

**FROM FARM TO TABLE:
IMMIGRANT WORKERS GET THE JOB DONE**

HEARING
BEFORE THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
ONE HUNDRED EIGHTEENTH CONGRESS

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FROM FARM TO TABLE: IMMIGRANT WORKERS GET THE JOB DONE

WEDNESDAY, MAY 31, 2023

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice at 10:01 a.m., in Room 216, Hart Senate Office Building, Hon. Richard J. Durbin, Chair of the Committee, presiding.

Present: Senators Durbin [presiding], Whitehouse, Klobuchar, Coons, Blumenthal, Hirono, Padilla, Ossoff, Welch, Graham, Grassley, Cornyn, Hawley, Kennedy, and Blackburn.

OPENING STATEMENT OF HON. RICHARD J. DURBIN, A U.S. SENATOR FROM THE STATE OF ILLINOIS

Chair DURBIN. This meeting of the Senate Judiciary Committee will come to order. Last week, the Members of the Committee traveled back home for Memorial Day. It was an opportunity to meet with constituents and learn more about their concerns. For my part, I met with constituents across the State of Illinois, and everywhere traveled I heard the same thing over, and over, and over. I'm sure other Members of the Committee did as well. Our Nation is in dire need of legal workers.

We have roughly 10 million unfilled jobs in this country, and too few workers to fill them. This shortage is hurting every community and every industry, from healthcare to hospitality. I visited Decatur, Illinois, a town in the central part of our State that I have represented in Congress—in the House and in the Senate for decades. I have never heard this before. They have too many job vacancies. They are desperate for workers in Decatur, Illinois. I don't think I've ever heard that in the 40 years that I've been representing that community.

One sector where worker shortages is especially dire is agriculture. An industry that relies heavily upon the labor of immigrants. Today, our Nation's broken immigration system makes it difficult for Americans' farms and factories to recruit and retain the workers they need to create stability and affordability of our food supply. Go to the grocery store if you haven't recently. Go with your parents if you're a young person. Let them tell you the story of what things used to cost just a few months ago and what they cost today.

Part of the problem is the supply chain itself and the people who are an integral part of it. So we're going to start this morning's hearing by looking at a video on the essential, dangerous, and often

invisible work that farmworkers perform every day, and how our immigration system is failing. It's failing them, as well as our Nation's farmers, and ultimately, the American people. Let's show the video.

[Video is shown.]

Chair DURBIN. For more than three decades, Congress has failed to modernize our Nation's immigration system. As a result, our Nation's farms, factories, and food processing facilities have struggled to secure a steady, stable supply of workers. I work with my friend, the Ranking Member Senator Graham, and others on both sides of the aisle to advance bipartisan legislation to reform farmworker immigration. But we've never secured enough votes to support the enactment of the law.

And that's not just bad for our Nation's economy. It's a national security risk. Our shortage of farm and food workers has forced us to rely on other countries to meet our food needs. In fact, the U.S. Department of Agriculture has projected that America—believe this or not—will soon become a net importer of agricultural products.

When it comes to securing our Nation's food supply chain, immigration reform is a top priority. And though strengthening our Nation's borders is a crucial component, it's only one part of the equation. We need to approach this issue as an economic imperative because the fact is, immigration reform is the most immediate and meaningful step we could take today to resolve our shortage of workers. We need to recognize these issues are fundamentally interconnected.

Many immigrants who cross the border end up working in the fields because of unmet demand for farmworkers. Immigration reform would help reduce unauthorized immigration by legalizing this labor migration. But it seems that some, in States like Arkansas, would prefer to address this shortage by rolling back child labor laws. This is not a solution. This is a shame. Immigrants already account for more than 60 percent of all farmworkers in our country. Most of them are undocumented.

Let's put the facts on the table. What would happen to America's farmer, farm operations if we deported these workers? Well, let me tell you about a farmer named Shay Myers, testified before our Committee 2 years ago during our last hearing on the importance of immigrant farmworkers. Shay shared with us that his asparagus farm lost an entire season's worth of profit because 36—36 H-2A workers were delayed at the border, and they couldn't find domestic workers to replace them.

He noted, and I quote, "It's not safe because if we can't get workers, we can't harvest our crops. If we can't harvest our crops, we can't feed you." Shay is one of the millions of American farmers and business owners who understand our economy depends on the labor of immigrants.

Reducing the wages of legal immigrant farmworkers or forcing undocumented farmworkers out of the workforce, as some have proposed, is not a solution. Instead, lawmakers must enact new laws to protect the rights of these workers while also providing them with a path to permanent legal status. These reforms will ensure that farmworkers can continue contributing to our Nation.

I'd like to thank Senators Ossoff and Tillis who requested this hearing on a bipartisan basis. They have both seen the critical role that immigrants play in the agricultural industry in their home States of Georgia and North Carolina. Now, I want to introduce my noteworthy colleague who has become notorious in one country, but he's safely returned to ours. We are glad to have him back. Senator Graham.

**OPENING STATEMENT OF HON. LINDSEY O. GRAHAM,
A U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA**

Senator GRAHAM. Thank you, Mr. Chairman. Yes, it's been an interesting couple of days. Glad to be home. That's for darn sure. I want to thank Senator Blumenthal for being willing to represent me in Russia. It'll be a test of your legal skills.

Senator BLUMENTHAL. You have the right to remain silent.

Senator GRAHAM. Thank you. I think I have a right to stay out. I intend to do that. So anyway, about my trip. This Committee has been bipartisan in many ways, and to my Democratic colleagues, and Republican colleagues, you've been great on Ukraine. You've been terrific. Senator Durbin, you've been absolutely terrific. People on our side, I feel the same way about.

In the coming days, maybe hours, there'll be a massive counter-offensive that will begin to liberate parts of Ukraine from the Russian invaders. All the money and effort we've made to help the Ukrainian military and people is about to pay dividends. So I'll talk in more detail about that.

So back to matters here at home. Chalmers Carr is a constituent of mine. He's in the farming business. Senators Cornyn, Grassley, myself, Durbin, all of us have been seeking a solution to a vexing problem for years. So let's start with the idea that it is a problem. I'm surprised that only 60 percent of the people working in agriculture are immigrants. I thought that it would actually be more.

So what we have is a dilemma. Nobody on this Committee wants to deny an American worker a job in any area off the economy. You can't get an H-2A visa until you try to hire an American to do the job in question. And legal immigration, as you well know Mr. Chairman, is designed to help American companies who fall short in hiring here at home. So they can have a robust workforce added to the native-born workforce or the U.S.-citizen workforce to keep the company in America so they don't have to leave.

And, you know, the visa programs supplement the American citizen workforce to give the employer a chance to stay in business here at home. So it's a win-win. The problem is, you've identified, is it's very difficult for employers right now to find workers in certain areas of our economy. I am here to tell you that H-2A, H-2B, we're not denying an American worker a job. We're creating an opportunity for an American employer to stay in business in America.

The problem we have, Mr. Chairman, is if we legalize the agricultural workforce, give legal status without securing our border, and changing our asylum laws first, you will have a run on this country that you've never seen. It will be pouring gasoline on a fire. That's the dilemma.

I am not antagonistic to trying to find a solution to the agricultural dilemma of creating a more robust legal system so you can

access legal workers. And some can stay because it would add value to our country. But if we legalize everybody here in the agricultural sector without first securing our border, and changing the magnets that are drawing 6 million people in the last couple of years into our country, then we'll have made the problem worse.

So I just would end on this note. Very sympathetic to the dilemma faced by the immigrant workforce and by the employers, but the solution of legalizing millions of people in the agricultural community without first dealing with the broken border and a broken asylum system, I mean, I think, is ill-conceived. Thank you.

Chair DURBIN. Senator Graham, I don't disagree with you. But I think there's an orderly way to do this in the bills that have been prepared by Senator Bennet, for one, our friend who is on the Gang of Eight, really put a time requirement in this so that the workers had to be here for, I think, it was 20 years, under one of our proposals. So this is not going to be a run on the border in any respect. You have to have shown that you're a reliable worker, number one, and a trustworthy future American over a long period of time to qualify.

And I would also say, I'm all for an orderly process at the border. I think we all agree on that. If we establish an H-2B process or something like it that has specific numbers coming in who are monitored while they're here in the United States, I think it's going to avoid the calamitous outcome that you think may happen. I hope I'm right. Let's see if the witnesses can add anything to that.

We have five witnesses today. I'll introduce the Majority witnesses and turn to the Ranking Member for the Minority.

Our first witness is Diana Tellefson Torres. Welcome. Serves as the chief executive officer of the United Farm Workers Foundation. The nonprofit arm of the United Farm Workers of America Union.

We are also joined by Adam Lytch—did I pronounce that correctly? Thank you. Adam Lytch is the operations manager at L&M Companies.

The final Majority witness is Daniel Costa. Serves as the director of immigration law and policy research at the Economic Policy Institute. Senator Graham.

Senator GRAHAM. Thank you, Mr. Chairman.

Our witnesses are Mr. Leon "Sequeira"—is that pretty close? Okay. Thank you. He's currently an attorney in private practice where he represents agricultural employers and ag associations across the country. He previously served as Senate-confirmed Assistant Secretary of Labor for Policy under President George W. Bush. At the Department of Labor, he was involved intimately in developing the Bush administration's immigration policy reforms, including the first overhaul of the H-2A program in more than 20 years. He received his bachelor's degree from Northwest Missouri State University, and his law degree from George Washington University Law School.

The second witness is my constituent, Chalmers Carr. Mr. Carr is a first-generation farmer and the owner, president, and CEO of Titan Farms located in Ridge Spring, South Carolina. He oversees a farming operation consisting of over 6,100 acres of peaches and several hundred acres of vegetables. And employs over 850 H-2A temporary workers annually.

Mr. Carr has served on many national boards for the U.S. Department of Agriculture, and is the current president of USA Farmers, a national organization representing H-2A employers. He's a member of the South Carolina Agriculture Commission, serves as treasurer of the South Carolina Peach Council, and is an executive board member of the Palmetto AgriBusiness Council.

He and his wife moved to Ridge Spring in 1995, Lori. And they have farmed there ever since. I've been to their farm, and he has the best peaches in the world. So thanks.

Chair DURBIN. We're going to have a peach competition before this is all over.

Senator GRAHAM. And that's saying something of South Carolina.

Chair DURBIN. Thank you, Senator Graham. So I'll lay out the mechanics of the process. It's simple. Five-minute opening statements, 5-minute questions by each individual Senator. We kick it off with the oath. And I ask each witness to please stand and raise their right hand.

[Witnesses are sworn in.]

Chair DURBIN. Let the record reflect that the witnesses have answered in the affirmative. Ms. Torres, you're first.

STATEMENT OF DIANA TELLEFSON TORRES, CHIEF EXECUTIVE OFFICER, UFW FOUNDATION, BAKERSFIELD, CALIFORNIA

Ms. TORRES. Chairman Durbin, Ranking Member Grassley, and distinguished Members of the Committee, I want to thank you for this opportunity to testify. My name is Diana Tellefson Torres, and I am the CEO of the UFW Foundation, based in California and serving farmworker families around the country.

Behind me are farmworkers and children of farmworkers who have worked in the fields. Take Jackie, who began picking blueberries at age 14. Our Nation's food supply relies on about two million farmworkers, about half of whom are U.S. citizens or lawful permanent residents, according to the Federal Government.

Farm work is a career. And farmworkers across the country often will proudly share about the decades that they have worked feeding the Nation, and, in fact, much of the world. And yet our fellow U.S. citizens and lawful permanent residents who are farmworkers often live in poverty, and struggle to feed their own families.

Fifty percent of the men and women they work alongside either do not have documentation or are here through the H-2A guestworker program. Lack of legal status, combined with a shameful history of excluding the industry from basic labor laws such as overtime pay or the right to join a union, makes farmworkers vulnerable to a range of abuses.

The threat of immigration enforcement is a form of coercion that employers can use against both undocumented and H-2A workers. U.S. citizens and work-authorized colleagues also often work in fear, as they know that they can easily be replaced by more vulnerable workers. Esther from California, who has worked as a farmworker in the U.S. for 25 years picking grapes, vegetables, and oranges asked me to tell you, "I wish to tell our lawmakers in Congress to please pass legalization for farmworkers so we may see our

families without fear. That we may work without fear. And that we may contribute to this country without fear.”

Today, the United States has a choice. We can recognize the incredible value of farmworkers, and work towards a day when the industry is characterized by workers who work and live without fear because they have a way to earn citizenship and enjoy equal labor rights. This choice will enable farmworkers to stay in agriculture and help the industry in our rural communities thrive.

Or, we can continue to turn a blind eye to the fact that too many farmworkers work without legal authorization, and that the existing H-2A visa program has become the worst source of human trafficking among U.S. visa programs. And workers in the program too often have their rights violated.

The number of H-2A jobs approved by the DOL has increased rapidly from 79,000 H-2A positions in 2010 to 371,000 in 2022. It is hard to know which stories to tell when it comes to the lives of too many H-2A workers. I hope you have read my testimony and understand that the problems for H-2A workers most often begin before they even get to this country because the system is dependent on recruiters that are able to discriminate in the workers they choose, and often insist on the payment of illegal recruitment fees. Accordingly, H-2A workers come to this country largely indentured.

Additionally, Federal law excludes H-2A workers from the Migrant and Seasonal Agricultural Worker Protection Act, which protects farmworkers’ rights. Workers live in substandard conditions, work in extreme conditions for well over 10 hours a day, experience wage theft, and do not speak up because they will only be chosen to come back to the U.S. in future years if they don’t complain. This is why our increasing reliance on the H-2A guestworker program in its current form threatens the conditions of all farmworkers.

Congress not passing bipartisan agricultural immigration reform that honors the women and men who feed us is an active choice to support a deeply flawed system, harming both workers and law-abiding employers. That is why we have worked for decades to craft bipartisan solutions to enable career farmworkers to gain legal status, and to reform the H-2A program.

The Farmworkers’ Movement, led by the United Farm Workers, has come to an agreement with most of the Nation’s major grower associations to move forward bipartisan agricultural immigration bills that won the majority votes in the House or Senate during the administrations of Presidents Bush, Obama, Trump, and Biden. And indeed, many of you here today have been part of those efforts. We have come so frustratingly close in passing agricultural immigration bills, and we remain ready to partner again. Thank you for the opportunity to speak to you about the important work that farmworkers do.

[The prepared statement of Ms. Torres appears as a submission for the record.]

Chair DURBIN. Thank you, Ms. Torres. Mr. Sequeira.

STATEMENT OF HON. LEON SEQUEIRA, FORMER ASSISTANT SECRETARY OF LABOR FOR POLICY, PROSPECT, KENTUCKY

Mr. SEQUEIRA. Thank you. Good morning, Chairman Durbin, Ranking Member Graham, and Members of the Committee. I appreciate the opportunity to testify today about the critical role of the H-2A agricultural visa program in providing much-needed farmworkers to America's farms.

I've worked on employment and immigration policy for nearly 20 years. Throughout my career, there have been two constants on America's farms. First, a profound shortage of domestic labor. And second, misguided Government policy that makes it harder to farm.

Unfortunately for farmers, each year, both of these factors get worse. The lack of sufficient domestic labor means that farmers with labor-intensive farming operations have no choice but to rely on the H-2A program to secure their labor. Throughout its history, the H-2A program has been plagued by complicated regulations, bureaucratic inefficiencies, high costs, processing delays, artificial limits on which agricultural employers can participate, and, most distressingly, open hostility from the Department of Labor.

Despite the program's numerous shortcomings, farmers have no other legal option. But each year, the Department of Labor seems intent on making it harder and harder to use the H-2A program. In the event there is any lingering doubt about whether there are sufficient numbers of domestic workers to take these farm jobs, a few statistics from the Department of Labor's data on the H-2A program will make this clear.

In 2022, farmers submitted more than 18,000 applications for certification of about 370,000 positions. As part of the Department's certification process, these positions were advertised nationwide, and farmers were required to hire any U.S. applicant who met the basic job qualifications.

Last year, fewer than 300 U.S. workers accepted these positions. That's not 1 percent. That's not one-half of 1 percent. That is six one-hundredths of 1 percent of available farmworker openings filled by U.S. workers. To say it another way, if math isn't your strong suit, as it is for me—or is not for me, I guess, I should say—for every 10,000 farmworker job openings, just 6 were filled by U.S. workers. And 2022 was not an unusual year.

Participating in the H-2A program is no easy task, and it is certainly not for the faint of heart. Even for a Government-administered program, its costs and difficulties are legendary. The Department of Labor sets annual wage rates for the program. And over the past 5 years, they've increased these rates, on average, nearly 25 percent.

Nationwide, the average H-2A wage is more than \$16 an hour. In Washington and Oregon, it's nearly \$18 an hour, and in California, it's \$18.65 an hour. On top of that, farmers also must provide their employees with free housing and free daily transportation benefits that virtually no other employer, farmer, or otherwise provides. In addition, farmers also pay all the expenses of their workers in traveling to the United States and then returning home each year.

Despite the profound lack of workers willing to perform this work in the U.S., and despite the already high cost of the program, the

Department of Labor has recently devised yet another way to ratchet wage rates and farm production costs even higher. New Department of Labor regulations will fundamentally change how H-2A wage rates are calculated. And they have decided to further increase rates for certain basic tasks performed on the farm such as driving a truck loaded with vegetables, transporting a worker from housing to the field, or erecting a fence to contain livestock.

This misguided approach will lead to significant disruption in farm operations and tens of millions—if not hundreds of millions of dollars in additional costs to farmers. My written testimony contains a more detailed description of how these new regulations will harm America's farmers.

The Department seems to assume that every time they increase wages, farmers will just correspondingly increase their prices to recover those costs. But the Department is oblivious to a central element of the agricultural economy. Unlike virtually every other business, farmers do not get to set the price of their products. The market sets the price.

And increasingly, the market is dominated by low-cost imports, especially from Mexico, where the required wage rate is the equivalent of \$10-\$11 per day. In the United States, H-2A farmworkers must be paid at least \$16 per hour on average. Is it any wonder why we have a \$37 billion trade deficit in fruits and vegetables with Mexico?

Plain and simple, the Department of Labor is pricing farmers out of the market and out of business. And as you said, Mr. Chairman, this will be the first year in which the United States imports more food than it exports. That should be a clear warning to policymakers that Government policy must change.

We need a future workforce solution that provides farmers access to labor with a fair and predictable cost structure that enables them to remain competitive in the international marketplace. Otherwise, within a generation, or even sooner, we will be totally dependant on foreign countries to feed us. Mr. Chairman, thank you, again, for the opportunity. I look forward to your questions.

[The prepared statement of Mr. Sequeira appears as a submission for the record.]

Chair DURBIN. Thank you, Mr. Sequeira. Mr. Lytch.

**STATEMENT OF ADAM LYTCH, OPERATIONS MANAGER,
L&M FARMS, EAST PALATKA, FLORIDA**

Mr. LYTCH. Good morning. My name is Adam Lytch, and I'm the regional manager for L&M Farms, located in East Palatka, Florida. Our operation spans several States, including Florida and Georgia. And we produce a variety of specialty crops including potatoes, cabbage, broccoli, bell peppers, watermelons, squash, cucumbers, and many more.

First of all, let me thank Chairman Durban and Ranking Member Graham for the opportunity to come here today to speak to this distinguished Committee on an issue that is very near and dear to me, the domestic workforce crisis facing U.S.—

Chair DURBIN. Mr. Lytch, could you pull your microphone a little closer, please?

Mr. LYTCH. Excuse me.

Chair DURBIN. Thank you.

Mr. LYTCH. For me, this issue transforms politics, and we need reforms that will allow us to have a stable workforce so that our growers can continue to feed the Nation. Like many farm kids, I grew up wanting to do the same thing that my dad did. I grew up in the fields alongside him and other workers doing everything from chopping cotton to cropping sand lugs. It was all hard work. I remember over 30 years ago, it started to become harder for my family to find workers. Our existing workforce had begun to age out, and others no longer wanted to pursue this type of work.

During this time, a man from Mexico, Ruben, stopped by asking for a job. He shared with me the love he had for a place he called home, and the importance of making sacrifices for your family. He simply wanted to be here in the U.S. so that his family in Mexico could have a better life. As the years went by, Ruben started to recruit more workers from Mexico. Our family operation had no other way to meet our seasonal work needs. That's how from an early age, I began to understand that American agriculture was dependent on immigrant workers to get the jobs done.

