mr. SEQUEIRA. That is exactly right. Most employers would tell you these wages that I am required to pay are much higher than actually prevail in the local market area. Again, when you are faced with workers who have come into the country through other than legal means, the only requirement the Department of Labor enforces is that people are paid the minimum wage, $7.25 an hour.

Again, employers complain I have to jump through all these hoops and legally hire workers to pay this high wage rate, my competitors can pay $7.25 an hour.

Mr. KELLER. We do not have our immigration laws enforced at our southern border, and we have people coming here illegally, who are trafficked and taken advantage of.

Mr. SEQUEIRA. In many cases, that is true, yes.

Chairwoman ADAMS. The gentleman's time is up.

Mr. KELLER. Thank you.

Chairwoman ADAMS. Thank you very much. I want to recognize Ms. Cherfilus-McCormick, you are recognized, ma'am for 5 minutes.

Mrs. CHERFILUS-MCCORMICK. Thank you, Madam Chair. My question is for Mr. Costa. Mr. Costa, Mr. Sequeira points to the importance of the DOL's role in verifying that there is not an adequate supply of domestic workers. In your view, does the DOL have adequate resources to perform that role?

Mr. COSTA. Well, there is the issue of resources and demand. The Office of Foreign Labor Certification is not actually verifying whether there are workers available or not. What they are doing is requiring employers to post job orders on a website, and they are

not looking at real world labor market conditions when they do these sorts of assessments, and I think maybe most importantly, and I think Mr. Pinkins has spoken about this.

After these jobs are posted OFLC, the Office of Foreign Labor Certification, is not doing anything to check to make sure that employers actually hire the U.S. workers who applied, so that allows them to really just overlook the U.S. workforce.

Mrs. CHERFILUS-MCCORMICK. Thank you. I have a second question for you. Mr. Sequeira also stated that the H–2 workers are among the most protected and educated workers when it comes to their rights. Can you explain why even given these aspects of the H–2 program, H–2 workers continue to face high levels of exploitation and workforce abuse?

Mr. COSTA. Sure. Even if we accept that these workers are briefed more than other workers about their rights, the reality is that the precarious immigration status that they have makes them vulnerable, and makes them very unlikely to complain when something goes wrong on the job, where they are not paid fairly, when they have unsafe working conditions, because that complaining can lead to getting fired, which leads to getting deported, and often these workers are paid a legal recruitment fee.

I also think Mr. Sequeira has also kind of glossed over the fact that H–2 workers actually do get robbed of their wages quite a lot. In the report that I published, we looked at data going back from 2000 to 2019, and there was about $24 million stolen in back wages from H–2A workers.

These are workers who earned very low wages, and it was almost 42,000 workers who had their wages stolen over the years, that is wage and hour data. The workers are vulnerable. We actually published a study in 2015 showing that H–2 workers earn approximately the same wages as documented workers, so it is not so much that undocumented workers are undercutting the wages, it is that H–2A workers, even though they have "legal status", they are still paid low wages.

Why is that? Well, because they cannot switch jobs, they cannot take the skills that they learned to do to another job, so there is no wage gain, there is no wage premium for this "legal status."

Mrs. CHERFILUS-MCCORMICK. Thank you so much. Madam Chair, I yield back the rest of my time.

Chairwoman ADAMS. Thank you very much. I want to recognize now the Ranking Member of the Full Committee, Representative Foxx you are recognized for 5 minutes.

Ms. FOXX. Thank you, Madam Chair. I would like to echo subcommittee Ranking Member Keller's sentiments on the Biden border crisis. It is as if the President wants chaos at the border, or simply does not care. The risks of human trafficking have been greatly increased because of the Biden administration's open border policies.

Mr. Sequeira, would you agree that what is most urgent is to secure the border, the southern border, and enforce our immigration laws to stop human trafficking?

Mr. SEQUEIRA. Thank you, Ranking Member Foxx. Yes, I would agree with that, and I think most everyone would agree that the border should be secure, and that the Federal Government should

do more to ensure that there is not extreme cases that we have seen all too recently at the border with human trafficking, and certainly the American workforce and American workers, I am sure, would appreciate increased border enforcement, so that they do not have to unfairly compete against workers who have not come to the country legally.

Ms. FOXX. Well, I wish you were right in saying almost everyone, but obviously, that is not the case, because the Biden administration is not enforcing the law. Many employers in North Carolina use the H–2 programs when no U.S. workers are available for these jobs. DOL regulations are intended to ensure that H–2 workers do not displace American workers, and I am very familiar with the rules and regulations and hear from employers all the time about this.

Mr. Sequeira, what do the statute regulations require before an employer is approved to receive H–2 workers, and what has been your experience with these regulations?

Mr. SEQUEIRA. There are very complex regulations by the Department of Labor, and additionally through the Department of Homeland Security, but in essence you can boil the process down to four major requirements. The Department of Labor has to determine if the employer is actually offering a temporary, or seasonal job, that it is a bona fide business, with a bona fide job on a temporary basis.

They require the employer to pay a mandated wage. Again, the government sets the wage at a level that it thinks is sufficient to protect U.S. workers. Then that job opportunity has to be advertised to U.S. workers. They have first shot at these jobs. They have a right to the jobs. If they are qualified, you are required to hire a U.S. applicant.

Even in the H–2A program, that requirement extends through the 50 percent point of the employment period. Even if you have already gone through the trouble of hiring U.S. workers—I am sorry, hire H–2A workers because you had no U.S. workers show up, if a U.S. worker shows up halfway through the employment period, you are still required to hire them.

There are extensive requirements in the regulations that employers are required to adhere to, and by and large they work.

Ms. FOXX. Well, that is my understanding too. Contrary to what we just heard a few minutes ago, they are paying the wage that is set. Let us talk a little bit about that. DOL sets the wage rates for H–2A workers for different reasons around the country, but many employers believe that these wage rates do not accurately reflect market conditions, and the unpredictable nature of the rates makes it challenging for employers to know what their labor costs will be.

Mr. Sequeira, what are the flaws in how DOL calculates the H–2A wage rates?

Mr. SEQUEIRA. I am not sure we have enough time today to really discuss that in detail, but I would say in general terms there are a lot of complaints with the way the wage data is collected and analyzed by USDA, and I think many of those can get into methodological problems and sample sizes.

The biggest problem in the end for employers is it is just simply not predictable. Employers and farmers do not know from 1 year to the next what the wage rate will be. In many areas of the country the wages will go up 5, 10, sometimes even 20 percent from 1 year to the next. You simply cannot—particularly as a farmer who does not set the price for their crop, you cannot effectively plan when you do not know what your labor costs are going to be.

Ms. FOXX. I believe they went up about 17 percent recently. I know down in Florida because I had some friends contact me about that. Well, we would be happy to get from you an analysis that we can submit for the record since we did not have enough time to go into answering that question a little more thoroughly, and I appreciate the fact that there is not enough time.

If you will submit some material for us, we will get it in the record. Thank you very much for your testimony. I yield back Madam Chair.

Chairwoman ADAMS. Thank you. Thank you, Ranking Member. I want to recognize Mr. Norcross. Gentleman, you have 5 minutes.

Mr. NORCROSS. Thank you, Chair. I certainly appreciate you and the Ranking Member for holding this hearing. It is, as I would describe, some of the best we have as a country, and some of the worst. The idea of immigration as something that we all believe in, but certainly needs to be handled in a way that benefits everyone.

Mr. Costa, one of the biggest flaws we have seen in the H–2B program is that the program tends to drive down wages for both immigration workers and those American workers. You know we talk about the wages being defined by the Department of Labor through surveys and things like that, but can you please discuss what Congress, Department of Labor, and others are doing to ensure that these prevailing wages are properly paid to workers who have those H–2B visas and workers who are already in the U.S. who work in these industries? How do they enforce it? We talk about enforcing the border, and I understand those discussions. Once they are here we see such violations of prevailing wage. Can you talk about that a little bit?

Mr. COSTAS. Sure. I do think that just to State at the top, the wage rules should be improved. They should reflect the national standard because the H–2B statute sets a national standard for recruitment and for workers, and at present it only reflects local wages.

When you compare national H–2B average wages versus average wages for all workers, the H–2B wages, my research has shown, are usually lower. I think it is an easy fix, it just needs political will, and the administration could actually do that on their own.

To your point about enforcement, I think you know we do know that H–2B industries where most H–2B workers are working, wage theft is very common among all workers in those top industries, wage and hour division data show that pretty convincingly.

When wage and hour does an investigation in a major H–2B industry, 80 percent of the time they find violations, and there was actually 1.8 billion dollars in the past 20 years stolen from workers in those industries. That is all the workers in the industry, not just H–2B.

I do think that the problem with enforcing the prevailing wage rule is that you know it is very difficult for H–2B workers to complain because of their precarious immigration status. They are very afraid to come forward because if an employer finds out that they are complaining, they can just fire them. They become deportable. That makes it very difficult to stay in the country and pursue a claim, whether it is through wage and hour, or whether it is through litigation.

That legal status really makes it hard for them to enforce their rights, and that is really the crux of the issue, I think.

Mr. NORCROSS. Thank you and let us be clear. The vast majority of employers do the right thing. Occasionally they will make a mistake. We are not talking about that. We are talking about that 8 to 10 percent who literally undercut the entire industry, and that is where I am going to go with my next question.

When we start talking about those violations, those companies that get the H–2B guest worker visa year after year, there are dozens of them, but violations, wage and hour, health and safety, recruitment, yet they continue to get it. They get the next year, and do the same thing over and over again.

The question is in your opinion Department of Labor, do they properly fund and hold these bad actors accountable? How do we get rid of the bad guys, which helps all the good employers?

Mr. COSTA. There has been some good reporting from Buzz-Feed that shows that many violators of the H–2B programs year after year continue to get workers as you readily suggest. I do think that something that would really help that has not been done is to have some sort of a front-end system to check whether or not employers have violated wage and hour laws, discrimination laws, civil rights laws.

Some sort of a—and maybe call it a TSA pre-check sort of a thing where employers submit their information and you know attest that they have not violated these laws in the past few years, and then have DOL verify it in some way. That way, you know, wage and hour is vastly underfunded, and understaffed, and probably will continue to be, so we need to have some way to weed out these bad actors before they actually get the visas, because as you mentioned they can violate the program year after year and keep getting visas, you know, really with no problem.

Mr. NORCROSS. Madam Chairwoman, we should take a look at that. Again, we are not trying to overburden the 90 percent of folks who are doing the right thing. We are just trying to get rid of the bad actors and level the playing field, and with that, I yield back the balance of my time.

Chairwoman ADAMS. Thank you, sir. Let me yield to now Ms. Miller-Meeks, you have 5 minutes, ma'am.

Mrs. MILLER-MEEKS. Thank you, Chairwoman. I thank our witnesses for being here. I am in Iowa, a former Director of the Department of Public Health, a military veteran, a physician, so I have had the ability to take care of people across a broad spectrum of Iowa.

I am from Texas originally, however, so I am very familiar with illegal immigration, and being in Iowa, I am very familiar with H–2A and H–2B. I have visited employers who have people that come

into the program. It is a very valuable program for us in agricultural communities.

I have also spoken with the workers at those farms, and at those dairies who like the job that they are doing. I have been able to take them aside to try to get information individually from them about their working conditions as well. As I said, a number of employers in my State use the H–2A and H–2B programs when no U.S. workers are available.

We used to have teenagers who would go out into the fields, but that does not seem to be an occupation that they strive to do in the summer any longer. While they appreciate the opportunity to fill jobs that are crucial for their operations, they are frustrated by the challenges—these are the employers, of navigating three different Federal departments to secure workers of complying with complex regulations.

And let me also say that one of the bills I cosponsored on legal immigration was passed this week through the House, and so we want to do what we can, and the doctors I've worked with who have come here legally think the system is unfair that it takes them so long to become legal citizens, where people are coming across our border with no repercussions.

Mr. Sequeira, what are the top reforms you would make to improve these programs?

Mr. SEQUEIRA. Thank you, Congresswoman. There are a number of reforms, I think a number of reforms that you know Mr. Costa and others, and employers could probably agree on. The process is too long. Most employers complain that it is too bureaucratic.

They have to start from the beginning every year, and again many employers have a seasonal need every year. They have to apply to the program every year, but every year they have to start from scratch. The government should build a data base, should have information to be able to quickly verify that they have a seasonal need, that they are offering the correct wage, and the process could be sped up, rather than taking 3 months. It could certainly be cut down.

Similarly, the Department of Labor determines all of these elements, that there is a temporary need, that the correct wage is being paid, et cetera. Once you clear that hurdle, you go to the Department of Homeland Security, and they determine all the same stuff over again.

It is classic government bureaucracy and inefficiency that really, I think for the benefit of the workers, for the benefit of the employers, and for the benefit of the government and the taxpayer, there could be a simpler, more efficient way to do this.

Mrs. MILLER-MEEKS. Having visited the border several times, and either witness, this is a yes or no question, are people coming across the border illegally even though they are processed, and given a return date for status, for refugee status. I mean are those individuals vulnerable to extortion, wage theft, and human trafficking? Yes or no, Mr. Pinkins? Yes or no please, I have got another question, yes or no?

Are these individuals coming across our border illegally subject to human trafficking, wage theft, vulnerabilities to extortion. Are they being utilized by the cartels, yes or no?

Mr. PINKINS. [Off mic.]

Mrs. MILLER-MEEKS. Thank you. Sir, yes or no?

Mr. SEQUEIRA. Absolutely.

Mrs. MILLER-MEEKS. Thank you. They are at risk. I appreciate it. It was a yes or no question. Mr. Sequeira, in December 2021, the Department of Labor published a proposed rule to make changes to regulation used to determine adverse effect wage rates for H–2A workers. The proposed rule would continue using Agricultural Department's farm labor survey to determine the wage rates for a majority of field and livestock workers.

It would shift the remaining occupations to the Bureau of Labor Statistics, Occupational Survey, because DOL believes these jobs should receive higher wages. Are you concerned about the effects of wage rates on the proposed rules? Is this push or pull for further illegal immigration?

Mr. SEQUEIRA. Congresswoman yes, I am concerned about that proposal, and virtually every farmer I have spoken to across the country is concerned about it because I think that the Department of Labor fundamentally misunderstands the nature of agricultural labor. It is not a factory job that can be easily classified into a specific task.

Most farm jobs involve doing multiple tasks over the course of the day, and how can you possibly apply the Department's proposal, the absolutely highest possible wage for any of those tasks applies to the entire period of employment. That will break the back of American farmers.

Mrs. MILLER-MEEKS. Thank you so much to our witnesses. Thank you Chair, I yield back my time.

Chairwoman ADAMS. Thank you. Five minutes to Representative Jayapal, you are recognized for 5 minutes ma'am.

Ms. JAYAPAL. Thank you, very much Madam Chair. My home State of Washington has one of the five largest populations of migrant farm workers in the country, and the contributions of farm workers to our communities and our economy, simply cannot be overstated.

In 2015, guest farm workers on pear, apple, and cherry operations alone contributing 619 million dollars in economic activity in Washington State, while putting food on the table for countless families across our State. It is absolutely essential that farm workers receive the same labor protections that Federal laws afford to other workers.

Migrant guest workers in particular need robust protections because their legal status is tied to their employer, which makes them especially vulnerable to exploitation and abuse. Ms. Romero, let me start with you. In your testimony, you mentioned some of the horrific labor abuses that were discovered during Operation Blooming Onion.

In your experience, how widespread are abuses like those found in Operation Blooming Onion in the H–2A program? How can Congress act to address these abuses?

Ms. ROMERO. Thank you very much, ma'am. Farm workers come to us everyday telling us what the abuses are. In many cases, farm workers, when they come to work with an H–2A visa, their passport and their phones are taken by the recruiter, because they

want to make sure that the recruitment debt gets paid before they can send any money home.

I think the Farm Workers Modernization Act would give legalization to these workers and would take away a big excuse to abuse. In many cases, not to pay the workers for the work they have done. Workers have been sent home because without pay, saying we will be sending you your check, which they never receive.

The Farm Workers Modernization Act would help here, but also it is important that we have the knowledge that these workers need somebody to help them and represent their rights. A union, a collective bargaining agreement could do that for them. They would be there to make sure that they have a voice, that they have somebody to talk to when abuses are happening.

Ms. JAYAPAL. Well, let us talk about collective bargaining agreements. In an April 21st letter to Secretaries Mayorkas and Walsh, United Farm Workers urged the Department of Labor to require H–2A employers to have collective bargaining agreements with a labor union.

Just with a yes or no, Ms. Romero, I want to quickly go through a list of all the ways that unions and collective bargaining can help farm workers. Do they increase wages?

Ms. ROMERO. Yes.

Ms. JAYAPAL. How about strengthening workplace safety?

Ms. ROMERO. Absolutely.

Ms. JAYAPAL. How about improving employer-provided food, transportation, and accommodations?

Ms. ROMERO. Yes.

Ms. JAYAPAL. Increasing enforcement of wage protections?

Ms. ROMERO. Yes.

Ms. JAYAPAL. Protecting workers from retaliation?

Ms. ROMERO. Absolutely.

Ms. JAYAPAL. These are many of the benefits that would come forward if we were to have unions able to have a critical role in protecting workers from abuse. Every single day, migrant farm workers experience exploitation, fraud and abuse. The H–2A program desperately needs increased oversight and enforcement, and we have to do our work and continue toward meaningful reform.

Mr. Costa, what barriers are there to the enforcement of wage requirements and workplace safety regulations for H–2A farm workers?

Mr. COSTA. I think that the main issue is the temporary precarious immigration status that H–2A workers have. It just makes it too difficult to come forward and avail themselves of the Labor Department, or other agencies because they are worried about retaliation, which could lead to deportation, which would not allow them to earn back the money that they probably paid in terms of a legal recruitment fees just to get that temporary job.

Ms. JAYAPAL. How would unions help build trust between workers and worker protection agencies, and to what effect?

Mr. COSTA. Well, I think they could help them know their rights, help them bring complaints forward with less fear, by having more information, and obviously I think a collective bargaining agreement is one of the best protections that a worker could have.

Ms. JAYAPAL. Absolutely right. Thank you all for your testimony, and I yield back Madam Chair.

Chairwoman ADAMS. Thank you very much. Let me yield to Mr. Good, you have 5 minutes sir.

Mr. GOOD. Thank you, Madam Chairman. Mr. Sequeira, we have surrendered operational control of our border to Mexican crime cartels. This has been willful, it has been intentional, it has been purposeful by this administration. I continue to just be baffled by my friends across the aisle. Do they live in a fantasy land, in a land of denial, and pretend that it is not happening at the border?

That these statistics coming from the administration, that there has been 3 million illegal crossings in a year and half that are encountered by Border Patrol before they release the majority of them into the interior of our country, and then some 800,000 criminal got aways, the ones who do not want to be taken into our social services, free healthcare, free education, free travel, with no requirement to appear in Court.

That 800,000, which I submit we will not know the full extent of the harm of those until eventually when we seal the border, whether we cutoff funding in '23, when we will absolutely have control of this Congress because the American people are rejecting these policies, or when we have the presidency as well in '25, and we can seal the border then.

I think the most devious actors will then begin to unleash their fury within the country when the border is secure. Why would they do it now when the border is open, and their friends are coming across, and this administration, this majority, apparently does not care.

While that is going on, at the same time, you know, and of course a record number in May, we had 240,000 illegal crossings, the ones that were encountered, that does not count again the got aways that are some estimated in the neighborhood of 15,000 a month, or something like that. 10,000 a day now being apprehended we are told or encountered.

Apprehended sounds like we are turning them back. We are not. We are releasing most of them in the interior of the country. At the same time, and this ties into the H–2 discussion, we are growing the welfare State, we have—and as Assistant Secretary of Labor, I know you can appreciate this. We are growing the welfare State. We have removed the work requirements for subsistence.

We are paying more people not to work. We are paying for housing. We are giving more provisions to folks who are not working making them comfortable doing so. The labor participation rate is down. We have got 10 million open jobs in this country. Despite the democrat majority's contempt for employers, contempt for small business owners, and their belief that left to themselves, their own devices, they would exploit and abuse their employees, they believe that about H–2A's as well.

I have met with many farm groups. I visited many farms and agriculture employers in my district, and they treat these H2A workers like family. There is a close relationship. Many of them have been working there for 20 or 30 years, and so forth. I would submit it as a less than an ideal situation.

My question for you, with the 2-minutes that I have remaining, what can be done as a former Assistant Secretary of Labor, what can be done to get more Americans working again? What can be done to reverse the decrease in the labor participation rate, and to incentivize and get more Americans working to fill these jobs so we do not have to rely on H–2 workers?

Mr. SEQUEIRA. Congressman, that is a great question. Probably the most difficult question anybody is going to be asked today. It is something that has stumped social scientists, and economists, and policymakers, and this body, and throughout the city and the country. There is undoubtedly a crisis in this country with regard to labor and people who want to work.

There are some 12 million jobs available that go unfilled every month. Certainly, employers who rely on these programs are frustrated. It used to be that they would get a few U.S. workers who would apply, and would work part of the time, or a few days, and then ultimately quit.

Now employers report they cannot get any applicants at all, and——

Mr. GOOD. Where did all the people go?

Mr. SEQUEIRA. It is a great question, and how do they survive day to day? How do they pay their bills? I do not have the answer to that question. I wish I did. I do not know who does have the answer to the question, but there is certainly a failure of policy at the local level, State level, Federal level, perhaps all of the above that has created a situation where evidently millions of Americans feel that they do not need to work, and I do not think that that is a good place for America. It is certainly not a good place for American farms.

We are at a crisis on our farms today, and it will be another generation, and we will not produce our own food. It is going to be produced abroad, because some food and some crops require hand labor, and if there is not the labor in this country to do it, it can, and it is done now south of the border.

Personally, I would rather have my food grown in the United States where I know what is sprayed on it, how it is harvested, and can track the supply chain.

Mr. GOOD. Well said, thank you. I yield back.

Chairwoman ADAMS. Thank you. Representative Steel, you are recognized for 5 minutes, ma'am.

Mrs. STEEL. Thank you very much. According to my local chambers and many local companies need more employees. Our employment rate remains very low. In southern California where I came from, the construction, hospitality, and healthcare industries are all in need of more employees.

Every day I hear from folks in these industries that there is a shortage of qualified workers. These industries operate year around. The current H–2 system is not efficient for employers or seeking to be employed. Mr. Sequeira, if I have pronounced it wrong, I am sorry, but should Congress adjust the H–2B program to address the needs of the current economy?

Could Congress establish a new market driven plan for temporary workers to enter the United States when the economy needs

them? Fewer when our economy does not? Would making guest worker program visas portable help employers?

Mr. SEQUEIRA. Yes, Congresswoman. Certainly, the demand for the H–2B program far exceeds the supply of visas available. Congress has not adjusted the permanent cap on H–2B visas since it was created nearly 30 years ago, and a more market-based system for allocating H–2B visas would certainly work much better than the current system, something more along the lines of what is used in the H–2A program where it is a market demand.

As long as you can prove a temporary need, and are complying with the other requirements, you can access H–2B workers when there are not sufficient numbers of U.S. workers. The demand is easily twice the supply, three times the supply in the H–2B program.

Mrs. STEEL. If we reform the H–2B system, including E-Verify, could employers grow their business and fill vacant positions, and add more economic activity to our economy?

Mr. SEQUEIRA. I think that is undisputable, and you have seen in the H–2A program where many employers participate in E-Verify, utilize H–2A program for seasonal labor, and because they have a workforce that they can count on, that they know is available, they are able to grow their businesses, and many businesses have succeeded very well and contributed to the U.S. economy, and provided many more good paying jobs for U.S. workers because there is the support of the seasonal workforce as well.

Mrs. STEEL. Thank you very much for your answer. I yield back.

Chairwoman ADAMS. Is Mr. Takano on the platform, I want to recognize?

Mr. TAKANO. Madam Chair, I am.

Chairwoman ADAMS. Yes sir, you have 5 minutes sir.

Mr. TAKANO. Thank you, Madam Chair. My question is for Mr. Pinkins. Mr. Pinkins, in your experience representing black farm workers who have been displaced by white guest workers, do you believe that the H–2A employers are discriminating against U.S. farm workers on the basis of race, national origin, and age in their selection of H–2A workers and payment practices?

Mr. PINKINS. Yes. As an example, I will share this with you. The farming season in Mississippi begins in February and runs through November. H–2A workers are generally brought in for that time period. The entire season involves planting and harvesting crops like cotton, corn, soybeans, rice, et cetera.

Mississippi farmers have for years, season after season, brought in white South Africans as H–2A workers without affirmatively reaching out to local black American workers from the previous season as mandated by Federal regulations. When I say that you have to take into consideration that the country of South Africa is over 80 percent black, and less than 10 percent white.

I grew up in the Mississippi Delta, and my work is concentrated in the Mississippi Delta, and I have yet to see a black South African working on the farm in the Mississippi Delta. Hard-working Americans in the Mississippi Delta have been doing this farm work for decades, driving tractors, combines, and cotton pickers.

Planting crops in the spring, harvesting those crops in the fall. For generations their families worked in those fields, passing down

essential skills and traditions of hard work. They know the seasons. They know the geography, they know the equipment, and they know the crops.

Local community members literally know the soil in the Mississippi Delta. However, that is not the case with the workers who are brought in under the H–2A program. They arrive without an adequate understanding of the different seasons, equipment, crops, and so how do farm owners overcome this employee training hurdle?

Well, I will tell you. Many farm owners begin by finding or forcing local black workers to train and mentor foreign white H–2A workers on how to operate the equipment, understand the season, and plant and harvest the crops. All this while, the local workers who are doing the training are being paid as low as $7.25 an hour, the Federal minimum wage, while the farm owners are intentionally paying the H2A workers at least the adverse effect wage rate, and sometimes as high as $16 an hour.

Next, after they have been adequately trained, the farmers put their H–2A workers on the same type of equipment, tractors, cotton pickers, and combines, that the local black workers are operating in the same fields at the same time. The only difference is that the H–2A workers are still being paid up to $16 an hour, while local black workers who trained them and are now working alongside them, are paid $7.25 to $8 an hour.

Last, what happens when local workers ask for a fair raise? Everyone wants to be paid fairly for an honest day's work. When local workers ask for a raise, ask to be paid equal to their South African counterparts, one of three things happen. They are either ignored, flat out told no, or threatened with being fired.

Mr. TAKANO. Mr. Pinkins, I am trying to understand this—I mean I have heard of situations where foreign workers are brought in, whether legally or not legally, and the motivation is to pay the foreign workers less. You are telling me that these H–2A employers are paying specifically white South African workers more than the local black workforce.

Help me understand. Obviously, it is not an economic reason. You are telling me black workers are more qualified, more experienced, and know about the local conditions.

Mr. PINKINS. Yes. If a farm owner trusts the black worker enough to train an untrained worker to harvest his crops worth millions of dollars, clearly that local black worker is qualified to do the job. What does not make sense is why a farm owner would bring in an H–2A worker under a policy that says that he has to pay him up to $12.45 an hour, but still pay that local black worker $7.25 an hour.