Fast forward over 30 years, and not much has changed. There have been no fixes to the problem that I witnessed firsthand all those years ago, and America's food system still requires seasonal workers. As American farmers, we face a variety of challenges. Most of these are things we cannot control, like weather, market conditions, rapid inflation, and supply disruptions, like during the recent COVID-19 pandemic.

However, the single biggest issue we face is the unprecedented shortage of domestic labor and the restricted access to a H-2A guest workforce. The H-2A program is currently our only option. The program is greatly flawed and made even more challenging by the Federal agency entrusted to administer it, with a volatile wage structure and program restrictions such as seasonal need which does not work well in this era of modern agriculture.

Additionally, under the H-2A program, a self-inflating Adverse Effect Wage Rate, or AEWR, is set each year for workers. The methodology for which lacks visibility, accuracy, and stability for growers. The AEWR was originally created to protect American workers who perform the same duties as those on the H-2A contracts so that they would not be adversely affected.

But that is no longer the case since there are no American workers willing to do these jobs. In fact, American families are the ones being adversely affected as our workforce crisis will continue to drive food prices even higher.

We treat our workers fairly. And most of them, over 93 percent, come back year after year. It is important that they earn a fair wage that provides us stability. We want them to come back every year. We want a program that works for all involved. But if nothing changes, there will certainly be a sharp decrease in production, affecting not only farmers and farmworkers, but the rural communities in which we operate who also depend on agriculture.

For 2023, the AEWR in Florida increased 15.5 percent, and we received notice of this just 38 days before it went into effect on January the 1st. We had workers on the way from Mexico when we found out we had nearly a \$2 dollar per hour increase coming. At

the same time, our crops were mostly all planted, giving us little to no time to react.

Our crops are touched by human hands at every step of the production, harvest, and packing process. Labor alone makes up between 40 and 50 percent of our total cost to grow and harvest most of our crops. As a result of the AEWB changes this year, my company will see at least a \$1.4 million payroll increase over the prior year. These rising labor costs tied to the H-2A program exacerbated by a new Labor Department wage rule, make it nearly impossible to compete with countries that pay a fraction of what we do for their workforce.

It is often said that food security is national security. We must create a pathway to earned legal status for those in the current domestic workforce, have wage stabilization, and greater H-2A program access to ensure that the U.S. can feed itself. But it is up to Congress to act.

In closing, I will ask you this: Will you support our American food system by passing agricultural workforce reform, or will we have to rely on our foreign competitors to step up, and meet our food and nutrition needs the next time our supply chain is so greatly disrupted? We need Congress to support and seed real change on this issue before it is too late. The future of American agriculture, especially the fresh fruit and vegetable industry, depends on it. Thank you.

[The prepared statement of Mr. Lytch appears as a submission for the record.]

Chair DURBIN. Thank you, Mr. Lytch. Mr. Carr.

STATEMENT OF CHALMERS R. CARR, III, OWNER AND CHIEF EXECUTIVE OFFICER, TITAN FARMS, RIDGE SPRING, SOUTH CAROLINA

Mr. CARR. Chairman Durbin, Ranking Member Graham, and Members of the Judiciary Committee, good morning.

Chair DURBIN. Good morning.

Mr. CARR. My name is Chalmers Carr. I'm a first-generation farmer from South Carolina, where my wife and I own and operate Titan Farms. We grow peaches, bell pepper, eggplant, and broccoli.

Over the last 24 years, we have grown into the second largest peach operation in the country. We could not have done this without participating in the H-2A program for the last 25 years, where we annually bring in over 800 workers, and we have over a 90 percent return rate of these workers. This, coupled with our great full-time employees, have allowed us to build a future for us and our family. I greatly appreciate you holding this vitally important hearing entitled, "From Farm to Table: Immigrant Workers Get the Job Done."

While this was very true for more than the last half of the century, things have changed greatly. There's ample evidence that we have a substantial shortage of domestic and immigrant workers choosing to work in agriculture. Yet nonimmigrant workers, guestworkers coming in through the H-2A program are taking these jobs by the hundreds of thousands.

Unfortunately, ag labor reform has been tied to immigration reform since 1990. Therefore, we have had no reform to ag labor. As

a result, we have a very fragile food supply chain that was highlighted during the pandemic. Food inflation is at an all-time high. Our imports and our dependence on foreign countries for our food sources is growing rapidly.

The Department of Labor is using a flawed wage methodology which has increased wages nationally 7 percent this year, and 24 percent over the last 5 years. Ten States this year, like mine and like Adam's in Florida, saw double digit wage increases. To couple the problem, DOL has recently passed a new wage rule that will bring in new wages, higher wages, and more complexity to the H-2A program, adding fuel to this problem.

Allow me to share a few impacts from our farm. Under the flawed AEWR methodology, this year our wages increased 14 percent. This will result in a \$2.6 million payroll increase. But more importantly, it will raise the cost of our box of peaches 5 percent. This is what we call food inflation.

The problematic new DOL wage rule will drive our wages up another 10 to 15 percent, adding another \$2 million to our payroll. We will have to file 15 to 20 H-2A contracts annually instead of the 5 that we currently do. We will have to hire two full-time employees, one in H.R. and one in accounting, just to implement this new rule. And we are very concerned about the liability of this new rule as it is very vague to how it's going to be applied. Honestly, with these recent changes and the current H-2A program, we are finding it difficult to understand if we can remain profitable.

Things to consider. The Adverse Effect Wage Rate, as Adam said, was designed to make sure that we protected domestic workers from foreign workers coming in and lowering wages in similarly employed positions. But yet we have less than 1 percent, as Leon said, 0.006 percent of American workers choosing to do these jobs.

So who are we adversely affecting? I would say we're adversely affecting the U.S. consumer with higher food prices. We are threatening our national security as our increased dependence on foreign imports grows. And yes, we're affecting the American family farm.

The new DOL wage rule uses BLS, Bureau of Labor Statistics, nonfarm wages to set new wage rates. How can this be considered similarly employed? That's like comparing peaches to oranges. I believe the future of our great Nation is imperative that we reform the H-2A program in order to stop, and hopefully undo, many of these negative trends that I've shared with you.

But first, I implore you to prioritize ag labor crisis as a national security issue. To separate ag labor reform from immigration reform which seems to be intractable by supporting and passing the following: Senate Joint Resolution 25, a congressional review action on the new DOL wage rule; and supporting the bipartisan bill, S. 874, Farm Operations Support Act. This is the first step you can do to put a tourniquet on the problem.

The next steps I would ask you to do is examine the issue closely, understanding the world today and our labor force is completely different than it was just 20 years ago. Study the issue, debate the issue, and then pass meaningful agriculture labor reforms that will help secure our country's future. I stand ready to work with you, and I thank you for allowing me to testify today. I appreciate you

having this hearing, and I look forward to answering your questions.

[The prepared statement of Mr. Carr appears as a submission for the record.]

Chair DURBIN. Thanks, Mr. Carr. Mr. Costa.

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

Mr. COSTA. Good morning, Senator Durbin and Ranking Member Graham, and other distinguished Members of the Committee. I'm especially honored to be before the Judiciary Committee today given my own interest and personal history on the topic.

I am myself the son of immigrants. Each who came to the United States from a different country, and through a different immigration pathway. The first jobs that most of my family members on both my mother's and father's side had, after arriving in the United States, were in the food supply chain in the agricultural heartland of California where I grew up and now live.

My dad's entire side of the family, when they immigrated to the U.S., almost all lived and worked on dairies milking cows in the Central Valley. My mom worked at the local poultry processing plant while she was still pregnant with me. Thus, I feel deeply connected to these issues that we're discussing here today.

I believe that the United States has benefited greatly from immigration and the immigrants who arrive both economically and culturally. It's also why I believe that the United States should grow and expand permanent immigration pathways. And I believe that we should do much more to improve the migration pathways that currently exist.

And Congress should first and foremost regularize the status of those who are in the United States but lack an immigration status. Or have only a precarious temporary status. That one action on its own would be the best and most impactful reform to improve conditions across many low-wage industries, including in the farm labor market.

At present, 5 percent of the U.S. labor force lacks an immigration status. That leaves those workers vulnerable to retaliation by employers, leaving immigrant workers fearful of complaining when their rights are violated which degrades standards for all workers, and allows employers to violate the law with impunity. It also makes it difficult for those workers to organize and join unions.

Increasingly, it's not just unauthorized immigrants who are suffering from the impact of this dynamic. There are millions of workers today, including those with DACA, TPS, and parole, for example. These workers have a precarious status that is in a gray area. They have some protection from deportation along with the work permit, which is good because, in practice, it means having workplace rights.

However, many of those migrants do not have a permanent path to remain in the United States. Their status is subject to the whims of policymakers and can be taken away at any moment. That prevents them from being able to integrate and participate

fully in American economic and political life. Congress should also provide them with a path of permanent residents immediately.

And then there are temporary work visa programs like H-2A which are an instrument to ultimately deliver migrant workers to employers, but without having to afford them equal rights, dignity, or the opportunity to integrate and participate in political life. And which undermine labor standards, and leave more than two million migrant workers vulnerable to abuse. Those work visa programs can and should be reformed to include a quick path to a green card.

How do we know that lacking status harms workers, and that providing status can make a significant, positive impact? Take a look at the research. Here's just a few examples. A landmark study of low-wage workers found unauthorized immigrant workers were more than twice as likely to be the victims of minimum wage violations as compared to U.S.-born citizens.

A study of DACA recipients, who have protections from deportation and a work permit, showed that they doubled their wages after receiving a work permit. And in terms of citizenship and permanent residents, there is a very broad consensus that exists among economists and in the literature. And there are some real-world examples, like the studies done on the wage gains after the IRCA legalization, showing that permanent residents and citizenship both raises wages and reduces poverty.

And finally, I'd like to say a few words about the conditions in the fields for farmworkers that cultivate and grow the food we eat, and the wages they earn. Working on a farm is one of the most dangerous and difficult jobs in the entire labor market. Farmworkers earn very low wages even compared to the wages of other low-wage workers. In fact, the wages farmworkers earn are either at or near poverty levels, making it so that many cannot afford the fresh fruits and vegetables that we all buy that they picked with their own hands.

As a thought experiment, a co-author and I at UC Davis posed the question, How much would it cost to give farmworkers a significant raise in pay, even if it were paid entirely by consumers? The answer is, not that much—about the cost of two movie tickets or a nice bottle of wine.

If average farmworkers' earnings rose 40 percent, and the increase were passed on entirely to consumers, the average spending on fresh fruits and vegetables for a typical household would rise by only \$25 per year. A 40 percent raise—some might recall—was a wage increase that Cesar Chavez helped to win in the first UFW table grape contract in 1966.

Taking the current national average wage of \$16.62 per hour for farmworkers, a 40 percent increase would mean a new hourly wage of \$23.27 per hour. Such a raise could greatly improve the quality of life for farmworkers without significantly increasing household spending on fresh fruits and vegetables.

And then finally, it's also important to keep in mind that many of the claims you'll hear today about the rising wages of farmworkers are misleading. First, because they cite percentage increases that are often not adjusted for inflation. And second, because the so-called large increases are almost always starting from a very low number. Like the \$12.41 an hour that H-2A farm-

workers earned in Florida last year, which is the biggest State for H-2A employment. Or the \$11.99 an hour they earned in Georgia, the second largest H-2A State. With that, I'll conclude. And I look forward to your questions.

[The prepared statement of Mr. Costa appears as a submission for the record.]

Chair DURBIN. Thanks, Mr. Costa. I was just conversing with my colleague, Senator Graham, about our experience on the Gang of Eight. Was that about 10 years ago?

Senator GRAHAM. Yes.

Chair DURBIN. We had four Democrats and four Republicans and we spent months putting together a comprehensive immigration reform bill which passed in the floor of the Senate. Included in that farm bill was a section on farmworkers agreed to by both growers and farmworkers and it involved a path to citizenship. It was, I think, a thoughtful and serious attempt to address this problem. It passed in the Senate. It was never called for consideration in the House of Representatives.

Senator Bennet has been one of the leaders on this issue from Colorado—Senator Feinstein, Senator Rubio, and a few others. I do believe there is a will to solve this problem. And the fact that it is a part of comprehensive immigration reform is the fact that we think valid arguments in many aspects of immigration to consider it. And I hope we do. I ultimately hope we do.

I want to say that I have no prejudice against growers and farmers at all. I had a valued member of my staff for many years whose family was one of the largest employers of migrant farmworkers in Southern Illinois. Good people. Really thoughtful people who cared a lot for their workers, and they showed it.

I also want to say that we're living in a world that is hard to understand. I pass by these fast food restaurants, and I see what's written on the signs outside. Burger King, \$15.70 an hour to start at your Burger King. You go by on I-55, driving from Chicago to Springfield, you pass an Aldi warehouse. Aldi, of course, being a major grocery company, they're offering nearly \$20 an hour for starting salaries for people who come to work for Aldi.

I don't know what they'd be doing, but it certainly would not start off as being too technical. And they're being offered \$20 an hour to sign up. So when we talk about the current wage rate in this country, I think we have to be honest and realistic about it. There's a competition going on and a bidding war for our limited number of workers.

Having said that, Ms. Torres, I read your entire statement. You didn't have a chance in 5 minutes to present it. And there are many parts of it that are just heartbreaking to think in America this is taking place. Would you address the issue of wage theft that is in your statement there? And it appears that many workers who are nominally being paid so much per hour are actually being paid less because there's a middleman. What's that all about?

Ms. TORRES. Well, thank you for your question, Senator. You know, I'll begin this with a story from Georgia because I was just there last summer. And I was speaking with some farmworker women who were indigenous workers, spoke an indigenous language from Mexico. Their first language was not Spanish or

English. And, you know, they were walking through some of the issues that they're seeing and started to tell me that when they get paid, they're getting paid by the person who actually gives them a ride to work.

So, it's not the foreman, it's not the actual owner of the farm, and they're getting paid in cash. And they're very aware that often the wages that they're being paid in cash don't include the amount that they should be paid for the work that they did that week. And so we're looking at not just a foreman as an intermediary. Now, we're seeing this random person who's giving them a job keeping some of the money.

And so these workers were letting me know that, "Well, we can't say anything. We don't have papers, and I need a ride to work because I don't own a car. I can't afford a car." And so we're talking about the most vulnerable of workers. And we're talking about individuals who are keeping our food secure. We're talking about individuals who often don't feel like they have a voice. They don't have legal status. They feel that if they say anything, they may get deported. And so they're—

Chair DURBIN. Let me ask, if I can?

Ms. TORRES. Of course.

Chair DURBIN. Just a few weeks ago, it was disclosed about the exploitation of child labor—immigrant child labor. And some of that's happening in the heart of the Midwest. You know, I'm not going to name names for the States that are involved. But we think that we're above that sort of thing, and it's not true. In food processing, in slaughterhouses, children are being employed. I don't know if it's intentionally or negligently, but it doesn't speak well for our country that that would be happening. You mentioned one of the young people with you today who started picking fruit at age 14. Did you say?

Ms. TORRES. Fourteen, correct.

Chair DURBIN. Is that common?

Ms. TORRES. That is common. Unfortunately, in agriculture, children can work in ag at a very young age. And so, you know, oftentimes you have parents—we're talking about poverty wages here where farmworkers are making between, like, median and mean, somewhere between \$17,500 a year to a little less than \$20,000 a year.

Chair DURBIN. I'm sorry—

Ms. TORRES. Those are poverty wages. And so—yes, sir.

Chair DURBIN. Sorry to interrupt you, but I want to ask one other question.

Ms. TORRES. Of course.

Chair DURBIN. Mr. Lytch, one of the proposals in the House of Representatives passed on a partisan basis was to impose E-Verify on agriculture workers. That, of course, would check whether they're documented or undocumented. That legislation also included changes to the H-2A program reversing recent Department of Labor regulation setting wages.

The bill did not include a path to legal status for undocumented workers even though we know they make up at least 40 percent of the agriculture workforce. What would a mandatory E-Verify provision for agriculture workers do to the agriculture industry?

Mr. LYTCH. E-Verify alone without some reforms to the H-2A program or a visa program would certainly be devastating. I think both have to happen together. We live in and operate in States that currently do have E-Verify, and we comply with those laws.

But I think for the ag sector overall, which is, I think, what you're asking, it would be pretty devastating to have that based on the percentage that you mentioned of workers that are undocumented. So both have to happen together. There has to be some type of H-2A reform, greater access to the program before mandatory E-Verify.

Chair DURBIN. Mr. Carr, I'm going over a minute here, but I want to give you a chance to respond to Ms. Torres about practices at your farm. I want you to have a chance to say a word about it.

Mr. CARR. I'd be glad to. Well, first of all, Ms. Torres was referring to non-H-2A workers, and unfortunately, she was also referring to undocumented workers. This is one of the reasons why I joined the H-2A program 25 years ago.

I have the oversight of the Department of Labor investigating or coming and looking at me every time. My payroll and my payroll records are published. They come in and look at those. Every employee on my farm gets a separate paycheck with their wage statement. So participating in the H-2A program is one way we can make sure that there isn't farm labor abuse.

Chair DURBIN. Thank you. Senator Graham.

Senator GRAHAM. So let's see if I can do kind of a recap here. Does everybody on this panel agree that—is it 40 percent, Mr. Chairman, of people working in agriculture are here illegally? Is that generally accurate?

Mr. CARR. Senator, that's probably a low number in farm labor. Actual crop growing, harvesting of crops, that is probably a low percentage.

Senator GRAHAM. All right.

Mr. COSTA. The data from the Labor Department says that it's about 44 percent are undocumented. But that's obviously a very difficult population.

Ms. TORRES. Nearly half is what we've seen from the Federal Government. So, yes, some consensus there.

Senator GRAHAM. Yes. Okay. Let's just assume for a moment it's half. All right, America, half the people in the food supply chain, in vegetables, in peaches, and all that other stuff we like to eat, are here illegally. If they all left tomorrow, what would happen to the agricultural community? Mr. Carr.

Mr. CARR. I would ask you, What would happen to our country? Because our food supply would go down, and our food security would absolutely disappear overnight. We—

Senator GRAHAM. What do you think, Mr. Lytch?

Mr. LYTCH. I would agree. I think that a lot of those jobs are likely being filled now by people—

Senator GRAHAM. What do you think, Mr. Sequeira?

Mr. SEQUEIRA. I would agree with the other comments, certainly.

Senator GRAHAM. All right. Okay, here's the deal. Half the people working here illegally, if they left tomorrow, we would be hosed. So how do you fix it? You find a way to keep them here on our terms without making other problems worse. Does everybody agree that's

kind of a reasonable solution? They stay here, but they have to pay taxes. They have to earn their way into some kind of legal relationship in the United States. Does that make sense to everybody on this panel? Okay. Good.

Now, here's the problem. If we do agriculture alone—and I know Chalmers doesn't like hearing this—you're going to have to include other parts of the economy that have the same problem you do. Because there are a lot of people out there want more labor like you do. And there are a lot of people on my side, less now, thinking this is not a problem at all. It's a problem.

If you say there's enough American workers to make agriculture work in America, you don't know what you're talking about. And if you say that we can survive in this country as farmers given foreign competition, you don't know what you're talking about. We're going to import more food than we export because it's so much cheaper to farm in other places than it is here.

So the goal we've been trying to achieve all these years, Mr. Chairman, is to fix this problem in a way that's a win-win. Is there any asylum reform in the bill that we're talking about regarding agricultural workers? The answer is no. So if we did this bill tomorrow, and you didn't change the asylum system, you're going nowhere with illegal immigration. That's the problem.

A secure border is necessary, I think, as part of any effort to provide legalization to people already here that are adding value to our country. Most Americans want to secure the border. And Democratic colleagues have been in the past very good on this. So I don't want to sugarcoat this. Everything you say is true, Ms. Torres. Everything you say—I don't doubt one bit what you say is true about—particularly women, how they're being treated.

Mr. Lytch, Mr. Carr, I don't doubt one bit if these rules keep going into effect, we're going to put you out of business. And, Leon, you've been trying to fix this for years. And Mr. Costa, we may have a different view about the impact of raising wages to \$23 an hour across the board on the American consumer.

So, Mr. Chairman, thank you for having the hearing. The only solution available to us is to take the problem in agriculture, come up with a win-win for the agricultural community. But also, deal with the other magnets of illegal immigration, and help other parts of the economy that are experiencing the same thing you're experiencing.