That does not make sense from a business perspective. The common denominator here is race. You want to pay local black workers the least possible, while paying white South Africans sometimes $12.45 an hour, which is the adverse effect wage rate, and in many cases up to $14, $15, $16 an hour.

Mr. TAKANO. Thank you, Mr. Pinkins. Madam Chair, the only conclusion I would reach is that these employers have to specifically recruit white workers from South Africa over black workers

in South Africa, if what this witness is telling me is true. I yield back.

Chairwoman ADAMS. Thank you very much. Are there other members on the platform who we have not recognized? Okay. Then we are going to move on. I want to say thank you to the witnesses. I want to remind my colleagues that pursuant to committee practice, materials for submission to the hearing record must be submitted to the committee clerk within 14 days following the last day of the hearing, so by close of business on August 3, 2022, preferably in Microsoft Word format.

The materials submitted must address the subject matter of the hearing. Only a member of the subcommittee, or an invited witness may submit materials for inclusion in the hearing record. Documents are limited to 50 pages each. Documents longer than 50 pages will be incorporated into the record via an internet link that you must provide to the committee clerk within the required timeframe.

Please recognize that in the future that link may no longer work. Pursuant to House rules and regulations, items for the record should be submitted to the clerk electronically by emailing submissions to edandlabor.hearings@mail.house.gov.

Now, I want to again thank the witnesses for their participation today. It has been a very enlightening hearing. Thank you for your testimony. Members of the subcommittee may have some additional questions for you, and we ask the witnesses to please respond to those questions in writing.

The hearing record will be held open for 14 days in order to receive those responses. I want to remind my colleagues that pursuant to committee practice, witness questions for the hearing record must be submitted to the majority committee staff or committee clerk within 7 days.

The questions submitted must address the subject matter of the hearing. We will now have closing statements, recognizing Ranking Member Keller for a closing statement. Mr. Keller you are recognized sir.

Mr. KELLER. Thank you, Madam Chair. Also thank you to our witnesses for appearing before the committee today. President Biden's border crisis hangs over this hearing. It is a self-made disaster that is endangering millions, and creating a humanitarian crisis.

We cannot meaningfully discuss reforming the H–2 programs while our border is wide open and being overrun. Employers need the ability to hire temporary H–2 guest workers when no U.S. workers are available, even though the government makes programs inefficient and frustrating to navigate.

The H–2 programs are certainly in need of improvements. While the H–2 programs have extensive protections for guest workers and American workers, H–2 employers cannot compete in an environment with an unsecure border, and millions of illegal workers filling labor shortages.

President Biden must secure the border, build the wall, and enforce our immigration laws, which will allow the H–2 programs to operate properly, and allow Congress to address the lawful guest worker programs. Thank you, and I yield back.

Chairwoman ADAMS. Thank you, sir. Let me just recognize myself for the purpose of making my closing statement, and I want to again thank our witnesses. Thank you for your time, and for your testimoneys.

Today we repeatedly heard the need for increased worker protections and employer accountability within the H–2 guest work programs. For too long, foreign workers have been exploited, defrauded, and abused at the hands of their employers.

As I stated earlier, these programs do not reflect their intended purpose. Instead, these programs are relic of slavery. Together we must reform the H–2 visa program to ensure that all workers are treated with dignity and respect. To that end I look forward to working with my colleagues to advance several legislative proposals to prohibit worker discrimination, to protect workers from retaliation, and to strengthen labor standards.

Again, thank you to our witnesses. If there is no further business, without objection, the subcommittee stands adjourned.

[Whereupon, at 11:46 a.m., the Subcommittee adjourned.]

[Additional submissions from Ranking Member Keller follows:]

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August 1, 2022

The Honorable Alma Adams
Chair
House Subcommittee on Workforce Protections
House Committee on Education and Labor
2436 Rayburn House Office Building
Washington, DC 20515

The Honorable Fred Keller
Ranking Member
House Subcommittee on Workforce Protections
House Committee on Education and Labor
1717 Longworth HOB
Washington, DC 20515

Dear Chairwoman Adams and Ranking Member Keller:

Farmers depend on skilled, reliable employees to produce our nation's food, fuel, and fiber, and have long advocated for smart policies that provide stability for the agriculture workforce while ensuring that the guest worker program works for both farmers and guest workers. As the nation's largest general farm organization, the American Farm Bureau Federation (AFBF) appreciates the opportunity to share our views regarding the importance of H-2 programs to agriculture and how these programs provide mutual benefits to both employees and employers.

AFBF is troubled by the title of this hearing which insinuates that guest workers are treated as second-class citizens. AFBF disagrees with this sentiment and notes how substantive oversight, unique to H-2 visa programs, aims to protect both domestic and guest workers. Numerous federal departments oversee the H-2A and H-2B programs. The departments are tasked with conducting audits, responding to employee complaints, completing necessary investigations, and levying the appropriate recourse in the event of any wrongdoing. The Department of Labor, the Department of Homeland Security, the Department of State, and the Department of Justice all have oversight over some portion of H-2 programs and work to ensure laws and their subsequent regulations are followed. State agencies also play a significant role in conducting program oversight, including inspections, and responding to guest workers' concerns.

Numerous rules and regulations specific to these guest worker programs afford employees added protections compared to traditional employment arrangements. For example, H-2A employers are required to pay for an H-2A employee's travel to and from the workplace and to provide housing at no charge to the employee. This housing must be inspected before guest workers arrive to ensure the accommodations meet strict health and safety standards.

Some also falsely claim that H-2 programs drive down local wages and take away job opportunities for domestic workers. However, there are requirements in place to pay guest workers and any domestic worker in corresponding employment at an elevated wage rate set by the U.S. government. For H-2B workers, employees must be paid the prevailing wage rate for the job duty. For H-2A, farmers must pay their H-2A workers and any domestic employees engaged in the same work the adverse effect wage rate (AEWR). The AEWR continues to increase each year, which has outpaced wages in the rest of the U.S. economy. According to the most recent farm labor survey, the national average AEWR increased by 6.4%, compared to the year before. By comparison, according to the BLS' Employment Cost Index, nationally, wages

and salaries for private industry workers increased 4.6% for the 12-month period ending in September 2021.

Furthermore, there are requirements to ensure that these job opportunities are first available to domestic workers before openings become available to guest workers. Employers are required to recruit in the United States for available jobs before the Department of Labor provides the necessary certifications to allow the hiring of an H-2 worker from a foreign country. As part of this process, employers must advertise for the available job and hire individuals who respond to the ads. Employers who seek to use guest worker programs have exhausted other means of finding labor. However, farmers and ranchers continually face workforce shortages, forcing them to use the H-2 programs to plant, harvest, and process food, fuel and fiber.

America's farmers and ranchers understand that the success of their farming operations depends on the well-being of those they employ. Aside from it being the right thing to do, there is also a robust regulatory system to ensure that H-2 workers are treated fairly in the workplace and that their hiring does not undermine job opportunities for local individuals seeking employment. Should bad actors utilize the H-2 programs for nefarious reasons, AFBF asserts that the regulatory system set in place and administered by both federal and state entities can identify any wrongdoing and handle these situations appropriately. H-2 programs provide meaningful employment to those who may otherwise not have these opportunities in their home countries while also ensuring farmers and ranchers have access to a workforce, essential to domestic food production.

Sincerely,

Zippy Duvall,
President

[Additional submissions from Mr. Sequeira follows:]

August 3, 2022

Ranking Member Fred Keller
Committee on Education and Labor
Workforce Protections Subcommittee
2101 Rayburn House Office Building
Washington, D.C. 20515

Dear Ranking Member Keller:

In response to a question from Ranking Member Foxx at the Subcommittee hearing on July 20, 2022, I am providing for the record materials discussing some of the major flaws with the H-2A program's Adverse Effect Wage Rate ("AEWR"), as well as many concerns the agriculture community has with the Department of Labor's ("DOL") recently proposed changes to the way the AEWR is calculated and administered.

Enclosed please find a copy of the following:

1. Rulemaking comments filed with DOL by a national trade association of H-2A Employers, USA FARMERS, on January 31, 2022. These comments were filed in response to the DOL notice of proposed rulemaking, 86 Fed. Reg. 68174 (Dec. 1, 2021), concerning changes to how the AEWR would be calculated and administered. The comments discuss numerous problems with the current AEWR, the flaws in DOL's proposed changes to reclassify work performed on farms in order to assign even higher mandatory wage rates in the H-2A program, and alternative suggestions for reforms to the AEWR methodology.

2. Rulemaking comments filed with DOL by a national trade association of H-2A Employers, USA FARMERS, on September 24, 2019. These comments were filed in response to an earlier DOL notice of proposed rulemaking, 84 Fed. Reg. 36168 (July 26, 2019), concerning numerous changes to the H-2A program, including to the AEWR. The comments discussing problems with AEWR, flaws in DOL's proposed changes, and alternative suggestions for reforms to the AEWR methodology are found on pages 4 through 9 of the letter.

3. An economic analysis of DOL's proposed changes to the AEWR, entitled *Proposed H-2A Changes Tries But Fails to Contain Considerable Wage Variability*, prepared by the American Farm Bureau Federation and published on September 19, 2019. This analysis discusses some of the flaws in the current AEWR methodology and explains that DOL's regulatory proposal would exacerbate rather than correct the problems with the AEWR.

Sincerely yours,

Leon R. Sequeira

January 31, 2022

Submitted via www.regulations.gov

Brian Pasternak, Administrator
Office of Foreign Labor Certification
Employment and Training Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Re: RIN 1205-AC05
ETA-2021-0006

Dear Mr. Pasternak,

USA FARMERS is the national trade association that exclusively represents agricultural employers of H-2A guestworkers. Our diverse membership includes nearly 1,500 large and small farmers and ranchers from 44 states who participate in, and who are directly impacted by the Department of Labor's ("DOL" or "Department") administration of, the H-2A program. On behalf of the association and our members, we submit these comments on the Department's Notice of Proposed Rulemaking, *Adverse Effect Wage Rate Methodology for the Temporary Agricultural Employment of H-2A Nonimmigrants in Non-Range Occupations in the United States* that was published in the *Federal Register* on December 1, 2021 ("NPRM").

As we enter the third year of a pandemic, our nation is plagued by runaway inflation, continual supply-chain disruptions, empty grocery store shelves, and a dysfunctional labor market with millions of people quitting their jobs and millions more full-time and seasonal jobs remaining unfilled every month. Each one of these factors would be a disaster on their own, but altogether they are causing unprecedented economic destruction for American families and businesses. Unfortunately, the NPRM will improve none of these problems and instead will just exacerbate them.

The H-2A program and the current AEWR does not cause or contribute to an adverse effect on U.S. workers. Thus, the changes proposed in the NPRM (to the extent we can understand them based on the vague descriptions) will not remedy, or even guard against, adverse effect on U.S. farmworkers resulting from the employment of H-2A workers. Instead, there is ample evidence that the employment of foreign guestworkers (including in the H-2A program) contributes to more employment opportunities for U.S. workers and the Department has recognized this fact in prior rulemakings. These proposed changes, if finalized, will actually harm American workers, American consumers, and American farmers by driving up costs, decreasing domestic production of fruits and vegetables and increasing the rate of mechanization on those farms that survive. The result of this NPRM will be the same as the Department's prior

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continual increases in the AEWR: more and more of America's labor-intensive food production will move offshore. For years, the Department has been warned about the counter-productive effects of its endless upward ratcheting of H-2A wage rates to avoid adverse effect. In a global economy, food can be (and is) produced abroad for a fraction of the cost of production in the U.S. There is ample evidence of the flood of foreign produce in the U.S. that was not present when the H-2A program began. It is not 1986 and the Department has failed to account for changes in the economy, in farming, and in international markets in the last 35-plus years. In the end, this NPRM will produce higher costs for farmers, higher costs for consumers, and a reduction in agricultural employment opportunities in the U.S. for the very people the Department claims will benefit from these misguided policies.

The NPRM is replete with vague and conclusory statements about the basis for this proposal and its supposed minimal impact on employers. The vague descriptions and incomplete explanations about how the proposal would operate in practice, combined with the lack of relevant contemporaneous data or analysis to support the Department's premises and conclusions makes it impossible for the public to fully understand the reach of what the Department is proposing. And more importantly, those failures by the Department provide relevant data make it impossible for the public to fully evaluate the impact of the proposed changes in the AEWR methodology.

The Department attempts to support its proposal by citing to misleading comparisons of wage rate increases over different time periods and by excluding consideration of data and areas that do not support the Department's misguided conclusions. Elsewhere in the NPRM, DOL attempts to support its rationale by presenting misleading partial quotes taken out of context from USDA when the complete quotation in context actually undermines the Department's rationale. We share the concerns expressed by the American Farm Bureau Federation in their comments about those practices and the impact of the Department's proposal. Similarly, the Department relies on statements about general agricultural employment and prices, while ignoring data specifically applicable to the sectors of agriculture that rely on the H-2A program, which again would contradict the Department's conclusions.

In yet other areas of the NPRM, the Department offers as support for its proposal only general references to prior rulemakings that were conducted years, or even decades, ago. But general references to a rationale offered in support of a different rulemaking at a different time puts the public in the untenable position of trying to divine what particular data or argument in support of that old rulemaking supposedly offers support for the Department's (often vague) rationale or conclusion now. In other areas of the NPRM the Department cites no data illustrating the specific impact of its proposal and amazingly even admits that it has data that would illustrate the impact of the proposal, but it will not release that information until later (i.e., BLS data on average wages by occupation).