So I'll end where I began. I'm for small deals. I'm for medium deals. I'm for big deals. But we're living in a world of no deals. To the American people, we've got a lot of problems. But what this hearing tells me, if we don't reform our agricultural system, food prices are going to spike in this country. It's going to become a national security problem. And a lot of American farmers are going to be out of business because they can't compete with foreign entities that don't have to deal with these problems. Thank you.

Chair DURBIN. Thank you, Senator Graham. I couldn't agree with you more, and we've at least got a little experience working together. And I hope that others will join us in our renewed effort. Senator Klobuchar.

Senator KLOBUCHAR. Thank you very much, Mr. Chairman. Thank you, both of you, for your work. I think that whether it is

in the agriculture area, whether it's in manufacturing, whether it is in our nursing homes, or hospitals, it is very clear that we need reform. I have been a long supporter of comprehensive immigration reform.

I was part of the original deal we had back when Bush was President where we had a few Democrats in the room. And we also had Senator Graham, I remember, in the room. Then we had the bill that when Senator Grassley and Senator Leahy were leading the Committee that passed through this Committee.

And then recently, Senator Rounds, during President Trump's time, led a group that we came up with an agreement that would have greatly helped on this front. But, unfortunately, President Trump didn't support it. And so now we are where we are. And three times. Three times we came close. And I believe we need a reform that includes agriculture workers, but also includes other things like doctors, and nurses, and healthcare aides, and the like. And I just don't think we're going to be able to wait anymore.

I'll start with you, Mr. Lytch. You discussed how you've been unable to fill all of your job openings with American workers. Last year, Minnesota had 6.9 job openings for every 100 jobs in the State. The third highest job vacancy rate since the State started tracking data. It's the number one concern I hear in rural Minnesota—and not just in ag, but with restaurants, manufacturing, and the like. I am proud of our good economy in our State, but it's getting to the point, especially in some of our healthcare settings, where we simply don't have enough workers.

As a business owner, could you talk about what challenges you faced? And also last year, Senators Cornyn, Coons, Tillis, and I urged the administration to fix the backlogs that keep seasonal workers and businesses that rely on them waiting. Could you talk about that, and what happens when there's a processing delay?

Mr. LYTCH. I'll be glad to. Thanks for the question. Similar to the story that Chairman Durbin shared about Shay Myers mentioning a couple of years ago his issues with asparagus. We had the same issue on our farm. December of 2021, we had 120 workers scheduled to come on December the 10th. There was delays at the State Department processing their visas—most of the workers that were all returning.

We had about 160 acres of broccoli that was ready to harvest that we completely lost, were unable to harvest. Our loss on those fields of broccoli totaled somewhere around \$600,000 which was a significant hit on our crop, and ultimately led to us losing pretty significant money for the season just because we lost that much because we did not have the workers to harvest it.

So, I think one of my concerns going forward with the new OEWS wage desegregation, and one of the issues that that could create is like one of the issues that Chalmers mentioned on the increase in applications. So, I think a lot of employers are looking to do that. They're having to desegregate and list these different jobs on different contracts. And I'm worried that there's already significant delays within both DOL and at the State Department that this could create an even worse backlog. So that's a major concern going forward.

Senator KLOBUCHAR. Okay. Thank you. Ms. Tellefson Torres, you talked about human trafficking and how there have been ag workers that have fallen victim to that. Senator Cornyn and I led the Abolish Trafficking Reauthorization Act, clearly, a priority of this Committee to move forward. What additional protections are necessary to protect farmworkers from human trafficking?

Ms. TORRES. Well, thank you for the question, Senator. Well, we're here also talking about the need for legalization with a path to citizenship for farmworkers who are here undocumented. We're talking about the dignity of all farmworkers, and so H-2A workers who are coming into this country need to be able to understand that they can enforce the law themselves.

And so this is why there is a need for equal rights, for the opportunity for H-2A workers to enforce their own rights. And really impose joint liability between employers, farm labor contractors, and recruiters to prohibit recruiting fees, prohibit wage theft to ensure that all of the different layers within the ownership and the people who are employing these folks understand that there shouldn't be any shenanigans. That farmworkers are here and need to be protected.

So we really feel that it's necessary to have H-2A workers be part of the Migrant and Seasonal Agricultural Worker Protection Act. They're excluded at this point. We're not sure why. Why are farmers who have only domestic workers having to abide by this Act, and those who are bringing in H-2A guestworkers not having to abide by one of the only Federal protections that covers farmworkers? And so there's a lot that needs to be done.

Senator KLOBUCHAR. Well, that's for sure. So, thank you. And I do hope, Chairman, as we work on these, that we also in addition to getting the Farm Workforce Modernization Act—that I strongly support—that we look at other issues I raise with H-2Bs, with the healthcare area, our Conrad 30 bill, and the like. When we look at this, we look at other areas as well where we need to add more workers. It's just becoming a near crisis point in my State. Thank you.

Chair DURBIN. Thanks, Senator Klobuchar. Senator Grassley.

Senator GRASSLEY. Mr. Sequeira, I want to briefly discuss policy issues, and implications surrounding undocumented immigration, and amnesty. First, does providing a mass legalization program for undocumented immigrant farmworkers actually address the problem of shortages in the agricultural labor? And does such a program do anything to break the cycle of agricultural dependence on undocumented labor?

Mr. SEQUEIRA. Thank you, Senator. I think the easy answer to your question is, no. The data shows us that providing legalization—and there may be perfectly valid policy reasons to do so. But the data shows that that does not solve the workforce labor shortage. All of those workers, or nearly all of them who would receive legal status, are already employed. Providing them legal status, again, may have some benefits, but it doesn't create any more workers to fill any of the openings.

Senator GRASSLEY. Okay. Also to you, the last time you were before this Committee, I spoke about my concerns with the 1986 Immigration Reform and Control Act, and issues with Special Agricul-

tural Worker program. Does the Immigration Reform and Control Act offer us any cautionary tales with respect to the results of a mass farmworker legalization program?

Mr. SEQUEIRA. Yes, Senator, it does. Which is, it's the exactly wrong approach to take. Providing legalization without ensuring a workable future, reasonable guestworker flow doesn't solve the problem.

The workers who were legalized under the 1986 amnesty quickly left agriculture to pursue other jobs in the economy. And no one can blame them for attempting to move up the economic ladder. That's part of the American dream. But those workers left agriculture and left additional openings that had to be filled, and with no reasonable means of filling them through any legal process. And with virtually no enforcement at the border, workers flooded across, and filled those jobs that the recently legalized workers had vacated.

Senator GRASSLEY. Okay. Then also for you. Several constituents have reached out to me regarding issues of the Labor Department's Adverse Effect Wage Rate, and the impact that it has on them. What changes would you like to see Congress or the Department of Labor pursue in terms of how the wage rule is calculated?

Mr. SEQUEIRA. Senator, I'm quite sure that everyone here will not stand around long enough to hear the long list in response to that question. I think, in short, the current wage calculation status is broken. Simply put. It's not rational. It's not transparent. And most importantly, it's not predictable.

As we've heard today, being notified 30 days in advance that you're going to have to increase your wage rates 10, 15, 20 percent per hour is an impossible business structure. Farmers are already committed for the year. They've already gone to the bank. They've already borrowed money based on what they expect their expenses are going to be. And the Department of Labor at the 11th hour will dramatically raise them. And they do this, year in and year out.

It's worse this year because the Department has now pursued an entirely new methodology and theory for trying to raise certain wage rates. It's going to insert even more unpredictability and more complexity into the system. And the bottom line is, it increases costs for farmers by tens of millions of dollars.

Senator GRASSLEY. Mr. Carr, we all know that farmers are struggling to find stability for their labor pool. In your view, what are the main drivers of the agricultural sector's reliance upon undocumented immigration labor?

Mr. CARR. When you say reliance on undocumented labor, the first and foremost is we have a society, a domestic workforce that is not choosing to do these jobs. It's definitely—it's clearly and amply pointed out when you see that less than 1 percent of Americans apply for the over 300,000 H-2A positions authorized every year.

So, it's an economic incentive for a foreign worker to come to this country. They're coming here not to migrate here and become citizens here. They're coming here for the economic opportunity. If we created a better guestworker program and reformed the H-2A program, we could solve this problem. And we could have a legal flow

of workers coming in and out of this country to support our domestic food production.

Senator GRASSLEY. Thank you, Mr. Chairman.

Chair DURBIN. Thanks, Senator Grassley. Senator Coons.

Senator COONS. Thank you, Chairman Durban, Ranking Member Graham for this hearing as well as for your leadership on this issue over so many years. And I'd like to thank all of the witnesses today.

In my home State of Delaware, immigrant labor is absolutely key to agriculture. Roughly 40 percent of our State's land is in agriculture. Although we're a small State, ag is a big part of our economy. The family farms that are largest in my State—Fifer, Vincent, Papen, others—all rely on immigrant labor to harvest our fruits and vegetables and are essential. And the badly broken H-2A system, and overall immigration system, imposes real and lasting costs.

When I meet with farmers in Delaware, they raise the need for more reliable, more transparent, more fair labor system, and faster processing in order to feed our Nation and the world. And I think we need to be mindful that we owe the food on our tables to farmworkers who've kept these farms growing despite shortages, uncertainty, unpredictability.

And in my view, their tireless, hard work under the sun must earn them a place outside the shadows of the American system. And to do that, we need to move, Mr. Chairman, towards an immigration system that is safe, humane, orderly, fair, and consistent with the rule of law.

I was pleased to see an initiative last week by Representatives Salazar and Escobar to introduce a bipartisan Dignity Act. A bill that would include substantial investments in border security, significant reforms to our asylum system, a path to legal status for Dreamers and others if they meet work requirements, and reforms specifically to our agricultural workforce. It is clearly a work in progress, but it's a start.

And it's clear to me that the ball is now in our court in the Senate to answer a simple question: What can we find 60 votes to do, and to finally get done, particularly in this area, to address a system every Senator knows has fundamental flaws? So I'm committed to working with my colleagues to find a path forward, and I hope they will join me in doing so.

For years, I've heard from Delaware farmers that the H-2A program's application process is too complex, too time consuming, too costly, too unpredictable. Many have to hire a consultant just to fill out the forms and pursue this. The process can't be sped up when needed to catch an early harvest. This past mild winter in the Mid-Atlantic caused whole fields of strawberries and asparagus to ripen weeks early. And multiple Delaware farms lost produce because their H-2A workers hadn't arrived yet, and there was no flexibility to allow them to arrive a week, or 2, or 3 earlier.

Mr. Lytch, could you just talk a little bit about how you've seen that same dynamic, and what pending legislation might do to address the issues I just raised?

Mr. LYTCH. Yes. Thanks for the question, Senator. Like I mentioned earlier about—you brought a good point about crops matur-

ing early. We're obviously picking a date out on the calendar that we want our workers to arrive. And so months in advance, 3 to 4, sometimes 5 months in advance when we start working on these applications.

And obviously, Mother Nature deals us the card that we're dealt. So we have a seed to put in the ground when we think it'll be harvested. And so the uncertainty of that is pretty dramatic. I will say, for our operation, especially after the issue we had a couple of years ago with our crops getting ready, the crew not able to come. We've just had to kind of cut back on what we do earlier, what we're putting at risk, because we have a continued worry that that will happen.

As far as legislation that's currently out there, I think any of them, obviously, it has to be a bipartisan effort. We understand that we have to have both sides, but we also need to address both parts. The workforce that is here, and we have to address these changes to the H-2A program. So we cannot have one without the other.

Senator COONS. We've been achingly close over and over in the 13 years I've been here. Mr. Costa, I know I'm about to run out of time. I was struck by your testimony that addressing our economic workforce needs is not just a matter of reforming the employment-based system. It's about addressing those who are here who are undocumented, and providing lawful and orderly pathways for people to come here more generally. Could you just elaborate briefly on those points as well?

Mr. COSTA. Sure. Having a permanent status means, in practice, having labor and employment rates. It also means not being afraid to leave your house to go to work and show up at your job. And so that is one of the main ways that you can really stabilize the workforce and allow people to know that they can show up at work.

In many cases, it'll also mean being able to join and form unions. Although, unfortunately, in agriculture, farmworkers are not covered by the National Labor Relations Act. So it wouldn't help farmworkers for that, but it would for other undocumented workers.

Senator COONS. Well, what I've heard across the panel this morning was, first, that millions of people deserve to live without fear. And that those who are employers, who are farmers, need predictability, transparency. If we're going to have a legal system, we need to make changes here. And we are falling short of what all of you need and deserve. Thank you, Mr. Chairman.

Chair DURBIN. Thank you, Senator Coons. Senator Cornyn.

Senator CORNYN. Thank you, Mr. Chairman. Thanks to each of the witnesses for being here today. The problem you're describing is real, and I just want to make sure everybody's clear. Mr. Carr, Mr. Lytch, you're not suggesting that any immigrant worker that has an H-2A visa would get a job that an American citizen was ready, willing, and able to perform. Are you?

Mr. CARR. No, sir. You have to go through an application, and DOL has to certify that there are no domestic workers willing and able to take those jobs.

Mr. LYTCH. Correct. And we have to report to DOL the number of applications that we get for the jobs that we do have posted. You

heard the number earlier, but we think it's less than one-half of 1 percent that apply for the jobs that we post and advertise for.

Senator CORNYN. Well, I note that the Farm Workforce Modernization Act which passed the House last year hasn't even been reintroduced in the House of Representatives this year. So I'm not really sure what bill it is we're talking about. But as one or more of you have noted, there's no way anything's going to pass unless it passes both houses of Congress and gets signed by the President. Which means, by definition, it has to be bipartisan.

And the House has passed a border security bill which could serve as a vehicle to do other things on the immigration issue. But so far, there hasn't been any indication from either the Chairman of this Committee with jurisdiction or Senator Schumer, who controls the agenda on the floor, that that is a priority for them. So that's part of our challenge.

I hope we can come up with maybe a rifle-shot way to ameliorate some of the hardship associated with the H-2A program. I'm not optimistic that we are somehow all of a sudden going to have an epiphany and figure out how to do comprehensive immigration reform. I'm skeptical that that could happen. And one reason why is because the Biden administration's current policies are a magnet for illegal immigration.

And Senator Graham, I agree with completely, has pointed out that the asylum system, as currently operated, again, is a magnet for people to come from all over the world to the United States, claim asylum, or be paroled. Which it means, to be released into the interior, and then being told, well, at some future date, maybe—maybe you'll appear in front of an immigration judge.

I'll repeat something that I've said before, an experience I had when a bipartisan group of Senators went to the Yuma Sector, the Border Patrol Sector, the agricultural community there in Southwestern Arizona. We were greeted by the Border Patrol Sector chief who said, "Welcome to the Yuma Sector. We have seen and encountered people from 170 plus countries that speak more than 200 languages at our Yuma Border Patrol Sector."

Those people, of course, under the current policies of the Biden administration were then released into the interior, either given a notice to appear for a future court hearing, or a notice to report to an Immigration and Customs Enforcement office for potential processing of their future and as yet unstated asylum claims.

Senator Kelly, one of the Senators from Arizona, pointed out that Mexicali, which is a city in northern Mexico, just close—just not very far away from the Yuma Sector. So he said, "I suspect what happens is, people will fly in here from all around the world, and Uber—Uber over to the Border Patrol, and claim asylum." So there is so much wrong and broken with our current immigration system.

I really feel like this hearing, as important as the subject is we're talking about, is almost a parody when it comes to how much our current system has failed, and how much we have failed as Members of Congress to address this in a rational, reasonable way. But it's not going to happen by either party trying to dictate what they want. The only way you pass things around here is in a bipartisan way, bicameral way, and something that gets a President's signature.

I have not yet seen a serious discussion that would give me any optimism that that's in the process of occurring or may occur anytime in the near future. I hope I'm wrong. I've been here for two decades now, been involved in every immigration debate that we've had, tried to be constructive, and I wish to continue to be constructive. But the way that this issue is being handled by the administration, and the failure of Congress to deal with this in a realistic fashion doesn't give me a sense of optimism. Thank you.

Chair DURBIN. Thank you, Senator Cornyn. Farmers have to be optimists, I don't know how you would survive otherwise. We should be, too. I would take that as a charge from Senator Cornyn and accept it. Senator Blumenthal.

Senator BLUMENTHAL. Thanks, Mr. Chairman. My grandfather was a farmer. And not always optimistic because he had to deal with many of the obstacles that have been described here. The weather, the markets, and the need for people to work for him. And he was a farmer in Nebraska. He raised corn and cattle on a farm just south of Omaha, Nebraska.

But I do think, in the interests of being constructive, to use my colleague's term, we can replicate the kind of process that we had in 2013 when we passed in this Committee—I was proud to be a part of it—a bipartisan effort, comprehensive in dealing with many of these issues. I think it's not only possible, it's obligatory at this moment in our history.

So I would like to work with you, Mr. Chairman, and the Ranking Member in this effort. I have supported the Farm Workforce Modernization Act, which would expand the H-2A program by permitting year-round contracts. And in our State, dairy farmers and produce farmers are desperately in need of this additional workforce.

But right now, this system, as the Senator from Texas said so well, is broken in fundamental and disastrous ways. One effect is not only on the prices of commodities for consumers, but also the human toll on workers, particularly in illegal trafficking. And I want to expand on the questions asked by Senator Klobuchar to you, Ms. Torres, dealing with the issue of trafficking. I know that your response to her was that one solution would be to include H-2A workers in the Migrant and Seasonal Agricultural Worker Protection Act, which would give them remedies and rights.

My fear is that they would be reluctant in seeking to enforce those rights. They would be intimidated by the system. Perhaps there would be private efforts to aid them. But isn't the issue of enforcement fundamental even now to preventing the illegal recruitment fees and other measures that are right now a violation of law under our current statutes? Don't we need more aggressive enforcement by the Department of Labor?

Ms. TORRES. That would be a resounding yes. We do. We definitely need more increased DOL enforcement. You mentioned workers coming forth even when they do have rights. Right? Worker representation is also helpful. Right? Organizations that work directly with workers that can develop the trust, like unions, for example. It's important for workers to understand what their rights are. We're talking about very vulnerable workers who sometimes

don't know how to read and write, even when I mentioned the indigenous workers that I've met with in Georgia.

So it's important to understand that sometimes even the rights that workers do have aren't always—you know, the workers will say that the laws on the books are not the laws in the fields. And so it's really important that workers understand what is available to them. And I also want to just say that, you know, any legalization program would be undermined if we just move forward with H-2A changes in isolation. So, you know, any type of policy really has to be something that is addressing undocumented workers here, and that is addressing the H-2A worker protections that are needed.

Senator BLUMENTHAL. I would suspect, and I think you would agree, that the kinds of abuses that are documented in the Polaris Project, in Operation Blooming Onion—you refer to them in your testimony—are much more widespread and I agree with you that it has to be more than just one piece of this framework to prevent illegal trafficking, wage theft, other abuses. There has to be a comprehensive approach. Would you agree?

Ms. TORRES. I would definitely agree. Yes.

Senator BLUMENTHAL. My time has expired. Thanks, Mr. Chairman.

Chair DURBIN. Thank you, Senator Blumenthal. Senator Blackburn.

Senator BLACKBURN. Thank you, Mr. Chairman. I want to pick up where Senator Cornyn left off, and really focus on the timing of this hearing. And this issue at the southern border is something that is a paramount concern. And this year, with you as the Chairman, we have not had a single hearing that really focuses on the crisis at the southern border.

And we know that girls are being trafficked. They are being raped. We know what is happening with all the fentanyl that is coming into this country. We know the numbers of illegal migrants that are coming into this country. And while Title 42 and the expiration of Title 42 loomed, this Committee, instead of focusing on that and the subsequent issues, we had a hearing about delegitimizing the Supreme Court.

And we have literally focused on so many topics, just about everything, except what is happening at the southern border. We did have Secretary Mayorkas come before us. He basically refused to answer any question. You mentioned earlier the concern with child labor laws. That is something that concerns me also.

But Secretary Mayorkas and Secretary Becerra, they've lost 85,000 children. They don't know if they're being trafficked. They don't know if they're alive or dead. They don't know if they're in work gangs. They don't know if they're being abused. But, you know, Mr. Chairman, I think we need to focus on the entire crisis at that southern border.

Now, in January of this year—and Mr. Carr, I want to come to you on the question—DHS proposed a new rule that would increase the application fees for the H-2A visas. Now, I think one of the things that is so troubling to Tennessee farmers that I talked to is here's this new asylum program fee which would charge employ-

ers seeking to sponsor immigrants for certain work visas, an unprecedented \$600 per visa.

Now, Tennessee farmers tell me that this is something that is making it just about unaffordable. And, of course, the fee is going to be there to support what is turning out to be a broken asylum system. And what frustrates a lot of our farmers is instead of rewarding people like you that are bringing in legal H-2A through a legal process, those that are able to be H-2A workers, that they're paying this fee, and then the fee is being used to prop up this illegal entry. And those that are trying to do it right are the ones paying the cost in more than one regard.

So, I've enjoyed listening to your testimony, and you've been at this for years. And I want you to talk about—specifically about this proposed rule, and the impact that that is going to have on farmers like you.

Mr. CARR. Thank you very much, Senator. So the Department of Homeland Security in their justification for their fee increase, which they said they needed more staff and it was costing them more to do the applications, also put in there that a portion of that increase would go to paying for the asylum process.

This is putting that burden on the workers—employers, such as myself, that are doing it legally and properly to pay for illegal workers coming into this country claiming asylum, which has nothing to do with agriculture. So I ask the question, why should agriculture be paying for this process?

Senator BLACKBURN. Well, and what I hear from farmers is there is no efficiency that they are being given in this process. That it's still taking them longer for this backlog to be cleared and to get people cleared. And sometimes the crop is already ready for harvest before they're getting the okay. That there does not seem to be any urgency from DHS. Is that what you're seeing?

Mr. CARR. I've seen those cases. What you have is a problem with the application process in itself. You have the ability for the Department of Labor to basically request further evidence, or give a notice of deficiency just because the complexity of the program. As these notices of deficiency go on and on, the timeframe of getting your workers moves out further and further.

If we streamline the H-2A process, and made the application system more easy, allow for an attestation where the employer can certify that they understand the rules of the game and they will abide by the rules of the game, we could then get our workers in much more timely manner.

Right now, we're not able to apply for H-2A workers. It's more than 75 days out from our date of need, but no less than 60 days from our date of need. That's a 15-day window that we have to work in, and then we have to try to figure out all the hoops and hurdles that we're going to get.

I've had notices of deficiencies on a contract written the year before that had no notices of deficiency given back to me the next year because a different reviewing officer looked at it and chose that there was something wrong with that application. Those inconsistencies are what's driving these delays.

Senator BLACKBURN. Thank you. That's helpful. Thank you, Mr. Chairman.

Chair DURBIN. Thank you, Senator. I'd like to address the issues which you directed to the Chair when you suggested that we did not have a border security hearing. You were present, were you not, when Secretary Mayorkas came before us? I know you did. And it's an annual appearance by the Secretary, which was not the case before I took over the gavel. And he was here for virtually 3 hours all about border security. Start to finish. So to say that—

Senator BLACKBURN. And refused to answer—

Chair DURBIN. Well—

Senator BLACKBURN [continuing]. Mr. Chairman—

Chair DURBIN [continuing]. That's your conclusion, Senator—

Senator BLACKBURN [continuing]. He refused to answer the questions.

Chair DURBIN [continuing]. You're entitled to your conclusion. The second point I want to make about a hearing on delegitimizing the Supreme Court. I sat here thinking, "What is she talking about?" Well, of course it has to do with Clarence Thomas and the gifts which he received, and whether the Supreme Court of the United States should have a code of ethics like every other Federal court. That is your construction of delegitimization of the Court, I don't see it that way.

In terms of fentanyl, thank you for coming last night. You and Grassley. Senator Grassley came with a presentation from DEA. I hope you understood that it was a bipartisan effort, off the record, so that we both understood the issue better. We're not ignoring it. We're trying to address it in a constructive, bipartisan way. And I'll continue to do that if I can. Senator Hirono.

Senator HIRONO. Thank you, Mr. Chairman. I thank all of the panelists for your testimony. Clearly, we have a broken immigration system, both on the legal immigration side as well as the undocumented persons who are in our country, some 11 million or so.

Mr. Costa, I understand that in terms of the percentage of people who are in the ag sector who are undocumented, perhaps some 45 percent of the ag workers are undocumented. It's hard to tell because it's not an easy statistic to get. But a very large percentage of ag workers are undocumented. And then those with H-2A visas, these are legal migrants, constitute perhaps 11 percent or so of those in the farm segment—ag segment. Are those accurate statistics?

Mr. COSTA. About 10—depending on how you count it, somewhere between 10 and 15 percent of the ag workforce. Yes.

Senator HIRONO. So of the 45 percent or so of the ag workforce who are undocumented, they are the most exploited in terms of recruiting fees, wage theft, and all of that. Correct?

Mr. COSTA. I would say they're very similarly exploited. I know that H-2A workers technically have a legal status, but they arrive here usually after paying illegal recruitment fees. Which leave them in debt. Which leave them sometimes more vulnerable than undocumented workers because they don't have family here and a network here.

Senator HIRONO. Thank you. I realize that it is not an easy thing to determine what steps we should take. Some of the information I have, for example, Mr. Costa, is that if we were to increase the legal pathways to enter our country—I'm not talking about path-

ways to citizenship. But just increasing, for example, our visa program, that it reduced illegal crossings at the southern border. Does that make sense to you? That if we were to increase the availability of legal visas that would decrease illegal border crossings?

Mr. COSTA. I have pushed back against the administration's efforts to channel the flows at the border into these indentured worker programs. I'm not sure, I think, it makes more sense to expand our asylum programs, and expand refugee numbers because the people who are showing up at the border are mostly people who need protections.

Senator HIRONO. So, I'm sorry, I'm running out of time. While there may be some connection, there are all these other issues with regard to persons presenting themselves at the southern border. I agree. I think both of—both you and Ms. Torres indicate—more so Ms. Torres—that H-2A workers perhaps should be covered under the Migrant and Seasonal Agricultural Worker Protection Act. I think Ms. Torres testified to that. Mr. Costa, would you agree that we should contemplate doing that?

Mr. COSTA. Yes, absolutely. And I would add on to what Ms. Torres said about labor enforcement in agriculture. Last year, we had the lowest number of inspections of agricultural employers that we've ever had on record. And the funding levels for the wage and hour division are at 2006 levels after adjusting for inflation. So there just aren't enough inspections to be able to protect workers in agriculture.

Senator HIRONO. Do the other panelists agree that putting everyone, all these ag workers, under the Migrant and Seasonal Agricultural Worker Protection Act would make sense as opposed to having two regimes? You know, the H-2A regime? Would you agree that we should consider putting everybody under the Migrant and Seasonal Agricultural Worker Protection Act? This is for the other three panelists who have not responded.

Mr. SEQUEIRA. Senator, I would not support that. Of course, ultimately, that's a decision for Congress. But when the Migrant and Seasonal Ag Worker Protection Act was passed by Congress, a conscious decision was made to exclude H-2A workers.

Senator HIRONO. Yes, I realize that. But it doesn't make a heck of a lot of sense to me.

Mr. SEQUEIRA. It's—

Senator HIRONO. You disagree?

Mr. SEQUEIRA [continuing]. I would say yes. It is principally because there are no protections in the Migrant Seasonal Agricultural Worker Protection Act that don't exist in H-2A. And in fact, the H-2A program has far more. The one difference is, under the Migrant and Seasonal Ag Worker Protection Act, workers get a private right of action to sue their employers and Congress determined that was a bad policy to extend to H-2A employees.

Senator HIRONO. Well, in my view, giving the employees a right of action is probably—I would consider it a positive thing. Mr. Lytch, what do you think?

Mr. LYTCH. I would have the same concerns that he shared. I think there's a lot of protections under the H-2A program that are already granted. And it all boils down to, you know, what I mentioned. We treat our workers fairly. We want them to continue to

come back. We have a lot of incentive to make sure that they're treated fairly, and so that they want to come back. We want the same skilled workforce to return year after year.

Senator HIRONO. Mr. Chairman, if I could ask Mr. Carr to respond also.

Mr. CARR. Thank you. My H-2A workers are part of my family. I've been in this program for 25 years. I started with 175 H-2A workers in 1999. I have over 800 now. They've come, they've built their families, and what they've done is grown the prosperity for their families back home. So to think that we're going to mistreat them is absolutely erroneous.

I would say to you also, if you come to my farm—and invite each and every one of you to come to my farm—every one of my farmworkers have cell phones with cameras and have access to the internet. If we were doing anything wrong, I would be on CNN tomorrow and every other farmer would be, too.

But back to your question about the Migrant and Seasonal Worker Protection Act. There are more rules and regulations in the H-2A program that go far beyond protecting workers than the Migrant and Season Worker Protection Act does. What it does by putting into the program, as Mr. Leon Sequeira said, is it gives the right to private right of action. Which means that farmers are going to be carried into courts of law where they're not comfortable, particularly, maybe not even in their home State, to have to defend themselves, often, from frivolous lawsuits.

Under the H-2A program, workers are guaranteed a wage. They have a contract for a wage, a contract for employment, and are provided free housing, and free transportation. Whereas any other workers in agriculture are not afforded or not given those rights. So I wonder why—what is the motive for putting the Migrant and Seasonal Worker Protection Act into the H-2A program other than having access to sue in the courts?

Senator HIRONO. Mr. Chairman, since that we have some of our panelists testifying against the Migrant and Seasonal Ag Workers regarding the private cause of action, could I ask a question of Ms. Torres—

Chair DURBIN. Sure.

Senator HIRONO [continuing]. On that point—

Chair DURBIN. Yes.

Senator HIRONO [continuing]. Or Mr. Costa?

Mr. COSTA. I'll give you a data point on it as well.

Senator HIRONO. Under the Migrant and Seasonal Agricultural Worker Protection Act where workers do have a private cause of action, are we seeing thousands and thousands of private lawsuits in this area? Mr. Costa, perhaps you're the person to ask.

Mr. COSTA. Absolutely not. What we saw for the workers who actually have that right to bring a private action, I believe there were 33 lawsuits nationwide last year out of the entire farm workforce.

Senator HIRONO. Thank you very much. Thank you, Mr. Chairman.

Chair DURBIN. Thank you, Senator Hirono. Mr. Carr, I hope the only reason that you're going to appear on CNN is for the quality of your peaches. Senator Kennedy.

Senator KENNEDY. Thank you, Mr. Chairman. It seems to me that America was born on a farm and you can't operate a farm without workers. We can't feed ourselves or our world's neighbors without farmworkers. And sometimes we need help from neighbors who live in foreign countries. Is that a fair statement, Mr. Costa?

Mr. COSTA. Yes. I believe immigrants play an important role.

Senator KENNEDY. Mr. Costa, do you believe that illegal immigration is illegal?

Mr. COSTA. Under the statutes, yes.

Senator KENNEDY. Okay. Mr. Sequeira—am I saying your name right?

Mr. SEQUEIRA. Yes.

Senator KENNEDY. Do you agree with that statement?

Mr. SEQUEIRA. Yes, sir.

Senator KENNEDY. Mr. Costa, what grade, A, B, C, D, F, would you give President Biden's administration on combating illegal immigration?

Mr. COSTA. I don't know what grade I would put. I think they've made some useful improvements. But, you know, I think that the border has—there's so much money going to the border that I think the border is mostly secure. People are mostly turning themselves in. They're not really crossing the border without authority.

Senator KENNEDY. You can't give a grade? You're an expert on immigration and you can't give a grade?

Mr. COSTA. Oh, I guess if I had to, that it'd probably be about a C, right in the middle somewhere.

Senator KENNEDY. A C or a D?

Mr. COSTA. A C, because they kept some Trump policies in place. They've made some improvements that's sort of in between.

Senator KENNEDY. Okay. How about you, Mr. Sequeira?

Mr. SEQUEIRA. Are we grading on a curve, Senator?

Senator KENNEDY. No, sir.

Mr. SEQUEIRA. I would be generous and say a D minus.

Senator KENNEDY. Okay. All right. Can we agree that either President Biden's administration believes in open borders or the person that he has put in charge of making immigration policy is not qualified to manage a food truck?

Mr. COSTA. I would fully reject the notion that the Biden administration believes in open borders.

Senator KENNEDY. Okay. How about you, Mr. Sequeira?

Mr. SEQUEIRA. At the risk of being too lawyerly, I might be interested in the definition of open borders. I think it's certainly fair to say there is a lack of significant enforcement at the border. And in fact, my clients who try to—

Senator KENNEDY. Let me try to put a finer point on it. Right now, we have conscientious farmworkers who live in other countries. Some of whom have worked here before. We have Nigerian doctors, we have German engineers who are waiting years, patiently in line trying to follow the rules of legal immigration to come into our country. But yet, the Biden administration will welcome anybody who can either secretly or less than secretly come into the United States from the southern border. Is that not correct?

Mr. COSTA. I don't believe so. I believe that the people showing up at the border are mostly seeking humanitarian protections because there's a dire need in this hemisphere.

Senator KENNEDY. How about you, Mr. Sequeira? Do you think that my description is correct?

Mr. SEQUEIRA. I do, Senator. And that seems to be obvious from watching the evening news.

Senator KENNEDY. Well, the agencies responsible for the legal immigration system, Mr. Costa, are failing to process applications promptly. Aren't they?

Mr. COSTA. For—I would say it depends. For low-wage work visas, they are mostly processing them quite quickly. I'd say—

Senator KENNEDY. We've got a backlog of 24 million applications. What do you mean, it depends?

Mr. COSTA. It depends on which visa you're talking about. I would say for H-2B, for instance, the USCIS prides themselves on how quickly they process those visas. When it comes to other things, like work permits, they've been slow. And I think the problem is that Congress has not appropriated funds for them. They have this—

Senator KENNEDY. It's always on money.

Mr. COSTA [continuing]. Fee-based structure.

Senator KENNEDY. We now have a larger Federal budget—adjusted for inflation—than we've ever had in the history of the United States of America.

Mr. COSTA. With all due respect—

Senator KENNEDY. It's always the money. Mr. Sequeira, what kind of job do you think that the Biden administration has done with legal immigration with a 24-million-person backlog?

Mr. SEQUEIRA. I think any fair estimation is that it's poor.

Senator KENNEDY. Well, can we agree that legal immigration is good and illegal immigration is bad?

Mr. SEQUEIRA. I would think so. The country is founded on immigration, people coming here from other countries. Legal immigration is good. Yes.

Senator KENNEDY. Does anybody disagree with that statement? Does anybody want to defend the Biden administration's 24-million-people backlog in legal immigration, but yet millions have come illegally across the border? Does anybody want to defend that? Anybody? Thank you for being here.

Chair DURBIN. Senator Padilla.

Senator PADILLA. Thank you, Mr. Chair. I want to thank you and Ranking Member Graham for convening this hearing. There's limited time and a couple of important questions I want to make sure to get in. So let me get right to it and I'll ask responses to be under a minute, if at all possible.

Clearly we have established today that farmworkers play a critical role in ensuring our domestic food supply is both secure and sustainable. Farmworkers—and I've seen this firsthand—work in jobs that are among the most dangerous, the most strenuous, and yet the least compensated in the country. And far too often with the fewest labor protections.

As Mr. Lytch stated in his testimony, food security is national security. And that could not have been clearer than what we all saw

during the height of the COVID-19 pandemic. It's one of the many reasons that the first bill I introduced in the Senate was my Citizenship for Essential Workers Act.

My first question is for Mr. Costa. Agricultural workforce industry employs about 400,000 workers. Given the significant overrepresentation of undocumented immigrants in the industry, how could providing a pathway to legalization for farmworkers bolster the U.S. economy and trade relations?

Mr. COSTA. Well, it would bolster the economy by allowing immigrants to have rights in the workplace, labor and employment rights, and be able to better themselves. And their wages would rise, and they'd be able to pay taxes, and have just the security of being able to go to work. And I would say it's actually 800,000 workers in California—400,000 is full-time jobs. So it's a very large number of workers that need those protections.

Senator PADILLA. Thank you. I'll just add to that that they are paying taxes. Taxes into programs that they are not eligible to benefit from. So it's in a benefit to the—

Mr. COSTA. Agreed. That they'll be able to—

Senator PADILLA [continuing]. Federal Government and to the U.S. economy.

Second topic. As temperatures continue to rise across the country, more and more workers, including farmworkers, are at increased risk of heat illness. Which can often lead to not just cramps, but organ damage, heat exhaustion, stroke, even death. In fact, according to a recent Public Citizen report, heat stress is expected to kill 2,000 workers, and cause an additional 170,000 workplace injuries across the country. That's why I've introduced the Asunción Valdivia Heat Illness and Fatality Prevention Act. Ms. Torres, can you discuss what protections exist for farmworkers currently that suffer from heat-related injuries, or what Congress can do to better support these protections?

Ms. TORRES. Thank you, Senator. Well, for most farmworkers there remains no requirement that would provide access to shade for periodic breaks, to be able to get a reprieve from the sun, something that basic. At the national level, there is no heat standard.

And clearly, the bill that you have introduced as Asunción Valdivia bill would basically do what we have done in California where farmworkers do have access to be able to take paid breaks whenever they need them when it is hot so that they can get that reprieve, and, you know, the type of water and access to water that they would need. So these are all very important things and so we certainly encourage having that Asunción Valdivia Act pass. California is only—

Senator PADILLA. And I was just going to add, and to be clear, we're not talking about shade and cool drinking water as a luxury or as a—

Ms. TORRES. It's basic.

Senator PADILLA. We're talking about basic protections in conditions that are on a very regular basis. In other parts of the country, but particularly the west, temperatures of 110, 120 degrees from sunrise to sunset. Extreme weather conditions.

The last topic, if I can get to it quickly, deals with worker protections. Despite the grueling and dangerous work, farmworkers

themselves often struggle to feed their own families because of low wages. In fact, official data tells us one-third of farmworkers live below the poverty line. I actually think the real number is bigger. Fewer than half have health insurance or paid sick leave of any kind. They do not qualify for unemployment insurance or other social safety net programs because of their undocumented status.

And most farmworkers do not have the right to collective bargaining. And without that they can be retaliated against for organizing, or for reporting unfair labor practices, or even complaining about working conditions. That's why I've introduced the Fairness for Farmworkers Act, last Congress, that would have guaranteed overtime. Simple concept. Overtime pay, and additional minimum wage protections for farmworkers. Can you describe for a minute what some of the protections that have been gained in California, and how they've helped workers?

Ms. TORRES. Absolutely, Senator. Well, you know, overtime pay, as you mentioned, is something that farmworkers around the country don't usually get to experience. And so in California, we were able to pass an overtime law that allows for farmworkers to be able to get overtime after 40 hours' worth of work. Prior to that, workers could work up to 60 hours or more—that's 6 days a week, often working 10 or more hours a day. And so what time do they get to spend with their children?

You have farmworkers now who are able to spend that time with their kids. They are able to get overtime like any other worker after they work those 40 hours. So it makes a huge difference in the quality of their life, but in addition for their paycheck. Right? It makes a difference to be able to get paid for the very deserving back-breaking work that they do.

Senator PADILLA. Thank you. And Mr. Chair, I know my time is up, but I just can't help but to request a fact check. Earlier in the hearing, Senator Graham cited a statistic suggesting that 60 to 75 percent of our farm workforce are immigrants, and was surprised that it's not a higher figure. My understanding is that 60 to 75 percent figure refers specifically to undocumented immigrants. If we were to add lawful immigrants, visa holders, and otherwise, the figure would clearly be a lot higher. And I'd be surprised if the total figure isn't in the mid to high 90s.

Senator Graham also implied that providing permanent protections for farmworkers would serve as a magnet for migrants and lead to a surge at the border. Let's be real. Republicans said the same thing about the lifting of Title 42, and the surge did not happen. For Members wanting to address irregular migration, we have to acknowledge that the pressures created for irregular migration are in large part driven by how hard we make it to come to this country lawfully. Whether it's the process. Whether it's the backlogs. Whether it's the caps.

Mr. Chair, there was no surge when Title 42 was lifted. There will be no surge if we pass the Farm Workforce Modernization Act. There will be no surge if we pass the DREAM Act. To paraphrase Senator Graham, once again. We can do a small deal. We can do a medium deal. We can do a big deal. But my God, let's get past the pretext. Let's get past the excuses. Let's get past the rhetoric. And let's do a deal that's good for growers, good for workers, good

for consumers, and good for our national security. Thank you, Mr. Chair.