1. Vague Scope of Proposal

The scope of the proposal, and therefore its impact on employers is not entirely clear from the NPRM. The Department repeatedly says in the NPRM that the "vast majority" of H-2A job opportunities will not be affected by the proposal. Does "vast majority" mean 55% or 90% or something else? We do not know because DOL does not tell us even though DOL alone has access to the data that would answer the question. But the Department never says precisely who

will and who will not be affected by the proposal or how the Department determined that the vast majority would not be affected. Even for those employers whose job opportunity has historically been classified within an occupation that DOL now says is encompassed by the FLS, DOL provides no assurance that going forward the job will be classified the same way. The NPRM says that if the job duties in an H-2A application do not fall within the USDA field and livestock category, which itself includes multiple other job categories with different and in some cases overlapping job duties, and some duties are encompassed by another job classification subject to a different AEWR, then DOL will assign the highest possible AEWR. But the Department does not offer a clear or bright line test that would enable an employer to know in advance whether their job opportunity is or is not affected by the proposed changes. Therefore, contrary to the claims in the NPRM, the proposal does not simplify the process for ensuring workers are correctly compensated, nor does it minimize record keeping burdens because there is no way to know for certain in advance which occupational category applies to a job.

This confusion over the Department's proposal is compounded because the Department claims that it along with the State Workforce Agencies (SWAs) will be the arbiters of whether the described job duties constitute more than one occupation subject to different AEWRs. But the NPRM provides no explanation of how that determination will be made. With no clear delineation between occupations, employers can only guess whether this proposal will affect them and thus have not been provided with adequate notice of the nature of the proposed changes and an opportunity to respond.

Furthermore, the Department does not describe the appeal process for correcting faulty determinations by the SWA or the Department in assigning these new job classifications and AEWRs. The Department cannot impose these new requirements and simultaneously deny employers basic due process rights to challenge incorrect decisions by the Certifying Officer. Currently, DOL regulations only permit appeals of denials or Notices of Deficiency. Thus, if an employer is unilaterally assigned a new occupation and AEWR by DOL and their application is approved, they will apparently have no appeal process. There must be a timely appeal process as the SWAs and even the Department routinely make mistakes in processing H-2A applications, as the case data from the Office of Administrative Law Judges makes clear. In addition, in response to the Department's AEWR Final Rule in 2020, SWAs in several states routinely misclassified countless employer job opportunities and misapplied the Final Rule even before it took effect. The Department's failure to describe the process for assigning the new occupational categories and failure to describe the appeal process for contesting the assignment of an erroneous occupation and wage has deprived stakeholders of an opportunity to fully evaluate the impact of the Department's proposal and the failure to include an appeal process in any final rule will deprive employers of due process.

2. Flawed Rationale for Proposal

The Department notes in the NPRM that the AEWR has been formulated and applied the same way for virtually the entire history of the H-2A program. Yet, the NPRM proposes a dramatic change in the methodology based on conclusory statements and vague concerns that are not explained. The Department has not demonstrated that any sizeable number of U.S. farmworkers are experiencing or are at any threat of adverse effect from H-2A workers. To the contrary, all available data shows the opposite. The Department cites outdated rationale and

employment patterns from prior rulemakings, some going back decades, that are no longer relevant. For example, the NPRM cites supposed migratory patterns of U.S. farmworkers that are virtually nonexistent today. If there were ample U.S. farmworkers and they followed traditional migrant patterns there would not have been such dramatic growth in the H-2A program in recent years, despite the exploding costs of the program.

As DOL continues to pursue automatic annual increases in the AEWR, U.S. farm employment continues to decline. The most recent USDA FLS survey notes that at the high point in 2021, there were just 797,000 hired workers on U.S. farms. As the Department has noted in prior H-2A rulemakings, USDA noted there were more than 1.2 million farmworkers on America's farms in 2006. *See* 73 Fed. Reg. 8538 (Feb. 13, 2008). And as the Department no doubt knows, the number of U.S. workers who accept H-2A employment continues to be a fraction of one percent of the total available H-2A jobs each year. But the Department includes no analysis of how its continual increases in the AEWR correlates to the continued unavailability and declining supply of U.S farmworkers. Nor the Department address its ongoing efforts to retrain farmworkers to take other jobs in the U.S. economy, further reducing the supply of U.S. farmworkers.

There simply is no evidence that the H-2A program has an adverse effect on U.S. workers and the Department has failed to consider the dramatic changes in the available labor supply, migration patterns and flood of foreign-grown low-cost fruits and vegetables flooding the U.S. market. As we and others have repeatedly explained to the Department in prior rulemakings, U.S. farmers in the H-2A program are directly competing against crops grown in Mexico where the input costs are a fraction of the costs of farming in the U.S. Labor is one of the largest line-item costs on farms growing specialty crops, and for a farmer in the H-2A program, labor can be 40 percent or more of production costs. As DOL rachets up the H-2A wage rate year after year, farmers are unable to raise their prices to keep pace. Many farms have seen little, if any, increase in the sale price of their specialty crops in recent years. For many farms, revenues are decreasing despite increases in their production costs. Unlike other businesses, farmers do not get to set the price of their products. These rising production costs cannot simply be absorbed when U.S. farmers are competing for space on grocery store shelves with imported fruits and vegetables. Americans want cheap food, and bad government policy is pricing U.S. farmers out of the market.

Thirty years ago, the U.S. was a global net exporter of fruits and vegetables. Today, we import more than twice as many fruits and vegetables as we export.[1] Nowhere is this disparity more evident than in our trade with Mexico. In the past 15 years, fruit and vegetable imports from Mexico into the U.S. have tripled. In 2019, the U.S. imported $15.6 billion worth of fruits and vegetables from Mexico, while exporting just $1.4 billion.[2]

Much of this can be attributed to the relative costs of production. The minimum wage in Mexico in 2021 was about $7.00 *per day*. By contrast, the 2021 nationwide average mandated wage in the H-2A program was more than $14.00 *per hour* –16 times higher than Mexico. It does not take a PhD in economics to realize that fruits and vegetables can be grown and harvested in Mexico, shipped to the U.S., and sold in grocery stores at prices far below U.S. farm

[1] *See* CRS In Focus IF11701, *Seasonal Fruit and Vegetable Competition in U.S.-Mexico Trade* (Dec. 11, 2020)
[2] *Id.*

production costs. And that is exactly what is happening. There are no government subsidies and no import protections for specialty crop growers in the U.S. The recently passed USMCA trade agreement did nothing to address the problem of low-cost imports displacing American grown food in the domestic marketplace. As a result, American farmers are getting crushed. Ultimately, the U.S. consumer and the entire nation will suffer when we become totally dependent on foreign countries for fresh fruit and vegetables and this NPRM will hasten that process.

3. Impact of Proposal

Assigning a wage rate to a job opportunity without regard to how much time is devoted to a particular task is arbitrary and leads to illogical results. Farming involves performing many tasks during the course of a day or week or season. Duties vary depending on the weather or time of year. Most jobs involve a variety of duties and many of those duties may be performed only sporadically or even rarely. Assigning a different classification to a job opportunity with multiple duties just because that job may involve performing one particular task on an occasional basis during the week or even just occasionally during one part of the season is not a rational basis upon which to reclassify the entire job.

For example, many harvesting jobs include occasional truck driving duties for some workers as crops are moved from the field to storage. Depending on state laws, those truck drivers may be required to possess a CDL. That does not transform the worker into a heavy truck driver. The worker could have a 8-month long contract performing duties solely within the general farmworker category and only once a day during the last two weeks of the 8-month season drive a truck a few times a week in addition to their harvest duties. The nature of the job is such that the employer does not have enough truck driving work to constitute a full-time truck driving job, so it would not even be possible to file a separate H-2A job application as suggested in the NPRM. Thus, the employer would have to pay a harvest worker a truck driving wage for the entire season, dramatically increasing their labor costs as a result of this proposal. If the Department proceeds with its proposal, it should provide that in order for a job opportunity to be assigned a particular occupational code (and corresponding AEWR), the job must involve the worker performing for at least 51% of the time, the particular task or tasks that trigger the prospective occupational code. Thus, in the example above, the occasional CDL truck driving duties at the end of the harvest season would not result in a truck driving wage being assigned to the job opportunity.

Similarly, because of the vagueness in the Department's proposal it is not reasonably possible to determine how the concept of corresponding employment will be applied in these situations. Assuming the employer in the example above added harvesting duties to an application for truck drivers with a CDL in order to create a H-2A job with full-time work, would that now require that all the other H-2A employees on a separate H-2A application with only harvesting duties be paid the truck driving wage when the truck drivers are harvesting instead of driving a truck? It appears so and the Department has failed consider the costs and impact on employers resulting from that scenario.

The Department's proposal to change the definition of the AEWR is fatally flawed because it continues to focus only on the cash hourly wage and ignores all other forms of compensation, including housing and daily transportation provided to workers. H-2A workers

receive free housing and daily transportation (in addition to other benefits) that are not provided to U.S. workers, yet the Department continues to fail to include the value of these benefits in measures to avoid alleged adverse effect. Employers should be credited with the cost of these benefits when the Department measures the benefits received by workers. Doing so would not adversely impact U.S. workers at all. U.S. workers could still be paid the AEWR, but the employer should be able to take a credit towards the H-2A worker's cash wage for the value of these benefits just like any other employer in the economy could do for any other worker.

Alternatively, in lieu of the current AEWR construct, the Department should revise the AEWE methodology to track the federal minimum wage plus a modest premium of 15% as has been previously proposed in federal legislation would ensure a transparent and predictable wage rate in the H-2A program.

The proposal would also result in significant new complexity and confusion for both workers and employers as wage rates change at different times of year with some jobs potentially being subject to multiple changes multiple times a year. The Department provides no analysis about how many applications are now affected by current mid-season AEWR changes and how many would be affected by the new OEWS mid-season wage changes. Because DOL does not provide a clear delineation of what job category will be assigned to what work, and because DOL fails to make available in the NPRM the BLS OEWS average wage data it claims would apply in the future, it is not possible for employers to even estimate the impact of the NPRM.

We appreciate the opportunity to provide comments on the Department's NPRM and urge the Department to reconsider this proposal and negative impact it will have on U.S. workers, farmers and the economy.

Sincerely,

Chalmers R. Carr III, President
USA FARMERS, Inc.

September 24, 2019

Submitted via www.regulations.gov

Adele Gagliardi, Administrator
Office of Policy Development and Research
Employment and Training Administration
Room N-5641
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Re: RIN 1205-AB89
Temporary Agricultural Employment of H-2A Nonimmigrants in the United States

Dear Ms. Gagliardi,

USA FARMERS is the national trade association that exclusively represents employers of H-2A guestworkers. On behalf of our diverse membership that includes nearly 1,500 large and small farmers and ranchers from 44 states across the country, we submit these comments on the Department of Labor's Notice of Proposed Rulemaking ("NPRM") *Temporary Agricultural Employment of H-2A Nonimmigrants in the United States* that was published in the *Federal Register* on July 26, 2019.

We very much appreciate the efforts of the Trump Administration, the Department of Agriculture and the Department of Labor ("DOL" or "Department') to improve the efficiency and operation of the H-2A program and to do so through this notice and comment rulemaking. There are some elements of the NPRM that would make meaningful improvements to unnecessarily bureaucratic, outdated, and ineffective elements of the current H-2A program and we appreciate those proposed changes. We are deeply concerned, however, with several other more consequential elements of the NPRM that, even if well intentioned, appear to reflect a profound misunderstanding of modern agriculture and would result in added bureaucracy, complexity, uncertainty and costs for farmers. In addition, we are also particularly concerned about proposed changes for which there appears to be no legitimate justification and instead seem designed to specifically advantage DOL by removing long-standing protections for farmers and associations in the H-2A program.

First, we appreciate the Department's recent efforts in finalizing the proposed H-2A rulemaking concerning advertising (RIN 1205-AB90). That rulemaking, in removing a wholly ineffective and costly requirement in the H-2A program is long overdue and will result in a reduction of costs and burden on farmers going forward. We assume that Final Rule will take

the place of the proposed advertising provisions in this NPRM. Below we have included our comments on several major provisions in the NPRM noting our approval, disapproval and suggested modifications. Our comments are roughly organized with regulatory section headings, but the headings are not controlling. Some of the narrative following specific headings also contains comments on related provisions or concepts that are located elsewhere in the NPRM.

655.102 Transition procedures

The Department's proposal regarding the effective date of the Final Rule appears to be designed to prolong the period before any Final Rule would actually take effect. Ordinarily, a Final Rule in the H-2A program takes effect in 30 days. *See, e.g.,* 84 Fed. Reg. 49439 (Sept. 20, 2019) (H-2A advertising final rule); 80 Fed. Reg. 62958 (Oct. 16, 2015) (H-2A range livestock final rule); 75 Fed. Reg. 6884 (Feb. 12, 2010) (H-2A comprehensive program final rule); 74 Fed. Reg. 25972 (May 29, 2009) (H-2A suspension final rule) (subsequently enjoined by federal court); 73 Fed. Reg. 77110 (H-2A comprehensive program final rule).

But even if the Department proposed a 30-day effective date, according to the proposal, the new rule would not apply to any application filed after the effective date unless the requested start date is more than 90 days after the "effective" date. Thus, if this proposal was published as a Final Rule on May 30 and became effective on June 30, an employer who filed an H-2A application on June 30, would still be processed pursuant to the "old" rules. In fact, because an employer must apply between 75 and 45 days in advance of their start date, if this rule takes effect on June 30, an employer could be bound to the old regulations for any application filed for up to 45 more days after the supposed "effective date."

This extended time period before the rule actually takes effect for all employers is counterproductive and could lead to mischief if the proposal was not finalized until late 2020 and there was a change in Presidential Administration in 2021. For example, if DOL finalized this rule on December 18, 2020, with an "effective date" 30 days later on January 18, 2021, the rule still would not be effective for at least an additional 15 days until February 2, because an employer can, at most, request a start date 75 days after the date of filing. Many H-2A employers file their applications the first week of January in order to have workers in place for spring planting in March. But many other employers begin hiring H-2A workers in January. Thus, with a 30-day effective date this Final Rule would have to be issued in September at the latest in order to ensure all 2020 applications are bound by the same rules.