Chair DURBIN. Thank you, Senator Padilla. Senator Ossoff.

Senator OSSOFF. Thank you, Mr. Chairman. And let me begin, Mr. Chairman, by thanking you for being so responsive to my request to bring the Committee together. To bring representatives of growers and farmworkers together to work at a solution here.

And I just want to share with you, and with our panel, and with the public that I feel optimistic that we are on the cusp of getting something done that will protect farmworkers from abuse, that will protect growers from the uncertainty and volatility of AEWWR, and that will address the reality that's been acknowledged by every panelist here today: That 40 to 50 percent of the farm labor workforce is undocumented, but lacking any pathway to legal status which puts both farm operators, and growers, and those workers at risk.

And so I'm optimistic, Mr. Chairman, because the solutions are staring us right in the face. And we almost got there last Congress. And thanks to Senator Bennet's leadership, intensive bipartisan negotiations, we were this close to achieving something that has eluded Congress for decades.

And the service that you, our panelists, have done today for this Committee is to illustrate that now is the time. The current situation is untenable for growers. The current situation is untenable for workers. We have the power in this Committee and this Congress to act, and to build upon a bipartisan framework that exists.

And I'll tell you that when I talk to growers in Georgia—and I'm proud to represent Georgia's extraordinary agricultural sector—they see it the same way. They support legislation that will give them certainty and stability on AEWWR and that will strengthen protections for farmworkers. Because we all know that while the overwhelming majority of growers do the right thing, and want to keep bringing back H-2A laborers year after year, and build strong relationships with their employees, that there is abuse. That it's unacceptable and that Congress can take action to prevent it.

Operation Blooming Onion, a DOJ prosecution in Georgia, Ms. Torres, just after those revelations of shocking abuse were made public, I led a letter from Senators to State labor and ag requesting administrative reforms to protect workers. Ms. Torres, it is the case, is it not? And look, and growers and farm operators in Georgia, they recognize this as well, that there is abuse, and we can and must do more to prevent it. You agree, Ms. Torres?

Ms. TORRES. I would definitely agree, Senator. It's necessary to do more in it. Just circling back to this Blooming Onion case that you talked about. The DOL cannot do this work alone. Right? That case, specifically, required multi-agency involvement. We're talking about DHS, the FBI, the State U.S. Attorney. And so it's a multifaceted effort because we are dealing with egregious abuse. But that was not a one-off case. We are seeing over and over again, hearing from farmworkers who are calling us and calling our team in different States that are talking about the type of abuse that they're experiencing.

Senator OSSOFF. Thank you, Ms. Torres. And Mr. Lytch, I found your testimony encouraging and you echoed the sentiments I hear

from Georgia growers every day, which is they want a common-sense, bipartisan solution because the current situation is untenable. Can you describe the impact, the uncertainty that growers face when they're suddenly saddled with a double digit increase in the AEW, and they haven't had the ability to plan with certainty, and they're facing other input cost hikes?

Why is it necessary that as part of a comprehensive bill that will address labor and human rights protections, that will provide a path to legal status for the undocumented farm labor workforce, that we address the urgent needs of growers to get certainty and stability on their costs?

Mr. LYTCH. Absolutely. Senator, I want to thank you for your work on the bipartisan effort that you tried to lead on this. It's a very important issue, and I think you stated that well. As far as the uncertainty related to the AEW, we just don't have enough time to plan. We cannot—no one could rightfully say that they could manage a business that you could foresee a 15 percent, double-digit increase literally in 30 days. And no one would manage their business that way. And we as growers can't either. The costs are just unsustainable.

So the effects that it will have on us is that we will just have to look at the crop mixes that we produce. We have a major operation in Moultrie, Georgia. We're proud to be Georgia-grown and we want to keep it that way. So we want to be able to grow the diversity of crops that we have there, but we have to have some certainty around the wage rates for sure.

Senator OSSOFF. Well, thank you for your work in Georgia. And let me just close, Mr. Chairman, by saying that if we can just disentangle this from Washington politics, we can strengthen labor and human rights protections for workers which is urgently needed. We can address the need of an undocumented farm labor workforce, and it's a need shared by those workers and growers to get on track to legal status.

And we can address these issues around the AEW that are causing so much instability, and so much uncertainty for growers in Georgia and across the country. What it's going to take is political will. And I want growers across the country to know that we're this close and we need voices raised across the Nation for Congress to take up that legislation that was almost passed at the end of the last Congress. Sit back down at the table and pass legislation to address these issues. Thank you all. Thank you, Mr. Chairman.

Chair DURBIN. Thank you, Senator Ossoff. And once again, I want to thank you and Senator Tillis for requesting this hearing. Senator Whitehouse, then Senator Welch.

Senator WHITEHOUSE. Thank you, Chairman. First of all, let me say that I don't know that there's a better Chairman and Ranking Member to breathe a little life into immigration reform here. I've been involved in at least three separate bipartisan immigration reform efforts. You've been at the center of many of them, particularly with respect to the Dreamers. And Ranking Member Graham has been heavily involved in them. And hearings like this, I think, give us some hope for some significant progress.

So there's also obviously real problems with not having an adequate farm workforce. And I'd like to ask Mr. Costa, American fam-

ilies saw food prices jump pretty dramatically recently. Do you assign any connection between that price jump and labor disruptions, inadequacy of the workforce, food left in fields, and the difficulty of farmers finding a steady and reliable workforce?

Mr. COSTA. I actually do not. My colleagues at the Economic Policy Institute have shown that most of the price increases from inflation have come from corporate profits and not from labor costs. There just isn't a connection there.

Senator WHITEHOUSE. And would it be to our advantage to have more reliable and stable farm workforce both in the farming community and for consumers?

Mr. COSTA. Absolutely. No question.

Senator WHITEHOUSE. That is why? I'm asking you an obvious question, but it'd be helpful to have you just go ahead and explain why.

Mr. COSTA. Because we need—having an adequate food supply is a national security issue, I believe. And I think that, you know, farmers need to have the workforce that they have. And farmers and the agricultural industry plays a very important role in many communities, including the one that I grew up in.

Senator WHITEHOUSE. Mr. Chairman, I'd like to follow up on Senator Padilla's comments about safety and respect for the farm workforce. And with the Supreme Court now so much the center of attention, I'd like to just recall the *Cedar Point* decision which barred union access to farms. Like so many of the decisions of this Court, this was a partisan decision. It was 6–to–3.

Like so many of these decisions that undo precedent and advantage corporations over regular people, this one was heavily populated with front group amici, and even front group litigator groups. In fact, the litigation was such a sham just to get an issue to the Supreme Court where the litigation groups knew they'd get a partisan victory that they actually went into the lower courts asking to lose.

Think about that for a minute. I've tried a bunch of cases, and I've sure as heck been around a lot of trials, and I've supervised a lot of lawyers who try cases. And going into court and saying, "Your Honor, I'd like to lose, and as quickly as possible," that's not something you see much. And then getting up to the Circuit Court of Appeals and saying, "Your Honors, we'd really like to lose, and as quickly as possible."

I think that kind of behavior sends a very strong message about how predictable this Court is and why. And we don't talk about *Cedar Point* as much as we do about, say, *Janus*, the labor case, *Friedrichs*, its predecessor, which had these same characteristics of front groups coming in.

In the case of *Janus* and *Friedrichs*, the front groups actually swapped position. So in one case, they're the litigating group. In the next case, they're the amicus group. And the amicus group in the front case becomes the litigating group in the second case. And the lawyers go in saying, "Your Honor, we'd like to lose, and as quickly as possible." It's a telling signal about what is wrong at the Supreme Court, and I wanted to remark on that today. Thanks very much.

Chair DURBIN. Thank you, Senator. Senator Welch.

Senator WELCH. Thank you very much, Mr. Chairman and to Ranking Member Lindsey. And I want to associate myself with the remarks of all of my colleagues.

In Vermont, it's the dairy industry that is absolutely critical to the well-being of our agricultural economy. They really account for two-thirds of the milk supply in the New England market. And also in Vermont, all of us who are not farmers benefit by the custodial connection they have to keeping 80 percent of our open land open. And our farms need workers and workers need protections. And everything I've heard from the panel suggests that you agree with that.

We've got to fix this. And it's really caught up in the situation at the southern border. And that becomes an excuse not to do anything that can be done concretely that will be beneficial to the agricultural community and agricultural workers throughout the country. You know, in Vermont it's dairy. I guess in Georgia you claim it's peaches. We got some pretty good peaches in Vermont, but we'll give you that for purposes of discussion.

But the point here is that local agriculture is incredibly important to the well-being of all of our communities. And it is dairy in Vermont. It is perhaps peaches in Georgia. But bottom line, all those farms need the workers. And I appreciate the comments that you've made.

And the problem is in Congress because instead of coalescing around doing something that will be beneficial to the agricultural sector that is part of our local regions, the specter of doing anything that politically can be seen as winning or losing on the whole southern border situation gets in the way of us doing anything that would be beneficial all around the country.

So a big issue for us in dairy is that the H-2A program is not available and you've got to milk cows 365 days a year. So having seasonal workers as opposed to permanent workers just doesn't work. And, you know, in my discussions with our workers, I went to the Open Door Clinic, which is a healthcare facility that was started by some volunteers in Middlebury, Vermont, for many of the agricultural workers.

Initially, farmers were somewhat skeptical and apprehensive because there's legal questions that everybody's living with, looking over their shoulder all of the time. But this Open Door Clinic is now embraced by the farmers. It's been a tremendous benefit for the workers. But you know what? It's pretty shocking to me that that has to be a big deal. Shouldn't you be able, in the total plain light of day, go see a doctor for a medical situation?

I mean, it's pretty outrageous that the failure of Congress to act to protect people who are doing what we all acknowledge is fundamentally essential work, milking our cows. Really acknowledge that it's hard work, then dignified work, and that folks who do that have to be worried as to whether they'll get picked up because they're getting a medical checkup, I mean, that's really on us.

So, you know, my hope is that we will be able to come around together to pass something comparable to what I voted for when I was in the House last year, and that's the Modernization Act. And is there anyone on the panel who would like to just comment—just go down quickly—about the benefits of Congress coming

together on that bill? And I'll start with you, Ms. Torres. And thank you for all your work—

Ms. TORRES. Thank you—

Senator WELCH [continuing]. Over the years.

Ms. TORRES [continuing]. Senator. I appreciate that. Yes, we've been working on this for two decades now. And as you mentioned, the Farm Workforce Modernization Act was incredibly important. I mean, we really showed on the farmworker movement side that we were negotiating and compromising in good faith. You mentioned the year-round jobs, you know, in the context of legalization for undocumented workers, and further protections for H-2A workers—we actually compromised on that.

We have supported expansion of the year-round guestworker program with a cap, but in the context of the entire program that we discussed. And I want to say, for year-round jobs, these are some of the most coveted jobs that farmworkers want because most of the work is seasonal. Workers who are U.S. based, domestic citizens, lawful permanent residents want these types of jobs.

And so, you know, we need to have a conversation in addition to the FWMA, and then, when we're talking about the Adverse Effect Wage Rate, that farmworkers need to be making more money, not less.

Senator WELCH. Thank you. My time is up, but I want to thank the panel and my colleagues. I yield back.

Chair DURBIN. Thanks a lot to my colleagues on both sides of the aisle for coming together for this hearing. It's timely, it's important, and I really believe it's a test. A test for Congress. One of my colleagues was asking for grades on the performance of the President. What would be the grade on the performance of Congress when it comes to immigration? Failed grade, I'm sure, by every standard. To wait for 30 years and to watch the situation grow as desperate as it has, not only at the border, but with businesses and farms represented here today.

I've been involved in this immigration debate. My mother was an immigrant to this country—I proudly add—and I think I've made a contribution as her son. As my kids will, too. That's part of America. Immigration has made us what we are today. But there are Members of Congress, make no mistake—and I won't name names—who believe that we don't need one single immigrant. Not one, for any reason. They believe that passionately. And I know because I've heard their speeches over and over again.

So we have a challenge. And the challenge, I think, is to do it right, and do it quickly. Now, that may be too much to ask with a divided Congress, but we certainly should put the effort into it. I've been involved in comprehensive immigration reform and I believe that is the only way to address this. To say, "I'll just pick my immigration issue, and I don't want to talk about anything else." Everything's connected, my friends. This is a connected Nation, and a connected economy, and we ought to have a sensible policy.

Look what's going on at the border now. We are saying, if you come across the border with an appointment—with an appointment, we'll consider your case. But if you're turned away and you try to come back a second time, you'll be disqualified for 5 years from ever returning. Guess what's happening? Fewer are coming.

They don't want to get that second-time jeopardy. It's understandable.

We also say that if you had immigration quotas for certain jobs people will line up to take those jobs. They believe they have a chance to get from their country to our country in a legal fashion. And that is appealing to them. I've talked to the folks coming off of those buses in Chicago over and over again. I cannot imagine Carlos taking his wife with a nursing infant, and a 4-year-old daughter, and making that trip through the Darien Gap.

I've seen what circumstances they face. How desperate they have to be. And their first question to me in Chicago is not, "Where is the welfare office?" Their first question is, "When can I go to work? Anything. Tell me, Senator. Anything." They want to work and they want to work hard.

And I believe—I thank Mr. Lytch and Mr. Carr for being here. I believe that you are conscientious, fair-minded people that are trying to make a living at a very tough job, running a farm operation. There are people who take advantage of other people in everything. In business, in farming, in politics. It happens. And I wouldn't blame any of that on you. I believe, based on my impression of your performance today, that you are in it for the right reasons.

So now what are we going to do? Senator Ossoff, you're in charge of this, my friend, from this point to talk about the next step. I want to rely on you and Senator Tillis, who asked for this hearing, to meet with Senator Bennet, which I'm sure you've done already, and to talk about a practical step to move towards some bipartisan hearing or markup in this Committee so we can get this issue moving. We've got to get off dead center and do something. And I think we're the only Committee that can on the Senate side. And I'm looking to you for inspiration and leadership. And I know you'll deliver.

With that, the Senate Judiciary Committee stands adjourned.

[Whereupon, at 12:13 p.m., the hearing was adjourned.]

[Additional material submitted for the record follows.]

APPENDIX

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

Witness List
Hearing before the
Senate Committee on the Judiciary

“From Farm to Table: Immigrant Workers Get the Job Done”

Wednesday, May 31, 2023
Hart Senate Office Building, Room 216
10:00 a.m.

Diana Tellefson Torres
Chief Executive Officer
UFW Foundation
Bakersfield, CA

Adam Lytch
Operations Manager
L&M Farms
East Palatka, FL

Daniel Costa
Director of Immigration Law and Policy Research
Economic Policy Institute
Washington, D.C.

Leon Sequeira
Prospect, KY

Chalmers R. Carr, III
Owner & CEO
Titan Farms
Ridge Spring, SC

**United States Senate Committee
On the Judiciary**

Full Committee Hearing on

***From Farm to Table:
Immigrant Workers Get the Job Done***

May 31, 2023

Written Testimony
of
Chalmers R. Carr III

President and CEO
Titan Farms LLC
Ridge Spring, South Carolina

Chairman Durbin, Ranking Member Graham and Members of the Judiciary Committee, good morning.

My name is Chalmers Carr and I am a first-generation farmer from South Carolina where my wife, Lori Anne, and I own and operate our family farm, Titan Farms. We grow peaches, bell peppers, and broccoli.

I serve as the Treasurer of the South Carolina Peach Council and am also its former President. I am an active member of the National Peach Council. I also serve on the Labor Committee of the American Farm Bureau Federation and am the Chairman of the South Carolina Farm Bureau Labor Committee. I have served on the U.S. Department of Agriculture's National Agricultural Research, Extension, Education & Economics Advisory Board, including as Chairman of the Specialty Crop Committee. I am also a member of the South Carolina Agriculture Commission and I serve as President of USA FARMERS, a national H-2A employers association focused on ensuring ample labor for U.S. agriculture.

As family farmers, my wife and I are truly living the American dream. We both graduated from Clemson University in 1990 and neither of us had anything to our name but for our degrees and a few credit card debts. We literally plowed, sowed, and harvested our way to creating a better future for ourselves and our children.

In 1999, we had the opportunity to purchase the land that we now farm which back then was 1,500 acres of peaches. Twenty-four years later, Titan Farms is the second largest peach farm in the United States, farming over 6,100 acres of peaches along with more than 700 acres of vegetables, including bell peppers and broccoli. Despite the size of our operation, every single day is a challenge for our 100 percent family-owned farm, from spring freezes to the predatory trade practices used by foreign countries that seriously harm family farms like ours. Ensuring we have enough workers on the farm is yet another big challenge.

This will be our 25th year of participating in the H-2A agriculture guest worker program under which we annually employ over 830 guest workers. We are extremely proud to share that we have an annual worker return rate greater than 90 percent. We care about our workers and their families and have developed a long-standing rapport with them which we believe accounts for our workers rejoining us each season.

Given my involvement in farming for more than 40 years, my engagement in the H-2A program for 25 years, and my national and state level experience as an advocate for agriculture labor reform, I believe I offer a unique perspective – a true "dirt under the fingernails" viewpoint regarding our nation's labor situation. In fact, I actually started working in the field when I was just eleven years old, alongside seasonal migrant workers hired by my uncle. I'm sure there are some jobs that I have not done on a farm in my career, but there are not many.

Titan Farms has really had to grow and adjust over the years in order to meet the incredible challenges facing farm families like ours. But one thing that has not changed over the years is our close ties to those who work on our farm who are members of our family, including and perhaps even especially the H-2A workers who leave their own families behind each year to come to South Carolina to work for 6 to 10 months in order to provide a brighter future for their families back home.

So, I greatly appreciate you holding this hearing, entitled, "From Farm to Table: Immigrant Workers Get the Job Done". It is very true that, for well over a half a century, immigrant farm workers have filled the majority of labor-intensive positions in agriculture in the United States. However, in the last decade, the situation has changed significantly. Today, we have a substantial shortage of both domestic and foreign workers electing to work in agriculture. This in part at least helps explain why food prices are increasing at 4-to-5 times the normal inflation rate, outpacing many other sectors of the economy. And, for the first time in my memory, the Department of Agriculture estimates that our country has become a net importer of our food. This, of course, means we have become dependent on other countries to feed us. Prior to the pandemic, this may not have concerned many Americans. But I believe that view has changed in America today. People care about where and how their food is produced.

In order to right the ship and ensure that the United States once again meets its own domestic food needs, as well as the needs of other around the world, we need to address the agricultural labor crisis here at home.

Each and every one of us rightly owes a debt of gratitude to the immigrant workers who have long worked right beside U.S. farm families to ensure that Americans have the safest, most abundant, and most affordable food supply in the world. Yet, we need only look back a couple of years to the frenzy caused by the pandemic that highlighted the fragility of our country's food supply chain. The pandemic served as a wakeup call that, as leaders of the free world, we must have a robust domestic food supply chain within our borders. An effective H-2A program is a critical part of making this happen.

Since the hard lessons learned from the soup lines of the Great Depression, we as Americans have taken for granted that food will always be safe, affordable, and abundant. But empty store shelves, closed restaurants, and the like reminded us that there is a lot of hard work and effort that goes into the plentiful food supply that we as Americans enjoy every day.



I was very proud of our country's leadership when farmers and ranchers and agricultural workers – including H-2A workers – were all officially recognized as "essential workers" at the outset of the pandemic. This meant that when most of the economy shut down, we were to carry on with the vital work of feeding the country. It reminded me of the certificates issued to farm families during World War II and the public placards that encouraged farmers to produce to feed our fighting forces as well as our civilian population. However, this may well have been the first time that anyone other than farmers and ranchers recognized the vital role the H-2A guest workers play in the stability of our domestic food supply chain.

The ABC's that define the Ag Labor Crisis

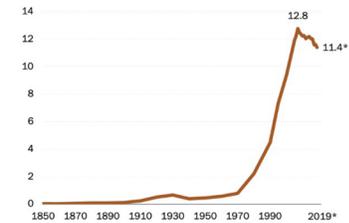
A. HELP WANTED: One cannot go anywhere and not see a help wanted sign, and this is particularly true in the case of agriculture. A part of this can be explained by the fact that, for whatever reasons, fewer and fewer able-bodied people are choosing to participate in the U.S. workforce.



Our current experienced off-shore agricultural workforce is aging out and retiring, with many of them returning to their home country of Mexico.

After peaking in 2007, the number of Mexican immigrants living in the U.S. has decreased

In millions



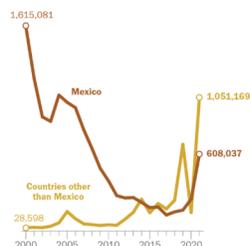
*Estimates for 2018 and 2019 are preliminary.
 Note: Mexican immigrants are people born in Mexico with two parents who are not U.S. citizens.
 Source: 1850-1980: Gibson, Campbell and Kay Jung, "Historical Census Statistics on the Foreign-Born Population of the United States: 1850-2000," U.S. Census Bureau, Population Division, Working Paper No. 81, 2006. For 1980-1990: Integrated Public Use Microdata Series (IPUMS-USA). For 1995-2000: Pew Research Center estimates based on augmented March supplements to the Current Population Survey and 2000 decennial census. For 2005-2019: Pew Research Center estimates based on augmented American Community Surveys.

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Illegal immigration from Mexico post 9/11 has decreased dramatically, although there is an uptick recently and certainly an increase from elsewhere.

More than 1 million southwest border encounters in 2021 involved people from countries other than Mexico

Migrant encounters at U.S.-Mexico border, by citizenship grouping and fiscal year



Note: Beginning in fiscal 2020, annual totals combine apprehensions and expulsions into a new category known as encounters. Annual totals before fiscal 2020 include apprehensions only.
 Source: U.S. Customs and Border Protection.
 PEW RESEARCH CENTER

Thus, there are not enough new foreign or domestic workers, legal or otherwise, entering the agriculture sector to keep up with the number of workers aging out or moving onto other sectors. The growth in the H-2A guest worker program over the last decade clearly highlights this dilemma.

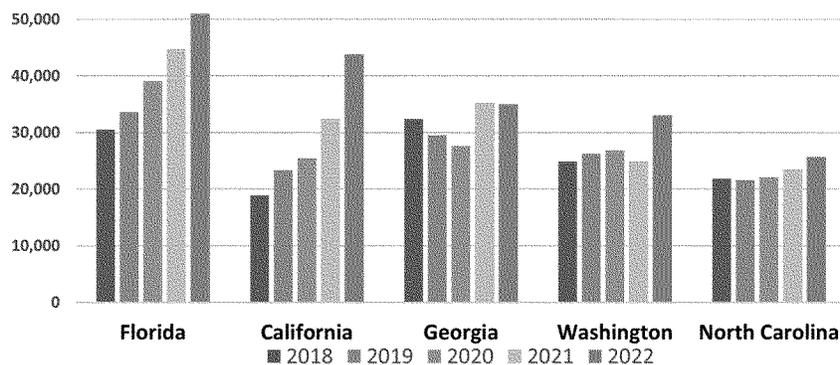
Figure 2. H-2A Visas Issued, FY1992-FY2022



Source: CRS presentation of data from U.S. Department of State, Bureau of Consular Affairs.
 Notes: See Appendix C for underlying data.

This dramatic growth in the H-2A guest worker program indicates the desperate situation U.S. family farming operations are facing to get sufficient labor. I use the term desperate because I know first-hand that many of my farmer peers declared they would never use a broken, outdated H-2A program to supply labor for their operations, yet over the last 10 years, most all of them have been forced to do so. Simply take a look at the growth in the H-2A program in states such as California, Florida and Washington State.

H-2A Top 5 States 2018-2022

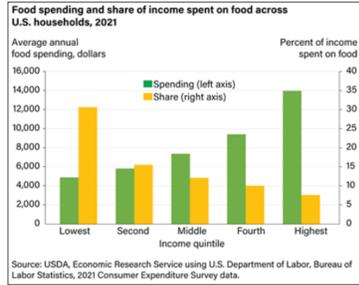


Combined, these states account for over 85 percent of the specialty crops grown in this country, mostly fruits and vegetables. California alone accounts for nearly 70 percent of our domestic supply of fruits and vegetables. Ten years ago, California scarcely brought in 5,000 H-2A workers but last year that number increased to over 40,000. California is projected to be the number one user of H-2A workers in 2023, with estimates north of 53,000 guest workers.

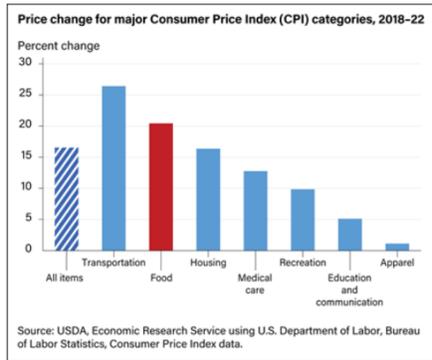
You may hear the view expressed that if farmers would pay workers more, U.S. workers would want the jobs on the farm. However, California and Washington have the two highest state minimum wages in the U.S. as well as the highest H-2A wages. Both state wage rates are double the federal minimum wage; yet California and Washington are among the fastest growing states in terms of H-2A employment. They also rank among the top 4 states with highest unemployment rates, highlighting generally the participation in the workforce issues mentioned earlier and more specifically workers' lack of interest in working in agriculture.

In 2022, for example, Washington state had 33,000 H-2A positions available. Even with over 180,000 U.S. workers in Washington receiving unemployment, only 11 U.S. workers showed up to fill those jobs.

B. Food Inflation: Higher food prices are directly related to the cost of labor. The higher cost of food affects everyone in this great country but some are affected more than others. On average a U.S. household spends about 10 percent of its disposable income on food. However, lower income households are disproportionately affected, spending three times more than the average household.

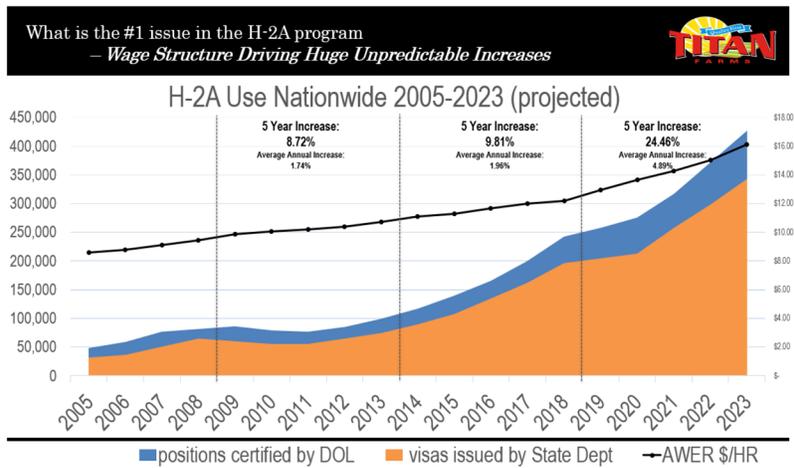


The main contributor to higher food prices directly relates to wage rates as, on average, payroll dollars make up 40 percent of the production cost of fruits and vegetables. For some crops, that number could be as high as 80 percent. In the last four years food prices have increased by more than 20 percent, outpacing inflation numbers for all other sectors of the economy other than transportation.

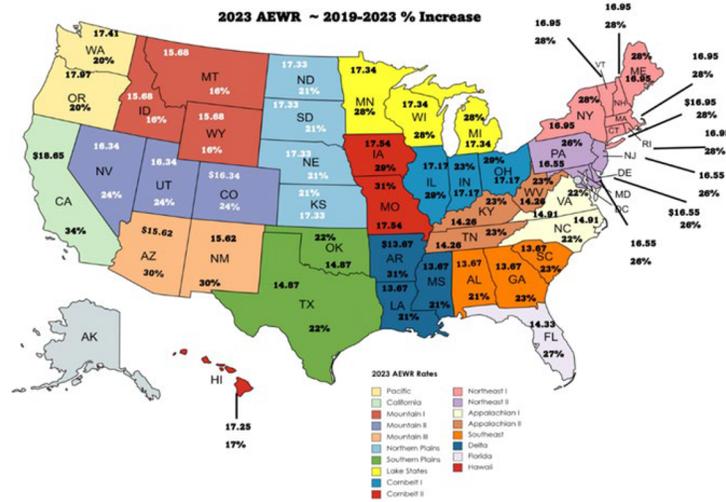


In 2022 food prices increased by 11 percent - five times their historical rate. This year prices are projected to increase between 6 and 8 percent. As a result, Americans are today spending more of their disposable dollars on food than they have been and this trend will not likely stop unless there are reforms to the H-2A program, including a change in the wage methodology of the H-2A guest worker program.

Increased wage rates directly relate to higher food costs. Over the last five years, the government has mandated a national Adverse Effect Wage Rate, or AEWR, under the H-2A program that has increased wages by 24 percent nationally, double that of the previous 5 years.



California, our leading food producing state, has faced increases of 34 percent in the past five years! Just a few years back the Colorado region endured a 22 percent increase in one year. If all other inputs remained neutral, this still means food prices would increase by approximately 13 percent.



Again, this year, the national average AEWR set a record - an increase of 7 percent in just one year. Under the current methodology, this is the highest ever one-year increase in wages, a trend that will not change unless Congress steps in to address the matter. To further highlight this issue, ten states, including my home state of South Carolina, experienced double-digit increases.

2023 AEWI plus One Year and Five Year Percent Increases

	2022 AEWI	Estimated 2023 AEWI	Percent Increase	2019-2023 Increase
Alabama	11.99	13.67	14%	23%
Arizona	14.79	15.62	6%	30%
Arkansas	12.45	13.67	10%	21%
California	17.51	18.55	7%	34%
Colorado	15.58	16.34	5%	24%
Connecticut	15.66	16.95	8%	28%
Delaware	15.54	16.55	6%	26%
Florida	12.41	14.33	15%	27%
Georgia	11.99	13.67	14%	23%
Hawaii	16.54	17.25	4%	17%
Idaho	14.68	15.68	7%	16%
Illinois	15.89	17.17	8%	29%
Indiana	15.89	17.17	8%	29%
Iowa	16.19	17.54	8%	31%
Kansas	16.47	17.33	5%	21%
Kentucky	13.89	14.26	3%	23%
Louisiana	12.45	13.67	10%	21%
Maine	15.66	16.95	8%	28%
Maryland	15.54	16.55	6%	26%
Massachusetts	15.66	16.95	8%	28%
Michigan	15.37	17.34	13%	28%
Minnesota	15.37	17.34	13%	28%
Mississippi	12.45	13.67	10%	21%
Missouri	16.19	17.54	8%	31%
Montana	14.68	15.68	7%	16%
Nebraska	16.47	17.33	5%	21%
Nevada	15.58	16.34	5%	24%
New Hampshire	15.66	16.95	8%	28%
New Jersey	15.54	16.55	6%	26%
New Mexico	14.79	15.62	6%	30%
New York	15.66	16.95	8%	28%
North Carolina	14.16	14.91	5%	22%
North Dakota	16.47	17.33	5%	21%
Ohio	15.89	17.17	8%	29%
Oklahoma	13.88	14.87	7%	22%
Oregon	17.41	17.97	3%	20%
Pennsylvania	15.54	16.55	6%	26%
Rhode Island	15.66	16.95	8%	28%
South Carolina	11.99	13.67	14%	23%
South Dakota	16.47	17.33	5%	21%
Tennessee	13.89	14.26	3%	23%
Texas	13.88	14.87	7%	22%
Utah	15.58	16.34	5%	24%
Vermont	15.66	16.95	8%	28%
Virginia	14.16	14.91	5%	22%
Washington	17.41	17.97	3%	20%
West Virginia	13.89	14.26	3%	23%
Wisconsin	15.37	17.34	13%	28%
Wyoming	14.68	15.68	7%	16%
United States	15.03	16.14	7%	24%

National Average
AWER
+7%
5 year +24%

California had the
highest 5-year
increase at 34%

Florida had the
highest one year
annual increase at
15%

10 states had double
digit % increases

It is difficult to see how farm and ranch families can expect to stay in business, plan for the future, and compete with heavily subsidized and protected foreign imports under such an unpredictable and unprecedented system.

H-2A wages no longer protect U.S. workers from the adverse effect of foreign labor, as intended. Instead, the H-2A wage system now drives the wage market which, in turn, exacerbates food price inflation. Very concerning to me is the fact that some are actually moving their production outside of the United States, thus furthering our dependence on foreign food imports.

Despite all of this, the U.S. Department of Labor recently published new rules for calculating the AEW. I am deeply concerned that the recently published AEW rule is in violation of the statutory requirement that wages for H-2A workers must be tied to those of U.S. workers similarly employed. This is a major change to the entire H-2A wage methodology.

I have read reports where Department of Labor asserts that this will only affect 3 percent of producers in the H-2A program. In fact, all producers will be adversely impacted. Since the program's inception, there has only been one wage per region and job descriptions were very broad in nature. This is appropriate given few farm workers perform a single kind of job. However, due to the new rule, job descriptions will become very detailed and employers will fear post-employment audits that could declare other wages should have been paid, subjecting employers to back wages, fines, and potential debarment from the program.

Beyond these concerns, there are other serious issues regarding the rule as well. The new rule is complex, confusing, and ambiguous for producers to follow. For example, for the first time, a state or region will not have a single wage rate but potentially several wage rates, all of which are subject to the interpretation of three different agencies, including State Workforce Agency, Farm Labor Survey and Wage and Hour. Subjective agency interpretations may well result in biases as to the particular job description ultimately determined appropriate.

The Department of Labor has also determined that six occupational wage codes will still apply to the current methodology. In talking to producers around the country, this new rule has the potential in some cases to double the wage rate.

Moreover, any of the hundred or more potential jobs that fall outside of the six wage codes will be subject to different wages, most all of which will be higher.

I would also like to point out some of the other flaws in the new wage methodology that are so concerning to farmers and ranchers from across the country:

1. In most cases the new wage methodology is based on non-farm wage labor surveys. This means a heavy tractor trailer truck driver simply hauling harvested produce from the field to the packing shed will be subject to new wages based off of full-time, experienced, over-the-road truck drivers.
2. Regardless of the amount of time a worker performs a particular job duty for which a higher wage is required, under the new wage codes they must be paid the applicable wage for the entire time worked. This is true even if only 5 percent of the time was spent performing the higher rate job. A good example is in the case of an H-2A worker who is assigned to drive an employer's van or bus. Drivers must carry other workers between employer-provided free housing and the fields and will spend an average of 30 minutes per day driving and the rest of the day performing the same work as other workers. Yet, under the new rule, the driver will be paid at the highest level for all hours worked.
3. And, if a job contract is determined to have multiple wage codes, every employee recruited under that contract will have to be paid the highest wage, regardless of whether or not they perform the duties at all. Hence, under the example above, every worker would be

subject to the higher wage even if they never perform the job for which the higher wage is prescribed.

The rule is also very vague. According to the Department of Labor, "directing or monitoring the work of others" is a \$13.67 per hour position in South Carolina but "training workers, monitoring compliance with safety regulations, or scheduling work crews" is a \$29.94 per hour position. If those jobs sound the same or very similar, imagine the farmer who has to figure out which is which. As noted previously, the farmer may well be told a year after the fact by the Wage and Hour Division that he was wrong in his classification and receive a bill for back-wages of upwards of six-figures for an honest mistake.

While it is yet to be determined, it is feasible that diversified operations like mine will end up having to file three or four different contracts, driving up costs exponentially, not just in wages, but in human resources support personnel. This is also going to double and perhaps triple the workload on the Department of Labor which also has to ensure compliance.

Again, this is yet to be determined, but I could easily see this new rule raising employer payroll costs by anywhere from 10 to 100 percent depending on how it is implemented.

In Florida, for example, where wages increased by 15.5 percent since December, the new rule will increase wages for drivers, mechanics, and crew leaders by another 74 percent, 102 percent, and 116 percent, respectively, in just a few weeks.

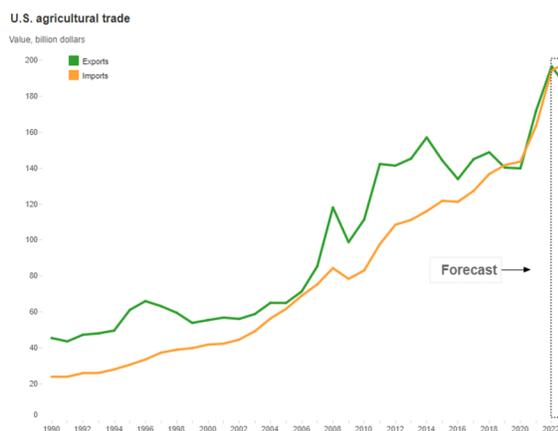
The vagueness and resulting uncertainty of it all is very troubling. Someone fixing a tractor might be a "Farm Worker" or an "Agricultural Equipment Operator" at the regular AEW, or, depending on the state or the subjective decision-making of the certifying officer, the worker might be a "Farm Equipment Mechanic" or a "Service Technician." In South Carolina, the decision could mean a 50 percent increase, from \$13.67 to \$20.00 per hour.

In the Midwest, producers are finding out that their livestock workers are all "fence erectors" who have to be paid the going rate for workers setting up fences around suburban pools or construction sites just because they hang barbed wire to contain the cattle. That is work that has had to be done on farms for 150 years. Abraham Lincoln was once a "rail-splitter" on a farm. He would have been surprised to be told that he was not a farmer but a "fence erector."

Here's another example of why producers are so concerned about the new rule: A farmer has an H-2A worker performing the job of a "custom combining equipment operator" who would still be subject to the current AEW methodology. However, the same worker more than likely loads his combine on a tractor trailer and moves it to the next field. However, the moment he does, the worker is now subject to the heavy tractor trailer wage which, in most states, will be nearly double the current AEW. This new rule is going to have very significant adverse impacts on the cost of grain harvesting in this country.

C. Food Security: A *national security* issue. In recent years, Americans have once again been reminded that any country that cannot feed itself cannot defend itself. Yet, over the last two decades, our country's increased dependence on foreign agricultural products has offered evidence of the agriculture labor crisis that continues to unfold. According to the U.S. Department of Agriculture (USDA), this year our nation will become a net agriculture food importer, meaning we are now relying on other countries to feed us.

[Outlook for U.S. Agricultural Trade: February 2023](#)



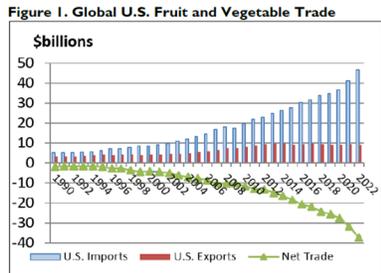
Source: USDA, Economic Research Service and USDA, Foreign Agricultural Service analysis and forecasts using data from U.S. Department of Commerce, Bureau of the Census.

But, if we look deeper into the more intense agricultural labor crops – namely, fruits and vegetables – the picture becomes even more concerning. Recent dietary recommendations published by the Department of Agriculture, known as MyPlate, encourages Americans to consume 50 percent of their daily food intake from fruits and vegetables.

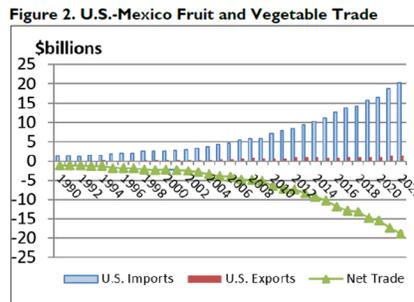


Yet our country has been a net importer of fruits and vegetables since the 1990s. In fact, last year, we imported four times the amount of fruits and vegetables than we exported. Our trade deficit on fruits and vegetables has doubled in the last decade, reaching \$37 billion.

As a U.S. farmer who directly competes with fresh vegetable imports from Mexico, I feel compelled to share that slightly over 50 percent of our trade deficit on fruits and vegetables belongs to Mexico. Starting back in the early 2000s, the Mexican government made huge investments into protected production of fruits and vegetables, greenhouses, hoop houses and shade covers, heavily subsidizing the industry to get production started. Mexico really ramped up in the last decade, doubling the number of acres dedicated to protected production of fruit and vegetable acres to nearly 150,000 acres – that’s ten times the acreage in the U.S.

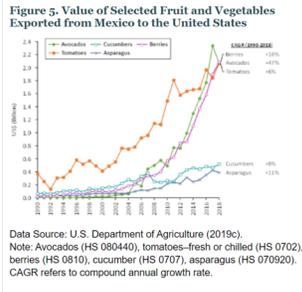


Source: CRS from data in the USITC’s Trade DataWeb database.
 Note: Fresh and processed products (Harmonized Tariff Schedule [HTS] chapters 07, 08, and 20, excluding nuts [HTS 0801-0802]).