655.103 Definitions

AEWR. We oppose the proposed change in the definition of the AEWR for the reasons described below in our comments on the proposed changes to the wage methodology. In addition, we oppose the change in the definition to include the term "gross" after the term hourly. That change is clearly designed to ensure that DOL does not utilize the new data being collected by USDA through revisions to the Farm Labor Survey. Ironically, that new data was supposed to better disaggregate wage rate information collected in the FLS, which would potentially provide a modest downward revision to the wages assigned to the largest H-2A job category.

But it seems the Department, through this definitional sleight-of-hand is attempting to ensure that any cost savings revealed by the new FLS survey will not be passed along to H-2A employers.

Average AEWR. We oppose the addition of this new definition for reasons described below in our comments on the proposed changes to the wage methodology. In addition, it is not clear from the proposal what use the Department will make of this new term beyond setting bond rates. It appears to add one more possible wage source that could be applied to an H-2A application and/or serve as some sort of minimum applicable AEWR.

Area of Intended Employment. We oppose the creation of a rigid distance for normal commuting distance or area of intended employment. There is far too much diversity of terrain, weather, population concentration, road quality, traffic, across the country to change the Department's current treatment of this issue.

Date of Need. We support the proposed change to allow a 14-day window for the start date. This is an administrative improvement in the program that will provide some much-needed flexibility for farmers given the wide variability in weather and the inability to predict start dates months in advance.

Employer. We oppose this dramatically changed definition. The Department appears to be attempting to change longstanding legal precedent and the Department's longstanding past practice to sweep into the regulations people an entities that are not considered "employers" under current law. The Department should follow the longstanding legal precedent from the Supreme Court regarding the factors that determine whether one is an employer. The proposal creates huge hidden liability for entities that would have no idea they could be considered an employer under the common law.

Joint employer. We oppose this new definition and the Department's attempt to impose liability on persons and entities that have not had liability in the entire history of the H-2A program. In particular, the Department's attempt to extend liability to entities, including agricultural associations, for violations by others by a shocking change in the Department's longstanding regulatory application and interpretation. The Department's attempts to extend liability also runs counter to the clear statutory language creating the H-2A program. There is no basis for extending liability to any entity that did not have knowledge of or participate in any violation and the Department's repeated claims in the NPRM that this is not a change and that employers are already familiar with this position of the Department is blatantly false. This is one of the most significant changes in the NPRM and would have wide-ranging and negative impacts by imposing liability on entities that had no part in a violation.

Agricultural labor or services. We take no position on the proposed inclusion of reforestation and pine straw activities, but note that given the variety of conditions under which those employers operate, those individual employers would each benefit from having the option of applying for either H-2A or H-2B as their individual circumstances warrant and we urge the Department to provide them with that flexibility.

Temporary or Seasonal. We urge the Department to clarify in the final rule that all agricultural activity for which employment lasts no more than 364 days meets the definition of temporary. That definition is already applied by the Department to sheep and goat herding and it should also be applied to diary and every other agricultural job. There is no legal basis for the Department's inconsistent treatment of different sectors of agriculture.

Ideally, USDA should be the agency that decides whether agricultural work is eligible for the H-2A program. DOL has no special expertise in agriculture. But if the only choice is between DOL and DHS, DOL should be the agency that determines whether an employer's need meets the requirements of the H-2A program, provided there is adequate due process rights for an employer to appeal the decision. Under the current system, it does not make sense for DOL to decide this issue and then for DHS to second-guess the decision DOL previously made. Nor does it make sense for DHS to decide this issue at all because that would result in employers having to endure all the time, effort and expense of filing a labor cert with DOL, get approved, and then only find out at the very end of the process that DHS has decided the farmer does not qualify for the H-2A program.

655.120 Offered Wage Rate

The Department's proposal to change the wage rate in the H-2A program is misguided and we oppose the wage proposal in its entirety. The Department's wage proposal is so complex, and the explanation is so confusing (and even self-contradictory) that it is not possible to predict with any certainty how the proposal would operate in practice. But based on what is described by the Department, it seems clear that the proposal would lead to nonstop increases in H-2A wage rates that would be even worse than under the current rule. The Department appears to not be familiar with employment in the agriculture sector because the proposal would make the problems with the current AEWR process and the H-2A program worse – not better.

To begin, we note that based on the content of the NPRM it is not clear exactly what the Department is proposing. Thus, without that clarity it is not possible to measure or predict the impact of the proposed changes. For example, we have consulted with others affected by this proposal and it seems no one understands just exactly how many standard occupational categories the Department proposes to use going forward. The Department mentions more than a dozen different categories in the NPRM, but it is not clear if that is finite number of available categories. Appendix A to the NPRM exacerbates this confusion because for some states there are just 12 job standard job categories listed, but other states have just 11 (e.g., Florida) or 10 (e.g., Idaho) or 9 (e.g., Missouri) or 8 (e.g., Tennessee). And some potentially applicable standard job categories, such as 37-3012 Pesticide Handlers and Sprayers, are not even listed for any state.

Thus, it is not clear whether the job categories listed under each state in Appendix A are the only possible job categories for work in that state. Or could any of the job categories listed under any state apply to any other state? Or could any job category, including those not mentioned for any state, potentially apply to an H-2A application in any state? Adding to the confusion is the numerous different potential data sources that produce the wage for each

category. It is not clear from the proposal whether all job categories could utilize any of the possible wage data sources. Or do only some data sources apply to some job categories. Given that there are more than a dozen individual job categories and at least five general wage sources (FLS Regional, FLS National, OES National, OES State and State Prevailing Wage), the Department's proposal results in nearly 400,000 possible wage combinations for every state (13 job categories x 5 wage sources for each category). It is not even reasonably possible to measure the impact of that proposal. And given the volatility of each of those wage rates, as is evident in Appendix A, an H-2A employer would have to consider each of those possibilities each year because the Department specifically says it will choose to apply the highest wage possible wage.

Virtually all agricultural jobs involve multiple tasks that are present in several of the standard job categories proposed by the Department. The Department's proposal to just automatically assign the highest possible wage rate associated with any task in the job description that is also present in any standard job classification makes absolutely no sense. That approach will result in employers never being able to predict what their labor costs will be in because a farmer will never know what job category someone at DOL will think the "appropriate" category should be. Most farms that participate in the H-2A program are small family operations that do not employ human resources specialists. Farmers do not have the time or ability to sit down and diagram what each of their employees does each day, what tasks are assigned to which standardized job categories, and what corresponding wages would apply each season. In fact, several of the proposed standardized job classifications contain tasks that are present in other standard job classifications. Thus, each year farmers would have no idea what their wage rate would be until filing their H-2A application paperwork and DOL assigns a wage. No one can operate any business in that manner, especially when labor is the largest single input cost on the farm.

With the all the different job categories and all the different wage data sources, everything will be different every year. It is hard to imagine a more arbitrary process for assigning wages. The Department's proposal acknowledges that several different wage rates, from several different wage sources would potentially apply to a job opportunity in a state at any time. But if there are multiple applicable wage rates, then there is no basis for DOL to just decide that the highest one is best one – or the correct one. The data DOL provided in the appendix demonstrates the arbitrariness of the wage proposal. From one year to the next in the very same job category there are extreme swings in wage rates of 50% and more. Federal courts have found such dramatic wage swings automatically call into question the validity of the survey data and calculations. *See Zirkle v. DOL,* No. 1:19-cv-03180 (E.D. Wash., Sept. 11, 2019) (Order granting preliminary injunction).

The National Milk Producers Federation comment letter points out an excellent example of the arbitrary results produced by the Department's wage proposal and we agree with their analysis. There is no consistency whatsoever among states in the standardized job category that would be assigned by DOL or the wage data source used to determine the wage for two farm's H-2A jobs filed with identical job descriptions in different states. The volatility among the various job categories and wage data sources also produce arbitrary results that lead to extreme

wage increases in most years, as shown in the analysis accompanying the comments of the American Farm Bureau Federation.

Despite all the confusion about the applicable wage rate to a specific job opportunity, it is clear that the Department's proposal will lead to increased costs for farmers. And the cost increases for small and medium-sized farmers resulting from the Department's proposal is particularly alarming. The American Farm Bureau Federation's economic analysis of the impact of the proposal makes this clear. See "*Proposed H-2A Changes Try But Fail to Contain Considerable Wage Variability*," American Farm Bureau Federation, available at www.fb.org/market-intel/proposed-h-2a-changes-tries-but-fails (copy attached).

Prevailing Wage

In addition, the Department's wage methodology proposal would remove the minimal protections for farmers that currently exist regarding state wage surveys. Over the years those surveys have been repeatedly proven to be unreliable and now DOL is proposing to let states issue basically any sort of survey results they want to issue by removing the standards for surveys present in Handbook 385.

In a case in Washington state just two weeks ago, a federal judge issued an injunction against DOL to block one of these very surveys from taking effect. Amazingly, DOL had actually approved that flawed survey that was allegedly conducting in compliance with the requirements of Handbook 385. Under the rules DOL has proposed, farmers likely would have lost that case in Washington and been stuck with the unjustified and massive 50% wage increases from a flawed state survey. Frankly, the Department's motivations for removing the methodological protections offered by Handbook 385 are suspect. This appears to be nothing more than an attempt by the Department to remove longstanding requirements to protect farmers against arbitrary government decision-making. The Department's claim in the NPRM that this new prevailing wage methodology "would allow the Department to establish reliable and accurate prevailing wage rates for workers and employers' is demonstrably false. 84 Fed. Reg. 25171.

The limited protections that already exist in Handbook 385 against arbitrarily conducted surveys and invalid methodology are clearly inadequate, as the recent *Zirkle* case in Washington state demonstrates. Inexplicably, DOL approved those obviously flawed survey results and attempted to enforce them against employers. Now, instead of bolstering protections for farmers against such arbitrary decision-making, the Department seeks to loosen the standards and expose farmers to even more radical changes in wage rates.

Mid-season Wage Changes

The DOL proposal would also require that farmers increase wage rates each year when new rates are published but does not similarly allow farmers the option to lower wage rates if the rate decreases. If the AEWR is supposed to represent the exact wage that protects U.S. workers at that time, then there is no valid basis to require payment of a higher wage when that wage is

no longer determined to be the AEWR. In addition, under the proposal there would be at least five different data sources for wage rates, including state prevailing wages, which means wage rates could change at virtually any time of the year. That adds yet another layer of complexity and uncertainty to the H-2A program.

The current change in wage rates towards the beginning of each year is already difficult for farmers who have previously planned their costs for the season and obtained operating loans based on nothing more than a guess about what their wage rates will be for the coming year. But at least under the current AEWR the mystery does not last long and DOL unveils the wage rates typically before workers arrive. But under the proposal, farmers will be faced with changing wages at virtually anytime during the year. And given the data that DOL has made available in the NPRM, it would not be uncommon for rates to increase by 50%, as indicated in the very first example the Department lists in Table 2 of Appendix A. *See, e.g.*, 84 Fed. Reg. 36249 (SOC 11-9013 in North Carolina, change in wage rate from 2017 to 2018).

It would be impossible for an employer to absorb a 50% increase in wage rates at any point but imposing such an increase mid-season after an employer has already committed to the H-2A program and has crops in the ground would be financially disastrous. Such an increase also calls into question the validity of the Department's methodology. *See Zirkle v. DOL*, No. 1:19-cv-03180 (E.D. Wash., Sept. 11, 2019) (Order granting preliminary injunction).

Wage Depression

The Department's concerns about wage depression for domestic workers resulting from the employment of H-2A workers is misplaced. Although the Department cites to commentary from a prior H-2A rulemaking in 2010 in attempt to support that concern, it inexplicably ignores commentary from a previous H-2A rulemaking in 2008 that reached a different conclusion. *See* 73 Fed. Reg. 8538, 8549 (Feb. 13, 2008) (finding the presence of millions of illegally employed workers is a greater threat to domestic wages and working conditions than limited number of H-2A workers); 73 Fed. Reg. 77110 (Dec. 18, 2008) (same); *see also Sure-Tan v. NLRB*, 467 U.S. 883, 892 (1984).

Moreover, there are very few U.S. workers who even express interest, let alone take these H-2A positions. The Department's own data shows a fraction of 1% of H-2A positions are claimed by U.S. workers, despite the artificially high wage rates and additional benefits. For example, in FY2018, according to data the Department makes available on its website, the Department certified 242,762 positions as eligible to be filled by H-2A workers on more than 11,000 applications by farmers. The Department's own disclosure data shows, however, that just 786 U.S. workers responded to all of those job offers. All 786 were considered hired for those positions regardless of whether they actually did take the position. Employers regularly report that U.S. workers who say they want the H-2A job frequently do not show up when the job begins. So, in FY 2018, U.S. workers filled just 0.3 % of all available positions that were eligible to filled with H-2A workers. There is no rational justification for imposing hundreds of millions of dollars of costs on the thousands of U.S. farmers that participate in the H-2A program in an attempt to benefit just 786 U.S. workers.

Moreover, at the same time the Department claims to be protecting U.S. farmworkers and making it more difficult to hire H-2A workers, they Department is spending 75 million dollars each year to affirmatively reduce the supply of U.S. farmworkers by training them to take other jobs in the U.S. economy through the National Farmworker Jobs Program. *See* https://www.doleta.gov/Farmworker/pdf/NFJP_Fact_Sheet.pdf

In addition, it is worth noting that the Department cannot consider corresponding workers to be "protected" against wage depression by being paid the AEWR, because those workers were already employed at a wage that they found acceptable before H-2A workers were employed. If anything, the presence of H-2A employees results in corresponding workers getting a temporary pay raise during the time period that H-2A workers are present on the farm. Thus, rather than requiring these corresponding workers be paid an additional premium (the AEWR), their wages would be protected simply by requiring employers to pay H-2A workers the same rate the U.S. workers were already receiving for performing the job.

The current AEWR system (and the proposed AEWR system) actually harms U.S. farmers and provide virtually no benefit for U.S. workers because, as the Department's own data shows, there are almost no U.S. workers interested in H-2A jobs. No matter what wage and benefits are offered, there are not enough U.S. workers to fill these jobs. In fact, the Department's own data shows that despite all the hundreds of thousands of dollars spent recruiting U.S. workers at inflated wage rates, farmers typically get zero U.S. applicants for these jobs. As a result, the hundreds of millions of dollars in inflated wages required by the AWER flows mostly to Mexican nationals who then transfer that money to their families in Mexico. So the Department's purported efforts to protect and benefit U.S. workers instead provides inflated wages to less than 1,000 U.S. workers in FY2018, while providing about 5 billion dollars to foreign H-2A workers ($25,000 in average H-2A wages x 200,000 H-2A workers).

The extreme costs imposed on farmers by the AEWR results in their inability to direct those funds to other parts of their operation that would undoubtedly create more benefits for more U.S. workers on the farm and in downstream jobs. Instead of sending additional tens or hundreds of millions of dollars to Mexico, via an H-2A worker who is paid an inflated wage rate, farmers could instead pay a reasonable, fair, and sustainable wage that leaves the farmer with the ability to invest more in their farm and benefit their local communities.

The wage proposal in the NPRM is even worse than the current misguided AEWR, but given a choice between the two, the current system is less bad. DOL should make meaningful changes to the AEWR by tying it to the minimum wage rather than using the flawed USDA Farm Labor Survey. In DOL's 2008 H-2A rulemaking you detailed all the problems with the AEWR methodology. DOL should replace the current system and instead set the AEWR as the higher of the state minimum wage or 10% above the federal minimum wage, whichever is higher. That would create a transparent wage rate that is predictable and would enable farmers to be able to plan their labor costs from one year to the next while also providing appropriate protections against wage depression. That approach is also consistent with what the Department has done previously in adopting a reasonable minimum AEWR floor in the 2008 Final Rule that set the floor at a rate above then-applicable federal minimum wage.

As an alternative to the revised AEWR suggested above, the Department should consider the value of all benefits provided, including transportation and housing, in considering any adverse effect. Housing and transportation are extremely valuable additions to cash wages and DOL ignores those without justification when looking at supposed adverse effect. U.S. workers are not entitled to housing and transportation costs outside of the H-2A program. Therefore, the provision of those benefits does not protect U.S. workers, rather they benefit H-2A workers alone because U.S. workers provide their own housing and transportation from their net pay.

The Department should expressly include in the value of these benefits and permit employers to take a credit for that value towards the cash wage. For example, permitting employers to recover some of the cost of housing through a modest credit towards the inflated AEWR would establish some parity in the H-2A program with employers who do not employ H-2A workers and do not have to provide housing for free. A reasonable rental rate could be established at something like 10% of gross wages per week. Because the cost of housing is a major barrier to entry into the H-2A program, this would also enable more farmers to participate in the H-2A program and employ legal workers, rather than having to rely on workers with questionable documentation for whom the only applicable requirement is the FLSA minimum wage, which is about 50% of the current average AEWR.

Appealing Assigned Wage

In addition, we oppose the Department's proposal to not allow employers to challenge or appeal an assigned wage rate. This is another example of the Department taking away due process rights of employers and adding unnecessary delays and inefficiencies to the program. It is not even clear how the employer could challenge a wage rate because the proposal says the application has to be denied in order to appeal. But the Department's restrictions on appealing a denied application would make it impossible in practice to challenge the wage rate because the application would have to be denied based on some other factor than the wage.

In sum, the current AEWR process is putting farmers out of business and the DOL wage proposal makes things worse. The extreme complexity of the proposal combined with the extreme volatility in wage rates and mysterious application of different wage rates from different sources and different wage categories each year will result in chaos for H-2A employers. This proposal adds to the complexity and uncertainty of the required wage methodology rather than adding predictability and transparency.

655.121 Job Order Filing Requirements

The proposal to require farmers to send the job order to DOL instead of sending it to the SWA does not appear to be an improvement and we therefore oppose this change. The proposal does not explain how this change will make the application process more efficient. Instead, it would appear to add more bureaucracy to process because DOL is just functioning as a middleman in forwarding the job order to the SWA. This is likely to just add to the likelihood of more delays and interfere in clear and efficient communication between employers and the SWA. Also, in order to add flexibility for farmers, DOL should allow employers to make

changes to the 9142 after it is filed in order to correct typographical errors or to respond to changes in market conditions. Prohibiting changes to the application makes the program more inefficient.

655.122 Contents of Job Offers

Employer-provided Housing

We support the proposed change permitting states to make housing inspections valid for 24 months. This is an administrative improvement in the program and has the potential to reduce the bureaucracy, burden and delays associated with the current housing approval process, assuming states will follow through and utilize this authority.

Rental and Public Accommodation Housing

The proposed changes to require rental and public accommodation housing to comply with certain OSHA temporary labor camp standards is misguided and we oppose it. This proposal would eliminate the limited housing flexibility that currently exists in the H-2A program. These other housing options (rental and public accommodation) were established for the H-2A program to offer flexibility because employer-provided housing built to specific H-2A standards is not always available. This proposal completely guts that option and would almost certainly result in most motels being unavailable to house H-2A workers.

A motel that has a business occupancy license meets appropriate and longstanding minimum standards in the H-2A program. It makes no sense to require a public motel to meet OSHA temporary labor camp standards. A motel open to the public is a permanent commercial structure intended to house people year-round – it is not a temporary labor camp. The Department has provided no justification for removing the housing flexibility that has always existed in the H-2A program.

In addition, it is not reasonable to expect farmers to be able to attest to the compliance of every individual room they may secure for their workers. Such a requirement is unnecessary anyway when the housing is approved for habitation, as required under the current rule. We oppose these proposed changes because it will drive up costs for employers and force farmers out of the H-2A program. Instead, the Department should pursue policies and regulatory flexibility that enables more farmers to use H-2A program. Housing is one the greatest barriers to entry into the H-2A program and this proposal would exacerbate – no alleviate – that problem.

Transportation

We support the proposed change to the establish the point for transportation reimbursement as the U.S. Consulate. This is a commonsense return to the previous longstanding approach of the Department in the H-2A program that will reduce some of the administrative burden of the program. The rational expressed by the Department in the proposal effectively describes the countless problems with current approach in trying to calculate

appropriate travel costs. Utilizing an objective location for all workers as the point where the reimbursement obligation attaches makes the most sense. The Department's proposal is a reasonable resolution of the problem causes by the Department's prior change in policy in 2010.

Employer-provided Transportation

The Department asked for comment on whether additional regulations should be developed in an effort to protect workers from tired drivers. We do not believe such regulations are required. Very few H-2A workers are transported long distances it is not clear that additional regulatory burdens are necessary to address – or would even be effective at addressing – an issue where there is not a widespread problem. The H-2A program is already too complicated and drafting more regulations in an attempt to address a few accidents, as unfortunate as they may be, is not likely to be effective and will likely only further burden employers. Tired drivers is not a widespread and a regular problem that demands further regulation.

655.130 Application Filing Requirements

Staggered Entry

The proposed change is probably the most significant administrative improvement to the program suggested in this rulemaking and we support it. Enabling farmers to stagger the entry of workers for 120 will reduce paperwork, costs, and burden for both farmers and the Department. This proposal is a commonsense improvement to simplify operation of the program

655.131 Agricultural Association and Joint Employer Filing Requirements

We oppose the proposed changes regarding agricultural associations. Contrary to what the Department claims in the proposal, until now, the Department has never held an association liable for violations committed by its members unless the association participated in the violation. This is a significant change that will threaten the very existence and participation of agricultural associations in the H-2A program. Associations are generally nonprofit arrangements, often owned and controlled by their members. If the association is now suddenly liable for violations that it had no participation in or knowledge of, the entire association will be exposed to massive financial liability, which could then revert back on the farmer members themselves. This dramatic regulatory and enforcement change is unprecedented and is plainly contrary to the statute creating the H-2A program. This proposal is also contrary to the Department's practice for the entire history of the program. The Department's repeated claims in the NPRM that this is not a change in regulatory interpretation or application is obviously false.

In addition, while we appreciate the clarification that individual farmers may file a joint application without the assistance of an association, the proposed requirement that all workers would have to perform work on each farm each week is completely unworkable. We therefore oppose that element of the proposed regulation. It is simply not feasible to ensure that all workers on a joint application work at each farm each week. The DOL proposal seems to

assume that two or more farms on a joint application would have identical needs. Such an assumption is wrong, or at least is not true for all farmers seeking to jointly apply for workers. In fact, in many cases a farmer would apply with another farmer because they have different and complimentary needs. One farmer may need 5 workers and one may need 15. If a farmer has a need for only 5 workers, it would be all but impossible for him to employ all 15 of the other workers on his farm for one day each week. In order to meet the requirement in the proposal, the farmers would have to continually rotate workers, which is ridiculously inefficient and costly. The proposed requirement to employ each worker at each farm for at least a day each week is unworkable and should be dropped.

655.135 Assurances and Obligations of H-2A Employers

50 Percent Rule

The proposed change is an administrative improvement in the program, and we support it. Returning to the rule from the 2008 Final Rule and requiring recruitment for only 30 days after the start date (or the latest entry date for staggered workers) make sense for the reasons articulated in the NPRM. This change will reduce bureaucracy, costs and the burden associated with the program.

655.141 Notice of Deficiency

We oppose the proposed change that would no longer permit appeals of Notices of Deficiency ("NOD"). This is another example of the Department's inexplicable efforts to remove due process protections for farmers in the H-2A program. The others being the proposed changes to the general appeal procedure, as well as the prohibition on challenging wage determinations. These troubling changes appear to be nothing more than a naked power grab by the Department to ensure a farmer cannot timely (or successfully) challenge a decision of the Certifying Officer. These protections for farmers have worked reasonably well for years to hold the Department accountable for mistakes and improper interpretations of H-2A regulations.

There is no justification whatsoever for removing the ability to appeal a NOD. Saying the procedure is not available in the H-2B program is not a justification, rather it is a justification for adding NOD appeals to the H-2B program. The reason that is not available in the H-2B program was clearly an oversight in 2008 as reference to the preamble discussion in those rules indicates. The operation of the H-2A program has been enhanced by employers being able to appeal NODs. The process allows for problems and issues to be resolved at the earliest possible time in the process, rather than wasting valuable time waiting for a denial, in order to begin the appeal process. The BALCA case decision records are full of hundreds of decisions over the past decade demonstrating the value of being able to appeal a NOD. The Department's proposal to gut this important and timely due process protection will add unnecessary bureaucracy and delay to the H-2A program and should be abandoned.

655.153 Contact with Former U.S. Workers

We oppose the proposal to require farmers to attempt to hire away a farm labor contractor's (FLC) employees as part of the farm's recruitment efforts. This is a monumental change in the Department's longstanding regulatory interpretation that will cause massive disruption to the relationship between farms and farm labor contractors. Requiring a farm to attempt to hire away the employees of another entity – a farm labor contractor – makes no sense and offers no protection for any U.S. workers.

First of all, all the U.S. employees of a farm labor contractor already have a job, so there is no potential adverse effect to them. In addition, most farm labor contractors, as part of their contractual terms with a farm, prohibit the farm from trying to poach their employees. But DOL wants to actually require farms to do that, which puts farms in the untenable position of having to breach their contract with the farm labor contractor and exposing the farm to financial liability in order to comply with this misguided proposed rule.

This proposed change serves no valid purpose and will actually be more likely lead to less work for U.S. workers. Farms that participate in the H-2A program will increasingly be unable to find FLCs willing to work for them because the farm labor contractor will want to avoid having his workers poached by his clients. Thus, the FLC will have fewer employment options for his employees. Additionally, farms that participate in H-2A program will stop hiring farm labor contractors with U.S. workers because they will be concerned about breach of contract liability resulting from their required attempts to poach the farm labor contractor's employees. This misguided provision is counter-productive and harmful to U.S. farmers, farm labor contractors, and U.S. workers and should be abandoned in its entirety.

655.154 Additional Positive Recruitment

We oppose the proposed provision for the OFLC Administrator to annually determine for each state whether there are other labor supply states. The Department should drop the concept of labor supply states in its entirety. As noted above, the Department's own data demonstrates less than 0.3% of H-2A positions are filled by U.S. workers. Virtually every state in the U.S. would have open H-2A applications at any point in time when the OFLC Administrator would be requiring an employer in one state to attempt to hire U.S. workers from another state. There is no logical rational for this requirement and the Department should instead the approach towards labor supply states that was included in the 2008 H-2A Final Rule.

655.171 Appeals

We oppose all of the proposed changes to the appeal process. This is perhaps the most insidious proposal in the entire NPRM. The Department has proposed to remove virtually all due process for farmers in an attempt to ensure a farmer can never successfully challenge a decision of the Certifying Officer. There is no justification whatsoever for these shocking changes. It appears clear that the Department simply wants to avoid any oversight of its actions or at least make oversight so difficult that farmers will just give up and run the gauntlet erected

by the Department. There is no legitimate basis, whatsoever, for the Department to take away the rights of farmers to get a copy of the case file before they file their appeal brief.