Source: CRS from data in the USITC’s Trade DataWeb database.

Mexico’s heavy subsidization of its specialty crop production coupled with a daily wage rate – not hourly wage rate – of approximately \$11.50 per day (i.e., roughly fourteen times lower than the national average AEWR) affords Mexico an incredible advantage over U.S. farm families.

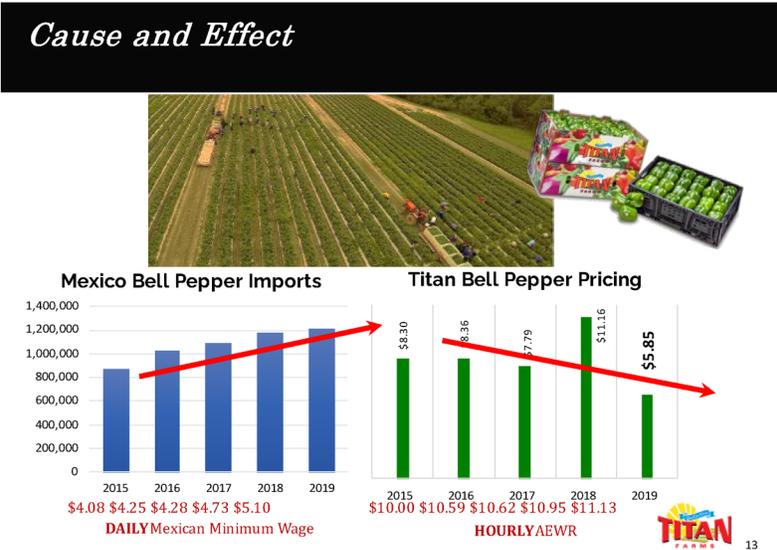


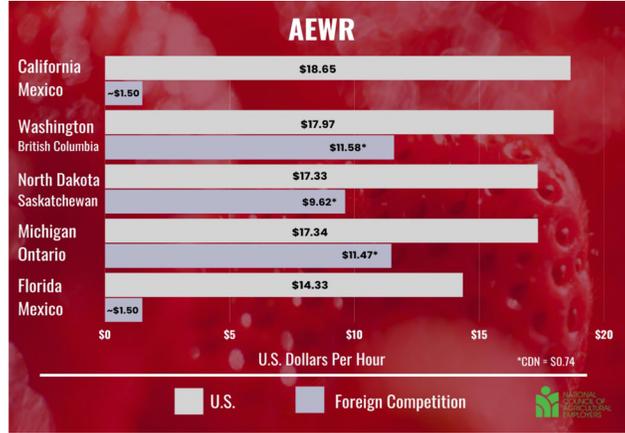
Data Source: U.S. Department of Agriculture (2019c).
 Note: Avocados (HS 080440), tomatoes—fresh or chilled (HS 0702), berries (HS 0810), cucumber (HS 0707), asparagus (HS 070920).
 CAGR refers to compound annual growth rate.

This should be of deep concern to all Americans and serves as yet another reason why we need to revoke the current AEWR and halt the Department of Labor from implementing its new AEWR rule.

I can offer two personal examples of exactly how the current AEWL methodology adversely affected my family farm and the American consumer:

1. This year the state of South Carolina received a 14 percent increase in the federally mandated AEWL wage. Since wages are my number one input cost, accounting for 36 percent of my total expenditures, this 14 percent increase translated into \$2.6 million in new payroll expense. More importantly, it raises my total cost of production by 5 percent. This is a prime example of how the AEWL is directly driving up food costs.
2. In 2019, we had one of the most beautiful fall crops of bell peppers - 400 acres, producing over 500,000 bushels of pepper. However, so did Mexico and Mexico was able to ship its crop to the U.S. and sell it for less than half my cost to grow it. We lost \$2 million on that one crop! Due to that horrible experience, my operation cut our vegetable acreage by more than one-half, thus eliminating 200 seasonal jobs. See the slide below.





Immediate Action Needed!

These and other significant headwinds clearly help define the agriculture labor crisis and the significant impact it is having on every American citizen. This is a crisis that will only continue to grow out of control unless Washington acts immediately to provide both short-term and long-term relief.

We can at least begin the work of reversing these very troubling trends that threaten U.S. agriculture production, our economy, and our national security by stopping some of the unforced errors. Enacting the measures below would be a good start:

- S.J. Res 25, the Congressional Review Act resolution to overturn the new AEWR;
- S.874 - Farm Operations Support Act

Beyond this, we need to separate agriculture labor reform from the larger debate over immigration in order to allow U.S. farmers to be able to survive, to recapture lost market share, to help lift our economy, and to provide food security, all of which will directly support national security. For over 25 years, since the late 1990s, agriculture labor reform issues have been linked to broader immigration legislation. Although there have been numerous attempts to move these issues in combination, each one has failed. Following the same playbook is what has gotten our country into the agricultural labor crisis we find ourselves in today. We need a different path forward.

Like virtually every other developed nation in the world, we require an agricultural guest worker program to support an abundant, affordable, safe, and secure domestic food supply.

For whatever reason, our domestic workforce has chosen not to perform these essential jobs. In fact, based on U.S. Department of Labor statistics, in the certification process, fewer than 300 domestic workers applied for the over 300,000 H-2A positions posted just last year.

As vitally important as it is, the 37-year-old H-2A program has major flaws in desperate need of correcting. There are huge challenges facing the outdated H-2A program. But, by far, the biggest challenges are self-imposed, including the AEWR wage methodology. It is amongst the biggest contributors to our nation's agricultural labor crisis.

Summary Points

- We have an Ag workforce crisis
- Food security is national security. US in 2023 will for the 1st time be a net importer of food. Why do we want to give up our food security?
- A high % of our domestic food production is now planted, cared for and harvested by legal non-immigrant foreign guestworkers and that trend will continue. We need to make a decision if we want that to continue farming on U.S. soil, under our food safety laws.
- Help sustain our farms, local communities, and our economy
- The wage rate is out of control, is devastating to family farms, and is forcing farms to change what we grow and go out of business. There will be fewer fresh fruits & vegetables grown here if we don't fix it.
- This is a labor & employment Issue. H-2A and H-2B are non-immigrant visas – this is not about immigration
- Labor is now as high as 40% of farms' total production costs
- Farms have been hit multiple times this year- AEWL increase (\$2.00 or 12.8% for MI), new H-2A rules, new AEWL rule with disaggregation of wages, Department of State Visa Fee hike (8%) and USCIS fee hike (anywhere from 15-137% increase)

Ag Guest Worker Reforms Needed

The Number one Issue, Adverse Effect Wage Rate

- Fix or Replace AEWL. Most important issue and priority.
 - Need an Affordable, Predictable and Stable wage rate.
- Repeal or eliminate the 2023 AEWL rule and disaggregation of wages with new OEWS categories.
- Limit/cap annual wage rate growth – use CPI annual index and/or limit increases or decreases to no more than 2.5%

Modernize & Update H-2A Program

- Last legislative change was 1986
- Expand the program to all agriculture, year-round and food processors.
- Provide option for up to a 3-year visa for returning workers, eliminating need for consulate processing, and reducing the backlog.
- Allow for staggered arrivals of workers. Reduces processing times, staff resources and costs for federal agencies involved through lower # of needed contracts. Reduces expenses for farms through lower # of needed contracts.
- Recognize farmers/H2A user for housing provided via a tax credit or other method.
- Reduce the positive recruitment period to 30 days
- Make USCIS application/processing digital and make USCIS respond to status updates and escalate cases via email. (Currently paper process with USPS)
- Allow contracts than involve work in more than one area of intended employment (AIE).
- Removal of joint employer restrictions now in place because of new H2A rule.
- Prohibit USCIS from charging H users for the Federal Government's asylum program

Hearing before the Senate Committee on the Judiciary

216 Hart
Wednesday, May 31, 2023– 10:00 AM

***FROM FARM TO TABLE:
IMMIGRANT WORKERS GET THE JOB DONE***

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 Senator Durbin, the Committee Chair as well as Ranking Member Graham, and the other distinguished members of the Committee for allowing me to testify at this hearing on the contributions of immigrant workers to the food supply chain and how to better protect them. I am a lawyer and 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 also a Visiting Scholar at the Global Migration Center at the University of California, Davis, a university known for its focus on the study of agriculture. UC Davis is the top university in the nation for agricultural sciences, plant and animal sciences, and agricultural economics and policy research.

I am especially honored to be before the Judiciary Committee because I am myself the son of 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. The first jobs that most family members on both my mother's and father's side had after arriving in the United States were in the food supply chain, in the agricultural heartland of California, the San Joaquin Valley, where I grew up, and now live. 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 allow them come and stay and integrate into the United States, and believe we should do much more to improve the migration pathways that currently exist, and we also should regularize immigrants

who are in the United States who lack an immigration status or only have a precarious, temporary status, such as Temporary Protected Status, Deferred Action for Childhood Arrivals, and parole.

The purpose of this hearing is to discuss the work that immigrant workers do across the entire food supply chain, from “farm to table,” and how immigration reforms could help immigrant workers and farms and business, as well as how best to protect both U.S. workers and immigrant workers. This hearing is especially timely given the countless stories of abuse and exploitation of immigrant workers who are employed in the low-wage jobs that support America’s food production and distribution. The COVID-19 pandemic exacerbated the already-extreme vulnerabilities of this cohort of workers, who were considered by the federal government to be “essential” and who were required to work in person rather than remotely, and who suffered disproportionately in terms of covid infections and deaths. Despite the plight of workers across the food supply chain being broadcast across the front pages of newspapers and on television, policymakers did little to protect them and honor their contributions.

Employers and industry associations have now been complaining about labor shortages and the lack of a stable workforce and calling for immigration reforms that would provide them with additional workers, but virtually no action has been taken to improve conditions in a number of industries, including agriculture—to help attract and retain workers—nor have the necessary investments been made to improve labor standards enforcement to protect workers in those industries. Without those measures first, it is impossible to know if the claims made by employers are legitimate. In a number of industries, there is little evidence of shortages of workers—but ample evidence that there’s a shortage of decent wages and working conditions on offer—creating a false image of a shortage that employers then wish to resolve with temporary migrant workers who are indentured to them through nonimmigrant work visa programs. The fervor around so-called labor shortages has gotten so intense, in fact, that in response, numerous state legislatures around the country are now passing and proposing laws that peel back the few prohibitions that exist to protect against child labor, as some of my EPI colleagues have recently documented.¹

In addition, many migrant workers who are already in the United States lack an immigration status or only have a precarious, temporary status, such as those with DACA and TPS, parole, or those who are asylum seekers, as well as those who are in a temporary nonimmigrant status with a work visa. The status of those workers is subject to change depending on conditions and the whims of policymakers; thus, the first needed step in terms of the immigration system is to stabilize the current workforce by ensuring migrant workers are regularized and have a quick path to permanent residence and citizenship. The employers and industries complaining that the U.S. workforce is not “stable” should look directly at Congress, which has the power to resolve and improve the status of immigrant workers.

Immigration, if done right, may be a perfectly reasonable response to labor shortages, but only when it aligns with broader strategies to lift workplace conditions. Our current workforce—

¹ Jennifer Sherer and Nina Mast, [Child labor laws are under attack in states across the country: Amid increasing child labor violations, lawmakers must act to strengthen standards](#), Economic Policy Institute, March 14, 2023.

whether migrants or U.S. workers—need and expect support in the form of regularization, access to green cards, and improved wages and working conditions and labor standards. Immigration is not the only policy response available to lawmakers—raising wages and investing in training are other examples of responses—but immigration is certainly an option, if done right.

All immigration pathways, including our refugee and asylum systems, can be vehicles for economic growth and workforce expansion, not just those that are employment-based by design. To the extent that pathways are increased with the primary intention of meeting employer need, those pathways must include, at a minimum, a credible method to determine whether the need is real if shortages exist (and not a system that simply relies on the attestations of employers). U.S. workers must have a fair opportunity to apply and be considered first for U.S. jobs for which they are qualified

When opportunities offered to migrant workers, they must be fair. At a minimum, migrant workers must be paid fairly according to U.S. standards, have adequate protections against retaliation and access to justice when their rights are violated. As importantly, Congress must create a clear and direct path to permanent residence that the migrant worker controls (rather than one that is controlled by the employer). Unfortunately, when it comes to U.S. temporary work 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 alike.

Furthermore, two of the most well-known and important temporary 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, have been an integral part of the public discourse on migrant workers and the food supply chain. Employer groups and industry associations have been calling to expand and deregulate both programs. Shamefully, policymakers have supported budget riders allowing employers to hire more H-2A and H-2B workers, while also lowering wage standards and watering down other important worker protections.

While the size of both the H-2A and H-2B programs has increased rapidly in recent years—during that time, few, if any, new protections have been implemented to ensure that workers in those programs and industries are adequately protected. Congress and federal agencies have failed to implement needed measures to lift standards and safeguard fundamental rights, despite numerous and egregious cases of worker abuses and exploitation including wage theft, health and safety violations, discrimination, human trafficking, and even death.

My written testimony will discuss the importance of the immigrant workforce in the United States and the need to invest in improving labor standards enforcement to protect workers, with a close look at labor standards enforcement in agriculture, including a discussion of wages for farmworkers and the false narratives around the discussion about the Adverse Effect Wage Rate for H-2A farmworkers. It will then turn to a discussion of U.S. temporary work visa programs, providing a background on their usage and the flaws that are common across them, and offer common sense solutions for the programs in their entirety, along with a specific focus on the H-2A and H-2B visa programs.

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Immigrant workers in the U.S. economy and the food supply chain

Numerous scholars, institutions, and government agencies have documented the key role that immigrant and nonimmigrant workers play in the U.S. economy, including in the U.S. food supply chain. Without immigrant workers, many sectors of the economy would cease to function adequately—whether it be the construction of buildings, crop production, or information technology services. This section discusses and cites some of those sources.

Immigrant workers play an important role in nearly all sectors of the economy

The latest report from the Bureau of Labor Statistics (BLS) on the labor force characteristics of foreign-born workers shows that in 2022, immigrant workers accounted for 18.1% of the U.S. civilian labor force, an increase of 0.7% compared to 2021.² According to the U.S. Census, the share of the U.S. population that is foreign-born was 13.6% in 2021; if this share held in 2022, it means that immigrants are overrepresented in the labor force by 4.5 percentage points. The labor force participation rate of immigrants was 65.9%, which was 4.4 percentage points higher than the labor force participation rate of the native-born.³

According to BLS, immigrant workers were also “more likely than native-born workers to be employed in service occupations (21.6 percent versus 14.8 percent); natural resources, construction, and maintenance occupations (13.9 percent versus 7.9 percent); and production, transportation, and material moving occupations (15.2 percent versus 12.1 percent).”⁴ Other sources made similar findings. For example, the Migration Policy Institute (MPI) reported that immigrants accounted for 17% of the workforce between 2017 and 2021, and represented 21% of all workers in the food industry, excluding restaurants. They also reported that immigrants were 18% of transportation workers, 22% of grocery and farm product wholesalers, 35% of meat processing workers, 25% of seafood processing workers, and 16% of grocery retail workers.⁵

² Bureau of Labor Statistics, “[Foreign Born Workers: Labor Force Characteristics—2022](#).” U.S. Department of Labor, News Release, May 18, 2023.

³ Bureau of Labor Statistics, “[Foreign Born Workers: Labor Force Characteristics—2022](#).” U.S. Department of Labor, News Release, May 18, 2023.

⁴ Bureau of Labor Statistics, “[Foreign Born Workers: Labor Force Characteristics—2022](#).” U.S. Department of Labor, News Release, May 18, 2023.

⁵ Julia Gelatt, “[Immigrant Workers: Vital to the U.S. COVID-19 Response, Disproportionately Vulnerable](#),” Fact Sheet, Migration Policy Institute, March 2020.

The Immigration Research Initiative also recently reported on the immigrant workforce. “Immigrants are a big and important part of the economy,” the report stresses, with immigrant labor responsible for 17 percent of total GDP in the United States.⁶ Contrary to common misperception, the report shows, immigrants work in jobs across the economic spectrum, and in a wide range of occupations. The report underscores two basic realities. On the one hand, the majority of immigrants are in middle- or upper-wage jobs—with 48% employed in middle-wage jobs, earning more than 2/3 of median earnings for full-time workers (or \$35,000 per year), and 17% are in upper-wage jobs, earning more than double the median. On the other hand, immigrants are “at the same time disproportionately likely to be in low-wage jobs. In all, 35 percent of immigrants are in jobs paying under \$35,000, compared to 26 percent of U.S.-born workers.”⁷ The immigrants employed in the food supply chain occupations and industries cited above by MPI, as well as those employed in agricultural jobs like crop farming and livestock production, are overwhelmingly likely to be part of the 35% of immigrants in low-wage jobs.

These data show that immigrant workers are playing a vital role all across the food supply chain and in countless other industries. This is virtually an undisputable claim.

[Millions of immigrant workers lack an immigration status or have only a precarious, temporary status, including many in the food supply chain](#)

While the importance of immigrants to the U.S. economy is generally understood, there is generally less discussion about the impact of the different statuses of immigrants in the mainstream public discourse, especially with respect to the varying labor market outcomes associated with those statuses. For employers who claim they lack a “stable” workforce, one of the key drivers is likely to be the lack of a stable and permanent status for too many immigrant workers.

The Pew Research Center has reported on the makeup of the U.S. immigrant population, by immigration status, showing that 45% of immigrants are naturalized citizens, 27% are lawful permanent residents (also known as green card holders), while 23% are unauthorized immigrants who lack status, and 5% of the total foreign-born population are temporarily residing in the United States with nonimmigrant visas.⁸ The latest estimate from the Center for Migration Studies shows that in 2019 there were 10.3 million total unauthorized immigrants residing in the United States, with 7.3 million of them of working age and participating in the U.S. labor force.⁹ The United States

⁶ David Dyssegaard Kalliek and Anthony Capote, [Immigrants in the U.S. Economy: Overcoming Hurdles, Yet Still Facing Barriers](#), Immigration Research Initiative, May 1, 2023.

⁷ David Dyssegaard Kalliek and Anthony Capote, [Immigrants in the U.S. Economy: Overcoming Hurdles, Yet Still Facing Barriers](#), Immigration Research Initiative, May 1, 2023.

⁸ Abby Budiman, “[Key Findings About U.S. Immigrants](#),” Fact Tank (Pew Research Center), Aug. 20, 2020.

⁹ Center for Migration Studies, “[Estimates of Undocumented and Eligible-to-Naturalize Populations by State](#),” State and National Data Tool, accessed May 27, 2023.

stands alone in terms of having such high share of its immigrants lacking an immigration status, and no country comes close in terms of an absolute number of unauthorized immigrants.

The 7.3 million unauthorized immigrant workers are not fully protected by U.S. labor laws because they lack an immigration status: Unauthorized workers are often afraid to complain about unpaid wages and substandard working conditions because employers can retaliate against them by taking actions that can lead to their deportation. That also makes it difficult for unauthorized immigrants to join unions and help organize workers. This imbalanced relationship gives employers extraordinary power to exploit and underpay these workers, ultimately making it more difficult for similarly situated U.S. workers to improve their wages and working conditions.

The exploitation described here is not theoretical. A landmark study and survey of 4,300 workers in three major cities found that 37.1% of unauthorized immigrant workers were victims of minimum wage violations, as compared with 15.6% of U.S.-born citizens. Further, an astounding 84.9% of unauthorized immigrants were not paid the overtime wages they worked for and were legally entitled to.¹⁰

There are also many migrant workers whose status is in a grey area: they may not have a permanent path to remain in the United States, but have some protection from deportation, along with an Employment Authorization Document (EAD) issued by United States Citizenship and Immigration Services (USCIS), which permits them to work lawfully. Having an EAD reduces the reasonable fear that unauthorized immigrants have of employer retaliation that can lead to deportation. A few of the major categories of migrants with EADs include asylum applicants and those who were recently granted asylum, parolees, those who were granted Temporary Protected Status (TPS) or established prima facie eligibility for TPS, and those who qualified for Deferred Action for Childhood Arrivals (better known as DACA). In fiscal year 2022, there were approximately 1.8 million migrant workers with valid EADs in those categories alone.¹¹

When it comes to the 5% of migrants that Pew estimates are in the United States with temporary visas, I've calculated that of that total 5%, approximately 2.1 million are employed in the U.S. labor force in a number of different work visa programs.¹² As will be discussed in-depth later in this testimony, the migrant workers in these programs are among the most exploited laborers in the U.S. workforce because the employment relationship created by the visa programs leaves workers powerless to defend and uphold their rights, due to fear of retaliation and deportation. Temporary migrant workers are usually tied to one employer and cannot change jobs if their boss is abusive or breaks the law, and the exorbitant fees charged to them by labor recruiters for employment

¹⁰ Annette Bernhardt 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, 2009.