There is also no legitimate basis for DOL limit how additional evidence can be introduced, and to limit the issues a judge can decide. Requiring an employer to actually participate in a de novo hearing in order to utilize additional evidence is contrary to the statue creating the H-2A program and contrary to nearly 40 years of DOL practice. These changes are unwarranted and do nothing to ensure transparency in the H-2A program. In fact, this proposal appears to be nothing more than an attempt by DOL to hide incorrect and illegal actions of Certifying Officers to ensure that DOL always wins an appeal. Limiting a farmer's rights and re-structuring the system so that a farmer cannot afford the delay to appeal an incorrect decision by the Certifying Officer is just plain wrong. All of these changes should be abandoned.

Instead, the Department should be strengthening the farmer's rights in the appeal process. For example, the Certifying Officer is supposed to promptly provide a copy of the appeal file, but our members report that the CO frequently and unreasonably delays that simple task. As a result, it often takes two weeks just to get a copy of the file, which unnecessarily delays the appeal proceedings. There is no legitimate reason that DOL cannot produce the appeal file within a few days. All of the documents are computerized and all someone needs to do is press "print." The Department should adopt a rule specifying that it will provide the employer and the ALJ with a copy of the entire appeal file within 72 hours of the appeal being filed. H-2A cases are time sensitive and it is clear that COs frequently attempt to gain leverage in appeals by dragging out the process in order to force employers to settle for less so that they at least have a chance to get their workers within a month of their start date. The Department should be adopting procedures to prevent these abuses and to protect farmers rather than changing the rules to benefit the CO and further disadvantage farmers.

655.173 Meal Charges

The proposed change to set a maximum limit on the meal charge is unjustified and unworkable and we oppose it. The Department should maintain the current procedure that permits an employer to petition for a higher meal charge based on actual costs. The current daily meal charge is already too low to enable an employer to recoup anything close to its actual costs. The new proposed maximum amount is even lower than the current amount. Setting an arbitrary maximum meal charge will result in increased costs to employers.

655.175 Post Certification Amendments

We support the proposal to allow post-certification changes to an application. As noted in the NPRM, there are often legitimate reasons that an employer would need to modify or change its application after certification. Our members report the most common reasons for this are the addition of work sites or crops. This change provides some much-needed flexibility to the program and will slightly reduce the current administrative burden. Given the extreme shortage of U.S. workers, we would suggest that the Department modify the proposal slightly to also permit an employer to add work sites in an adjoining areas of intended employment. That

additional flexibility would be helpful in those circumstances where employer add additional worksites during the year, particularly through acquisition. In these difficult economic times for farmers, bankruptcies and foreclosures often result in nearby farms taking over another existing farming operation. In those instances, the farm being acquired is usually operating on a skeleton crew because of the dire financial condition. If the acquiring farm is in the H-2A program, they may need to adjust their current certifications to include new work sites to ensure preservation of existing jobs at the newly acquired farm and there would not be time start a new H-2A application from scratch.

Again, we appreciate the opportunity to provide comments on the Department's NPRM and appreciate the Administration's efforts to propose the positive changes we described above. We trust the Department will make extensive changes in accordance with the comments we have offered and that you drop the most problematic elements of the NPRM that we described above.

Sincerely,

Chalmers R. Carr III, President
USA FARMERS, Inc.

Proposed H-2A Changes Tries But Fails to Contain Considerable Wage Variability

Market Intel / September 19, 2019

On July 26, the Department of Labor published a proposed rule that would amend its regulations regarding certain provisions of the H-2A program. Among the many changes in the proposed rule are revisions to the methodologies used to determine the Adverse Effect Wage Rate. Rather than a single AEWR for all H-2A workers within a region, DOL has proposed AEWRs by agricultural occupation. The proposal reflects the department's concern that the current AEWR methodology for field and livestock workers (combined) may have an adverse effect on the wages of workers in higher-paid agricultural occupations, such as farmworker supervisors and construction laborers on farms. Following the data supplied by DOL in the proposed rule, this Market Intel will look at what the proposal means for farms utilizing the H-2A program.

Current Procedures

The current AEWR is based on data from the Farm Labor Survey, a quarterly USDA survey that provides estimates of the number of hired workers, average hours worked and wages paid to workers employed on U.S. farms. Hired workers include field workers, livestock workers, supervisors, administrative employees and other workers employed directly by farmers. Field and livestock workers include employees who operate farm equipment. The FLS excludes contract workers, who are paid by a crew leader, contractor, buyer, processor, cooperative or other person who has an oral or written agreement with a farmer/rancher.

Approximately 12,000 farms are surveyed each January, April, July and October. The survey includes both full-time and part-time workers, as well as workers who work either part-year or year-round. Wages consist of cash wages before taxes and other deductions. Wages

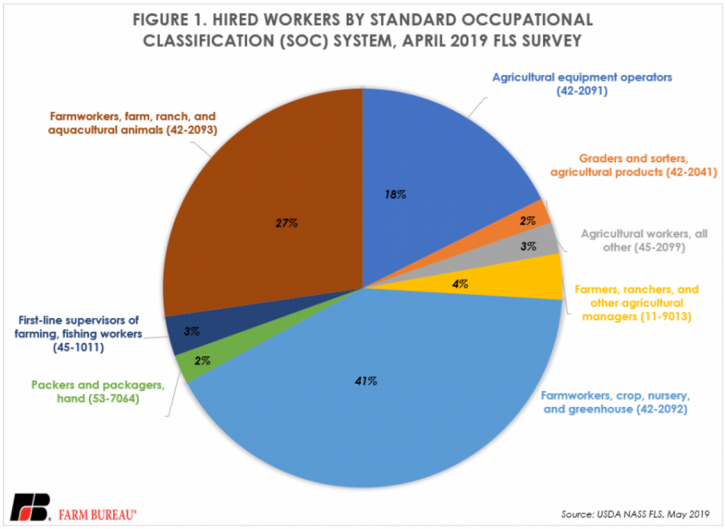
paid not paid on an hourly basis (e.g., a salary or piece rate) are converted to hourly rates. Average hourly wages are total wages by type of worker (i.e., crop, livestock and all hired workers) divided by total hours worked. Wages do not include fringe benefits, bonuses, housing or meals.

USDA publishes annual estimates of average hourly wages for field and livestock workers in 15 regions. The 15 regions include 46 states. Separate estimates are published for California, Florida and Hawaii and Alaska is not included in the survey. The AEWR is the same for each state within a region; for example, the Pacific Region AEWR is the same for Oregon and Washington. Similarly, the Northeast I Region AEWR is the same for Connecticut, Maine, Massachusetts, New Hampshire, New York, Rhode Island and Vermont. Nationwide, there may be up to 18 different adverse effect wage rates (i.e., if the rates are different for each of the 15 regions and the three states that are reported separately). The AEWR is the weighted average hourly wage for field and livestock workers (combined) from the previous year's quarterly surveys.

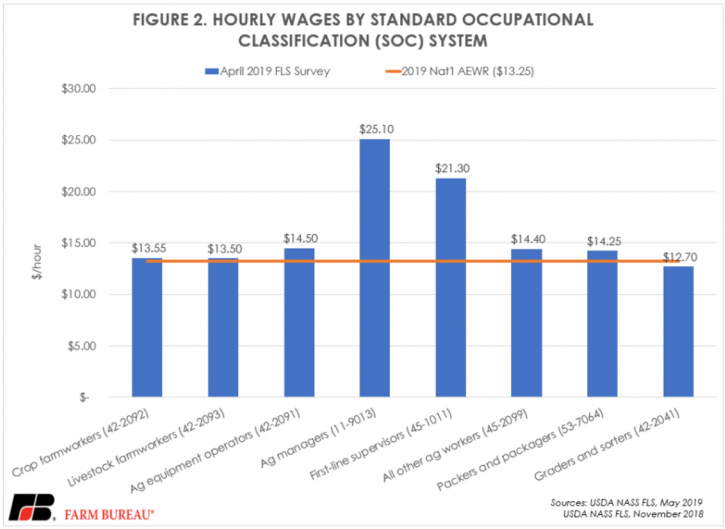
Some policymakers are concerned the current AEWR does not provide sufficient wage detail by area, occupation, or level of skill and experience required by employers. Currently, the AEWR applies equally to all crop workers, livestock workers and farm equipment operators in a region or state. However, within a region or state, wages for the same occupation may vary because of differences in the cost of living or in the relative supply of or demand for workers.

Perhaps in preparation to answer future questions about differing wage rates based on occupation, in 2014 the FLS also began asking respondents to classify hired workers by the Standard Occupational Classification System. SOC codes include: Graders and sorters, agricultural products (42-2041); Agricultural equipment operators (42-2091); Farmworkers, crop, nursery, and greenhouse (42-2092); Farmworkers, farm, ranch, and aquacultural animals (42-2093); Agricultural workers, all other (42-2099); Packers and packagers, hand (53-7064); Farmers, ranchers and other agricultural managers (11-9013); and First-line supervisors of farming, fishing workers (45-1011).

Of the 629,000 workers surveyed in the April 2019 survey, 590,000 were classified via the SOC system. Of those 590,000 workers, the SOC position breakdown was as follows: Graders and sorters, agricultural products (12,000; 2% of total); Agricultural equipment operators (104,000; 18%); Farmworkers, crop, nursery, and greenhouse (243,000; 41%); Farmworkers, farm, ranch, and aquacultural animals (161,000; 27%); Agricultural workers, all other (15,000; 3%); Packers and packagers, hand (14,000; 2%); Farmers, ranchers, and other agricultural managers (22,000; 4%); and First-line supervisors of farming, fishing workers (19,000; 3%).



In addition to capturing the number of positions by SOC code, the FLS also captures wage rates, which are as follows: Graders and sorters, agricultural products ($12.70); Agricultural equipment operators ($14.50); Farmworkers, crop, nursery, and greenhouse ($13.55); Farmworkers, farm, ranch, and aquacultural animals ($13.50); Agricultural workers, all other ($14.40); Packers and packagers, hand ($14.25); Farmers, ranchers, and other agricultural managers ($25.10); and First-line supervisors of farming, fishing workers ($21.30). The Combined Field and Livestock Worker Wage Rate, which is the basis for the current AEWR methodology, is $13.72.



New Proposal

This single survey view of the wage data collected by SOC position indicates wages across positions vary a great deal. But one data point doesn't make a trend and the data presented in the FLS is national data. Helpfully, DOL included state-by-state and position-by-position data for 2016, 2017 and 2018. The inclusion of this data makes it possible to compare the total wage expenditure a farm would have paid in 2016, 2017 and 2018 under both the current regulation (one-single AEWR) and under the proposed rule.

To develop total wage expenditures for sample farms, we used Appendix A, Table 2 of the proposed rule DOL, which has wages and data sources for 12 different SOC positions. The appendix also reveals that there are at least five different possible data sources for a specific wage: Occupational Employment Statistics State, OES National, FLS Regional, FLS National, or a state prevailing wage.

The wage expenditure in each state for three example operations – small, medium and larger crop farms is estimated using the SOC code and associated wage from Appendix 2 that matches the type of work in the FLS most similarly.

Large farm with 70 workers:

- 60 paid workers classified as Farmworkers - Crop, Nursery and Greenhouse (SOC 45-2092), working 3,000 total hours per week;
- 3 paid workers classified as First-Line Supervisors of Farm Workers (SOC 45-1011), working 150 total hours per week;
- 3 paid workers classified as Agricultural Equipment Operators (SOC 45-2091), working 128 total hours per week; and
- 4 paid worker classified Graders and Sorters - Crop, Nursery and Greenhouse Products (SOC 45-2041), working 170 total hours per week.

Medium farm with 20 workers:

- 16 paid workers classified as Farmworkers - Crop, Nursery and Greenhouse (SOC 45-2092), working 800 total hours per week;
- 2 paid workers classified as First-Line Supervisors of Farm Workers (SOC 45-1011), working 100 total hours per week; and
- 2 paid workers classified as Agricultural Equipment Operators (SOC 45-2091), working 85 total hours per week.

Small farm with 10 workers:

- 8 paid workers classified as Farmworkers - Crop, Nursery and Greenhouse (SOC 45-2092), working 400 total hours per week;
- 1 paid worker classified as First-Line Supervisors of Farm Workers (SOC 45-1011), working 50 total hours per week; and
- 1 paid worker classified as Agricultural Equipment Operators (SOC 45-2091), working 42.5 total hours per week.

In Table 1, the example of a small farm in the Appalachian II region (Kentucky, Tennessee and West Virginia) is shown in detail. The first table of the exhibit is for the sample small farm utilizing the current regulations for calculating the AEWR. Utilizing the regional AEWR of $10.85, the total weekly wage expenditure was $5,344 in 2016, $5,378 in 2017 and $5,511 in 2018. Any small farm with the same number of workers in the Appalachian II region would pay the same total gross wages.

Table 1. Appalachian II - AEWR Under Current Regulation

SOC Code	Worker Code Description	No. Paid Workers that week	Total Hours Worked that week	2016			2017			2018		
45-1011	First-Line Supervisors of Farm Workers	1	50	$543	$10.85	FLS Regional	$546	$10.92	FLS Regional	$560	$11.19	FLS Regional
45-2091	Agricultural equipment operators	1	43	$461	$10.85	FLS Regional	$464	$10.92	FLS Regional	$476	$11.19	FLS Regional
45-2092	Farmworkers - Crop, Nursery and Greenhouse	8	400	$4,340	$10.85	FLS Regional	$4,368	$10.92	FLS Regional	$4,476	$11.19	FLS Regional
Total		10		$ 5,344			$5,378			$5,511		

As mentioned above, under the proposed rule the wage rate may vary for different positions in each state, depending on the data source: OES State, OES National, FLS Regional, FLS National, or a state prevailing wage.

The variability of the SOC wage source for a small sample farm in Kentucky is well displayed in Table 2. For SOC code 45-1011, the wage source is the same for 2016, 2017 and 2018 – OES State. For SOC code 45-2091, the wage source for 2016 and 2017 is OES State, but switches to FLS National in 2018. For SOC code 45-2092 the wage source in 2016 is OES State, but switches to FLS National in 2017 and 2018. As a result of the variability in both the wage rate and data sources, the total weekly gross wages for the small Kentucky farm changes significantly throughout the three-year period. The total weekly wage expenditure would have been $6,974 in 2016, $5,836 in 2017 and $5,964 in 2018. Table 3 and Table 4 display the same small sample farm, but in West Virginia and Tennessee. In both states, there is considerable variability in the SOC wage source.

Table 2. Appalachian II - Kentucky - Wage Under New Proposal

SOC Code	Worker Code Description	No. Paid Workers that week	Total Hours Worked that week	2016	2017	2018

45-1011	First-Line Supervisors of Farm Workers	1	50	$1,144	$22.87	OES State	$1,199	$23.97	OES State	$1,142	$22.83	OES State
45-2091	Agricultural equipment operators	1	43	$458	$10.78	OES State	$461	$10.85	OES State	$514	$12.10	FLS Regional
45-2092	Farmworkers - Crop, Nursery and Greenhouse	8	400	$5,372	$13.43	OES State	$4,176	$10.44	FLS Regional	$4,308	$10.77	FLS Regional
Total		10		$6,974			$5,836			$5,964		
Total Gross Wage Increase Over Current Regulation				31%			9%			8%		

Table 3. Appalachian II - West Virginia - Wage Under New Proposal

SOC Code	Worker Code Description	No. Paid Workers that week	Total Hours Worked that week	2016			2017			2018		
45-1011	First-Line Supervisors of Farm Workers	1	50	$1,255	$25.09	OES State	$1,170	$23.39	OES State	$1,233	$24.66	OES State
45-2091	Agricultural equipment operators	1	43	$526	$12.38	FLS National	$546	$12.85	FLS National	$514	$12.10	FLS Regional
45-2092	Farmworkers - Crop, Nursery and Greenhouse	8	400	$4,040	$10.10	OES State	$4,176	$10.44	FLS Regional	$4,308	$10.77	FLS Regional
Total		10		$5,821			$5,892			$6,055		
Total Gross Wage Increase Over Current Regulation				9%			10%			10%		

Table 4. Appalachian II - Tennessee - Wage Under New Proposal

SOC Code	Worker Code Description	No. Paid Workers that week	Total Hours Worked that week	2016			2017			2018		
45-1011	First-Line Supervisors of Farm Workers	1	50	$1,197	$23.93	OES State	$1,031	$20.61	OES State	$1,007	$20.14	OES State
45-2091	Agricultural equipment operators	1	43	$515	$12.12	OES State	$564	$13.26	OES State	$514	$12.10	FLS Regional
45-2092	Farmworkers - Crop, Nursery and Greenhouse	8	400	$4,056	$10.14	OES State	$4,176	$10.44	FLS Regional	$4,308	$10.77	FLS Regional
Total		10		$5,768			$5,770			$5,829		
Total Gross Wage Increase Over Current Regulation				8%			7%			6%		

In all three states, in all three years, the total weekly gross wage would have been greater under the proposed rule than under the current regulation. For the Kentucky farm, under the proposed rule, total weekly gross wages would have been 31% higher in 2016, 9% higher in 2017 and 8% higher in 2018. For the West Virginia farm, under the proposed rule, total weekly gross wages would have been 9% higher in 2016, 10% higher in 2017 and 10% higher in 2018. For the Tennessee farm, under the proposed rule, total weekly gross wages would have been 8% higher in 2016, 7% higher in 2017 and 6% higher in 2018.

Ideally, the proposed rule would not result in higher wage expenditures, but that would not be the case for the sample farms in most states. Nationally, the total wage expenditure for the small- and medium-sized sample farms would have been 10% higher in 2016, 10% higher in 2017 and 9% higher in 2018 if the wages had been calculated following the proposed rule, compared to the current regulations. Nationally, the total wage expenditure for the large-sized sample farms would have been 4% higher in 2016, 4% higher in 2017 and 3% higher in 2018 if the wages had been calculated following the proposed rule, compared to the current regulations. The proposed rule does, however, result in a lower wage expenditure for the sample farms for some states, particularly the larger-sized sample farms. The estimated differences in payroll expenses for small-/medium-sized and large-sized farms by state can be seen in Table 5.

Table 5. Payroll Expense Under Proposed Rule Compared to Payroll Expense Under Current Regulation
(Positive Percentage Indicates Amount Higher the Proposed Rule is Compared to Current Regulation)

State	Small & Medium Crop Farm (10 & 20 workers)			Large Crop Farm (70 workers)		
	2016	2017	2018	2016	2017	2018
Alabama	16%	22%	17%	8%	11%	8%
Arizona	-6%	4%	12%	-12%	-2%	4%
Arkansas	9%	11%	3%	2%	5%	0%
California	4%	5%	6%	0%	1%	1%
Colorado	12%	14%	9%	3%	6%	1%
Connecticut	13%	14%	11%	7%	9%	6%
Delaware	15%	10%	13%	7%	3%	6%
Florida	13%	12%	10%	5%	4%	3%
Georgia	15%	15%	13%	7%	8%	6%
Hawaii	1%	7%	11%	-6%	-1%	7%
Idaho	6%	11%	6%	1%	6%	-1%
Illinois	10%	7%	-2%	4%	2%	-7%
Indiana	10%	9%	0%	4%	3%	-7%
Iowa	26%	14%	3%	18%	6%	-5%
Kansas	-4%	2%	6%	-8%	-3%	0%
Kentucky	31%	9%	8%	26%	2%	1%
Louisiana	13%	17%	3%	4%	7%	2%
Maine	16%	17%	13%	11%	11%	7%
Maryland	18%	16%	17%	9%	6%	8%
Massachusetts	21%	17%	12%	13%	11%	7%
Michigan	8%	0%	4%	1%	-6%	-1%
Minnesota	8%	4%	10%	3%	-3%	3%

Mississippi	9%	10%	3%	2%	4%	0%
Missouri	-2%	0%	-1%	-8%	-6%	-7%
Montana	4%	8%	1%	1%	6%	-3%
Nebraska	19%	22%	36%	15%	18%	31%
Nevada	8%	13%	8%	3%	6%	1%
New Hampshire	22%	16%	13%	15%	10%	7%
New Jersey	13%	6%	7%	7%	1%	4%
New Mexico	-4%	2%	8%	-8%	0%	3%
New York	20%	18%	15%	12%	11%	8%
North Carolina	18%	22%	20%	9%	11%	9%
North Dakota	3%	4%	10%	-2%	-1%	8%
Ohio	13%	11%	0%	5%	4%	-6%
Oklahoma	9%	5%	9%	6%	2%	2%
Oregon	16%	9%	9%	8%	3%	4%
Pennsylvania	15%	11%	17%	7%	3%	8%
Rhode Island	17%	12%	8%	12%	8%	5%
South Carolina	18%	22%	20%	9%	11%	9%
South Dakota	-11%	-13%	0%	-16%	-17%	-4%
Tennessee	8%	7%	6%	1%	1%	0%
Texas	-6%	5%	10%	-10%	2%	3%
Utah	8%	12%	7%	2%	6%	0%
Vermont	21%	13%	11%	16%	9%	6%
Virginia	15%	12%	14%	5%	5%	6%
Washington	15%	11%	9%	9%	5%	5%
West Virginia	9%	10%	10%	0%	2%	2%
Wisconsin	8%	4%	7%	2%	-3%	1%

Wyoming	6%	10%	3%	1%	6%	-3%
Simple National Average	10%	10%	9%	4%	4%	3%

Considerable year-to-year variations in the AEWR in some regions have made planning difficult for farmers. For example, the 2019 AEWR of $13.13 for the Mountain II region, which includes, Nevada, Colorado and Utah, was $2.44 per hour or 23% higher than the 2018 AEWR of $10.69. Reducing some of the variation in payroll expense from year to year would be a welcome outcome of the proposed rule.

Unfortunately, according to the limited three-year span of data provided by DOL, the proposed rule does not accomplish this goal, as demonstrated in Table 6. For example, the total wage expenditure under the current AEWR for the small/medium farm example farm in the Cornbelt I region increased 8% from 2017 to 2018 and then decreased by 1% from 2017 to 2018. Under the proposed rule, the total wage expenditure for the example small/medium farm in Illinois, a state within the Cornbelt I region, increased 6% from 2017 to 2018 and then decreased by 10% from 2017 to 2018.

The variability story is similar for the large crop farm, despite a labor force that has a slightly smaller share of higher wage positions (14% positions on the large farm vs 20% on the small/medium farms). The total wage expenditure under the current AEWR for the example large farm in the Cornbelt I region increased 8% from 2017 to 2018 and then decreased by 1% from 2017 to 2018. Under the proposed rule, the total wage expenditure for the example large farm in Illinois, a state within the Cornbelt I, region increased 6% from 2017 to 2018 and then decreased by 11% from 2017 to 2018. Across several regions the proposed rule methodology ends up producing more wage variation from year to year, rather than reducing it.

Table 6: Year Over Year Change in Payroll Expense

Calculation Method	Region or State	Small & Medium Crop (10 & 20 workers)		Large Crop (70 workers)	
		2016/2017 Change	2017/2018 Change	2016/2017 Change	2017/2018 Change
Current Regulation	Appalachian I	5%	2%	5%	2%
Proposed Rule	Virginia	3%	3%	5%	3%
	North Carolina	6%	5%	6%	4%
Current Regulation	Appalachian II	1%	2%	1%	2%

Proposed Rule	Kentucky	-16%	2%	-19%	2%
	Tennessee	0%	1%	1%	1%
	West Virginia	1%	3%	2%	2%
Current Regulation	California	6%	5%	6%	5%
Proposed Rule	California	7%	5%	7%	5%
Current Regulation	Cornbelt I	8%	-1%	8%	-1%
Proposed Rule	Illinois	5%	-8%	6%	-10%
	Indiana	7%	-9%	7%	-10%
	Ohio	6%	-10%	6%	-11%
Current Regulation	Cornbelt II	8%	2%	8%	2%
Proposed Rule	Iowa	-2%	-7%	-3%	-8%
	Missouri	9%	2%	10%	1%
Current Regulation	Delta	-3%	3%	-3%	3%
Proposed Rule	Arkansas	-1%	-4%	-1%	-1%
	Louisiana	0%	-9%	0%	-1%
	Mississippi	-1%	-4%	-1%	-1%
Current Regulation	Florida	4%	2%	4%	2%
Proposed Rule	Florida	3%	0%	3%	1%
Current Regulation	Hawaii	4%	9%	4%	9%
Proposed Rule	Hawaii	10%	14%	9%	17%
Current Regulation	Lake	6%	2%	6%	2%
Proposed Rule	Michigan	-1%	6%	-1%	8%

	Minnesota	2%	9%	1%	9%
	Wisconsin	2%	6%	1%	7%
Current Regulation	Mountain I	-1%	0%	-1%	0%
Proposed Rule	Idaho	4%	-5%	5%	-7%
	Montana	3%	-7%	4%	-9%
	Wyoming	3%	-7%	4%	-9%
Current Regulation	Mountain II	-2%	-3%	-2%	-3%
Proposed Rule	Colorado	0%	-7%	1%	-8%
	Nevada	2%	-7%	1%	-8%
	Utah	1%	-7%	2%	-8%
Current Regulation	Mountain III	-2%	-4%	-2%	-4%
Proposed Rule	Arizona	8%	2%	8%	2%
	New Mexico	4%	1%	6%	-1%
Current Regulation	Northeast I	5%	4%	5%	4%
Proposed Rule	Connecticut	6%	1%	8%	1%
	Massachusetts	2%	-1%	3%	0%
	Maine	6%	0%	5%	0%
	New Hampshire	1%	0%	1%	0%
	New York	4%	1%	4%	1%
	Rhode Island	1%	0%	2%	1%
	Vermont	-2%	2%	-1%	1%
Current Regulation	Northeast II	5%	-1%	5%	-1%
Proposed Rule	Delaware	0%	2%	0%	2%

	Maryland	3%	0%	2%	1%
	New Jersey	-2%	0%	0%	1%
	Pennsylvania	1%	4%	1%	3%
Current Regulation	Pacific	5%	6%	5%	6%
Proposed Rule	Oregon	0%	5%	1%	6%
	Washington	1%	4%	2%	6%
Current Regulation	Northern Plains	0%	-1%	0%	-1%
Proposed Rule	Kansas	6%	3%	6%	3%
	North Dakota	1%	5%	2%	8%
	Nebraska	2%	10%	2%	10%
	South Dakota	-2%	13%	-1%	14%
Current Regulation	Southeast	0%	3%	0%	3%
Proposed Rule	Alabama	5%	-1%	3%	0%
	Georgia	1%	1%	1%	1%
	South Craolina	4%	1%	2%	1%
Current Regulation	Southern Plains	4%	2%	4%	2%
Proposed Rule	Oklahoma	0%	6%	0%	3%
	Texas	16%	7%	18%	3%

Conclusion

To alleviate concerns about potential adverse effects on the wages of workers in higher-paid agricultural occupations, DOL is proposed a new AEWR methodology that would establish separate AEWRs by agricultural occupation. However, due to thin data for many occupations it appears as if the proposal will make estimating wage expenditures more difficult, more variable and more expensive. The window to submit written comments on the proposed rule closes September 24.

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