¹¹ Author's analysis of EAD data from USCIS, from I-765 forms. The 1.8 million total includes EAD approvals for 2021 and 2022, because EADs are often valid for two years, or 18 months for TPS grantees, and include the EAD eligibility categories of A054, Granted Asylum Sec. 208; A124, Granted TPS; C085, Applicant for Asylum/Pending Asylum App; C11, Parolee Sec. 212.5/Public Interest; C19, Prima Facie Eligibility For TPS; and C33, Deferred Action for Childhood Arrivals.

¹² 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.

opportunities in the United States leave workers indebted and indentured to both employers and recruiters.

Three of the main temporary work visa programs utilized by U.S. employers across the food supply chain, for almost exclusively low-wage jobs, are the H-2A, H-2B, and J-1 visa programs. The H-2A program, used almost exclusively by employers in the food supply chain, allows employers to hire workers from abroad for agricultural jobs that normally last less than one year, including picking crops and shepherding. There is no numerical limit on H-2A visas, and in recent years, the H-2A program has grown sharply, to approximately 300,000 workers in 2022. The H-2B program allows employers to hire temporary workers in low-wage nonagricultural jobs like landscaping, forestry, food processing, hospitality, and construction. There is an annual numerical limit of 66,000, but workers often stay longer than one year or have their stay extended, and congressional appropriations riders have raised the cap in recent years, resulting in approximately 150,000 H-2B workers in 2022 (as discussed later in this testimony). According to the Office of Foreign Labor Certification, approximately 10.5% of H-2B jobs were certified for occupations in the food supply chain.¹³

The J-1 visa is part of the Exchange Visitor Program, a cultural exchange program run by the State Department that has more than a dozen different J-1 programs, including programs that permit Fulbright Scholars to come to the United States, but also five de facto low-wage work visa programs. J-1 workers are employed in a number of low-wage occupations like au pairs, camp counselors, maids and housekeepers, and lifeguards, but many—especially in the Summer Work Travel program, the largest J-1 program—are employed in the food supply chain, by staffing restaurants, as well as smaller food stores and concessions stands like ice cream shops, including at amusement parks and national parks.¹⁴ The Summer Work Travel Program has a numerical limit of 109,000 per year; and 92,619 temporary migrant workers were employed through it in 2022.

Together, there were close to 550,000 temporary migrant workers employed in just these three visa programs in 2022, rivaling the number of low-wage temporary migrant workers at the peak of the Bracero program,¹⁵—a program so notorious for worker abuses that Congress eventually shut it down—with the vast majority employed across the food supply chain. Like the Braceros before them, temporary migrant workers in the H-2A, H-2B, and J-1 programs—and most other work visa programs—are indentured to their employers and have limited workplace rights. The trend towards temporary work visa programs—instead of providing migrants with a permanent immigrant status—is a trend that is being observed across the OECD, and has been documented

¹³ Author's analysis of Office of Foreign Labor Certification, "[H-2B Temporary Non-Agricultural Program – Selected Statistics, Fiscal Year \(FY 2022\)](#)," Employment and Training Administration, U.S. Department of Labor.

¹⁴ Migration that Works coalition, [Shining A Light on Summer Work: A First Look at the Employers Using the J-1 Summer Work Travel Visa](#), July 30, 2019. (The Migration that Works coalition was formerly known as the International Labor Recruitment Working Group (ILRWG)).

¹⁵ Victor Salandini, "[The political-economic dynamics of California's farm labor market—a highly specific model of international factor flows](#)," *Journal of Behavioral Economics*, Volume 2, 1973, Pages 144-246.

by migration scholars.¹⁶ It is a particularly troubling trend, considering the consensus that exists among economists that permanent residence and citizenship raises wages and reduces poverty.¹⁷

Immigration is the government's top federal law enforcement priority while labor standards enforcement agencies are starved for funding and too understaffed to adequately protect workers

Since this hearing is focused on how of immigration and labor are deeply intertwined, it must be noted how Congress has heavily prioritized the enforcement of immigration laws—much to the detriment of labor and employment laws—as evidenced by the massive imbalance in appropriations made to enforce each. For too long, employers have lobbied members of Congress to keep funding levels unrealistically and disastrously low for agencies like the U.S. Department of Labor (DOL) and the National Labor Relations Board (NLRB)—so low that they cannot adequately fulfill their missions. The result is an environment of near impunity for rampant violators of labor and wage and hour laws, a situation brought to light by the recent wave of labor organizing across the country as workers make it clear that they are unwilling to continue accepting unsafe and unjust conditions on the job.

“Budgets are moral documents,”¹⁸ and one clear way to understand the priorities of a government is to look at how it spends money. For at least the past decade, the U.S. Congress has placed little value on worker rights and working conditions. A recent comparative analysis I published of federal budget data from 2012 to 2021 reveals that the top federal law enforcement priority of the United States is to detain, deport, and prosecute migrants, and to keep them from entering the country without authorization. Protecting workers in the U.S. labor market—by ensuring that their workplaces are safe and that they get paid every cent they earn—is barely an afterthought.

This situation leaves migrant workers especially vulnerable to employer lawbreaking. There are not enough federal agents to police employers, while a massive immigration enforcement dragnet threatens workers with deportation. Employers take advantage of the climate of fear this creates to prevent workers from reporting workplace abuses. Workers who find the courage to speak up can be retaliated against in ways that can set the deportation process in motion.

¹⁶ See for example, Daniel Costa and Philip Martin, “OECD highlights temporary labor migration: Almost as many guestworkers as permanent immigrants,” *Working Economics* blog (Economic Policy Institute), December 4, 2019; Anna Boucher and Justin Gest, *Crossroads: Comparative Immigration Regimes in a World of Demographic Change*, Cambridge University Press, 2018.

¹⁷ 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; Heidi Shierholz, *The effects of citizenship on family income and poverty*, Economic Policy Institute, February 24, 2010.

¹⁸ The origin of the phrase is unknown but it has been used regularly in the context of economic and fiscal policy debates, including by Dr. Martin Luther King, Jr. See, for example, Jon Wiener, “Martin Luther King’s Final Year: An Interview with Tavis Smiley,” *The Nation*, January 18, 2016; Rev. Dr. William J. Barber II, “Every budget is a moral document,” Twitter, @RevDrBarber, April 27, 2017, 2:37 p.m.; Scott Wong, “Beitch: Budget ‘a Moral Document,’” *Politico*, April 11, 2011; and Dylan Matthews, “Budgets Are Moral Documents, and Trump’s Is a Moral Failure,” *Vox*, March 16, 2017.

The wide gap in government funding between immigration and labor standards enforcement has persisted for at least a decade

In 2013, the Migration Policy Institute made headlines with a report highlighting how appropriations for immigration enforcement agencies exceeded the combined funding for the five main U.S. federal law enforcement agencies by 24%.¹⁹ Updating these figures for its 2019 report, the institute revealed how in 2018, after another six years of skyrocketing spending, immigration enforcement agencies received \$24 billion, or \$25.6 billion in 2021 dollars after adjusting for inflation.²⁰ This amount is “34 percent more than [what was] allocated for *all other principal federal criminal law enforcement agencies combined*” [italics in original], including the Federal Bureau of Investigation; the Drug Enforcement Administration; the Secret Service; the U.S. Marshals Service; and the Bureau of Alcohol, Tobacco, Firearms, and Explosives. Both reports bring to light the fact that immigration enforcement has undoubtedly become the U.S. government’s top federal law enforcement priority.

Not much has changed since 2018. My analysis of DHS budget documents reveals that Congress appropriated another \$25 billion in fiscal year 2021 to enforce immigration laws, while Department of Justice and DHS budget documents show an appropriation of \$20.4 billion to the principal federal criminal law enforcement agencies.²¹

But where do labor standards and worker rights fit in?

My analysis of federal budget data also reveals that government spending on immigration enforcement in 2021 was nearly 12 times the spending on labor standards enforcement—despite the mandate of the labor agencies to protect the 144 million workers employed at nearly 11 million workplaces.²² Labor standards enforcement agencies across the federal government received only \$2.1 billion in 2021. (See **Figure A**.)

This is an important fact to acknowledge, because having a robust system for labor standards enforcement is a key strategy to balance the interests of employers—in having the labor force they need—and those of both immigrant and U.S. workers—in having decent wages and working conditions and recourse when employers break the law. Any new immigration reforms considered

¹⁹ Doris Meissner, Donald M. Kerwin, Muzaffar Chishti, and Claire Bergeron, *Immigration Enforcement in the United States: The Rise of a Formidable Machinery*; Migration Policy Institute, January 2013; Julia Preston, “[Huge Amounts Spent on Immigration, Study Finds](#),” New York Times, January 7, 2013.

²⁰ Doris Meissner and Julia Gelatt, *Eight Key U.S. Immigration Policy Issues: State of Play and Unanswered Questions*, Migration Policy Institute, May 2019.

²¹ See U.S. Department of Justice, “[Summary of Budget Authority by Appropriation, Fiscal Year 2020–2022](#),” U.S. Department of Homeland Security, *U.S. Secret Service Budget Overview, Fiscal Year 2023, Congressional Justification*, U.S. Secret Service.

²² Author’s analysis of data on the size of the labor force and establishments from Bureau of Labor Statistics, U.S. Department of Labor, *Quarterly Census of Employment and Wages (QCEW)*, accessed October 1, 2022. Data on the number of workers represent QCEW data on the total number of employees covered by unemployment insurance programs, which is used as a proxy for the number of workers covered by labor standards enforcement agencies.

by Congress should include increased funding and strong mandates for labor standards enforcement.

FIGURE A

Government funding for immigration enforcement was nearly 12 times as much as labor standards enforcement funding in 2021

U.S. government funds appropriated for immigration and labor standards enforcement, 2021

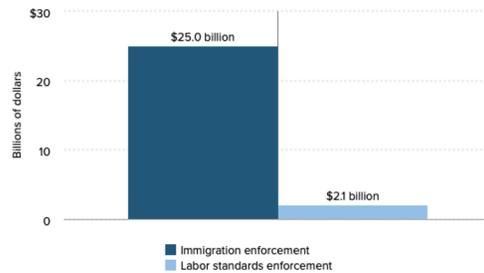


Chart Data

Notes: Values are adjusted to constant 2021 dollars and reflect totals for the U.S. government's fiscal year (October 1 to September 30).

Sources: U.S. Department of Labor, *Fiscal Year 2023—Department of Labor, Budget in Brief and Archived Budgets*, fiscal years 2012–2022; National Mediation Board, *Congressional Justifications*, fiscal years 2014–2023; National Labor Relations Board, *Performance Budget Justification*, fiscal years 2012–2023; and U.S. Department of Homeland Security, *DHS Budget, Congressional Budget Justification for Fiscal Years 2012–2023*.

Economic Policy Institute

The appropriations story is largely the same over the past decade and across three presidential administrations. As **Figure B** shows, in 2012—a decade ago—Congress appropriated \$21.4 billion for immigration enforcement but only \$2.4 billion for labor standards enforcement (in constant 2021 dollars). In fact, 2012 was the peak year for labor standards enforcement funding for the 2012–2021 period. Shockingly, the budget for labor standards actually declined by \$300 million from 2012 to 2021. Meanwhile, immigration enforcement funding peaked in 2019 at \$26.9 billion. The average annual amount appropriated for immigration enforcement funding over the past decade was \$23.4 billion, while the average for labor standards enforcement was \$2.2 billion.

FIGURE B

Over the past decade, average annual funding for immigration enforcement has been over 10 times as much as labor standards enforcement funding

U.S. government funds appropriated for immigration and labor standards enforcement, 2012–2021

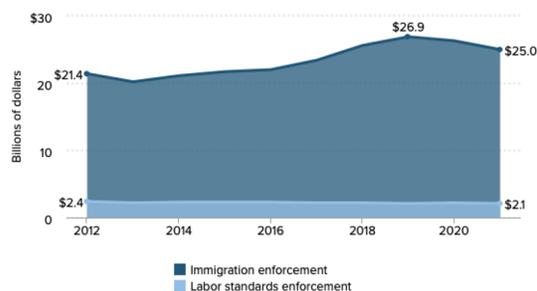


Chart Data

Notes: Values are adjusted to constant 2021 dollars and reflect totals for the U.S. government's fiscal year (October 1 to September 30). [↗](#)

Sources: U.S. Department of Labor, *Fiscal Year 2023—Department of Labor, Budget in Brief and Archived Budgets*, fiscal years 2012–2022; National Mediation Board, *Congressional Justifications*, fiscal years 2014–2023; National Labor Relations Board, *Performance Budget Justification*, fiscal years 2012–2023; and U.S. Department of Homeland Security, *DHS Budget*, Congressional Budget Justification for Fiscal Years 2012–2023.

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This estimate for labor standards enforcement appropriations uses an expansive definition that includes federal budget data for fiscal years 2012 to 2021 for the eight subagencies, administrations, and offices that DOL considers for “worker protection,” in addition to the NLRB and the National Mediation Board.

The wide staffing gap between immigration and labor standards enforcement agencies has persisted for at least a decade

Federal budget data show that labor enforcement agencies are staffed at only a fraction of the levels required to adequately fulfill their missions. In 2021, as **Figure C** shows, Congress gave the 10 labor standards enforcement agencies combined only enough funding to employ fewer than 9,400 personnel, while the immigration enforcement agencies—U.S. Customs and Border Protection (which includes the U.S. Border Patrol), U.S. Immigration and Customs Enforcement

(ICE), and the Office of Biometric Identity Management—received enough funds to employ a total of almost 79,000 personnel, more than eight times as many personnel as the labor standards enforcement agencies.

FIGURE C

In 2021, immigration enforcement agencies had eight times as many staff as labor standards agencies

Annual full-time equivalent staffing levels at immigration and labor standards enforcement agencies, 2012–2021

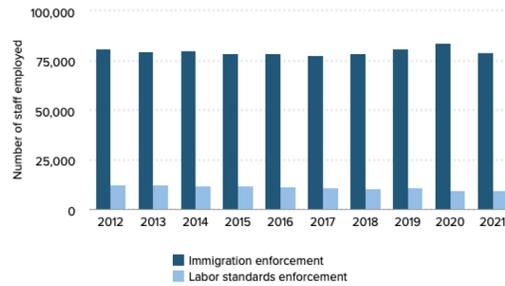


Chart Data

Notes: The number of full-time equivalent staff reflects totals for the U.S. government's fiscal year (October 1 to September 30).

Sources: U.S. Department of Labor, *Fiscal Year 2023—Department of Labor, Budget in Brief and Archived Budgets*, fiscal years 2012–2022; National Mediation Board, *Congressional Justifications*, fiscal years 2014–2023; National Labor Relations Board, *Performance Budget Justification*, fiscal years 2012–2023; and U.S. Department of Homeland Security, *DHS Budget, Congressional Budget Justification for Fiscal Years 2012–2023*.

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Figure C also shows the staffing levels for immigration and labor standards enforcement over the past decade, 2012 to 2021. Labor standards enforcement agencies' staffing levels peaked in 2012 at 12,288. Alarming, staffing at those agencies declined by nearly a quarter over the decade, hitting a low of just 9,337 in 2021.

Immigration enforcement staffing for the 2012–2021 period peaked in 2020 at 83,689. Average staff levels over the 10-year period were 79,821 for immigration enforcement and 11,117 for labor standards enforcement; in other words, immigration enforcement agency staff numbers are, on average, 618% greater than those of labor standards enforcement agencies (seven times as many personnel).

The wide funding gap between immigration and labor standards enforcement hurts all workers—including migrant workers

So why does any of this matter? Because it is increasingly more difficult to ensure that all workers—whether they were born in the United States or abroad—are treated fairly in the workplace. Budgets for labor standards enforcement agencies are shrinking, as shown above. Employer tactics such as forced arbitration prevent workers from suing in court when they are robbed by their employers.²³ And a growing body of research shows that workers attempting to change jobs face many challenges.²⁴ Making matters worse, without a strong mandate and funding from Congress to enforce labor standards, the executive branch can severely limit the work that labor agencies do on behalf of workers through executive actions, regulatory policy, and even political appointees—something the former Trump administration specialized in.²⁵

Vastly underfunded labor agencies combined with enforcement-only immigration policies hypercharged by runaway budgets risk enabling retaliation against immigrant workers who stand up for their rights on the job. When immigrant workers can't stand up for their rights, it degrades labor standards for their American counterparts working alongside them.²⁶ Perhaps that is why employers rob their immigrant employees at much higher rates than those who are U.S. citizens.²⁷

All workers face too much risk if they act to make their workplaces safer and fairer. But for nearly 8 million workers—roughly 5% of the U.S. labor force²⁸—those risks include deportation and family separation because they lack immigration status.

Temporary migrant workers represent another significant and rapidly growing segment of the workforce. These are migrant workers employed through temporary visas (known as “nonimmigrant” visas under U.S. law).²⁹ There are roughly 2 million temporary migrant workers employed in the United States, accounting for 1.2% of the total labor force.³⁰ These workers have good reason to fear retaliation and deportation if they speak up about wage theft, workplace abuse, or working conditions such as substandard health and safety procedures on the job—not because they lack valid immigration status but because their visas are almost always tied to a single employer who controls both their livelihoods and their visa status.

²³ Kate Hamaji et al., *Unchecked Corporate Power: Forced Arbitration, the Enforcement Crisis, and How Workers Are Fighting Back*, Economic Policy Institute, May 2019.

²⁴ See Economic Policy Institute, “[Unequal Power Project](#)” and “[Not So Free to Contract: The Law, Philosophy, and Economics of Unequal Workplace Power](#),” *Journal of Law and Political Economy* 3, Issue 1, 2022.

²⁵ The New York Times Editorial Board, “[Trump’s War on Worker Rights](#),” *New York Times*, June 3, 2019.

²⁶ Daniel Costa, *Employers Increase Their Profits and Put Downward Pressure On Wages and Labor Standards by Exploiting Migrant Workers*, Economic Policy Institute, August 27, 2019.

²⁷ Annette Bernhardt 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, 2009.

²⁸ Jeffrey Passel and D’Vera Cohn, “[Mexicans Decline to Less Than Half the U.S. Unauthorized Immigrant Population for the First Time](#),” Pew Research Center, June 12, 2019.

²⁹ 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.

³⁰ 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.

No worker should ever have to risk deportation in order to file a claim with a labor agency, but that's the reality for 6% of the entire U.S. workforce in a grossly imbalanced enforcement context.

[Effective labor standards enforcement in agriculture is necessary to protect farmworkers](#)

Now that I have contextualized the state of labor standards enforcement in the United States vis-à-vis immigration enforcement, I turn to a discussion of labor standards enforcement in agriculture.

Farmworkers in the United States: A background on numbers and the existing legal framework

Farmworkers support the first and most important element of the food supply chain, by growing and picking crops and tending to livestock. Yet farmworkers in the United States earn some of the lowest wages in the labor market and experience an above-average rate of workplace injuries.³¹ In addition, a large share of them are also vulnerable to exploitation and abuse in the workplace because of their immigration status.

No one knows the exact number of workers employed for wages on U.S. farms during the year, although there are multiple estimates. The Quarterly Census of Employment and Wages (QCEW) shows that average annual employment of farmworkers who are employed on farms that report to state unemployment insurance (UI) agencies was 1.2 million in 2021,³² but estimated that there were an additional 300,000 “wage and salary” farmworkers not included in QCEW data,³³ suggesting average employment of 1.5 million in 2019.

The QCEW reports average employment, which underestimates the number of unique farmworkers due to seasonality and turnover. The Census of Agriculture (COA) asks farmers (i.e. farm employers or farm owners) how many workers they employ directly; in 2017, farmers reported hiring 2.4 million farmworkers.³⁴ However, the COA does not report workers who are brought to farms by nonfarm employers such as nonfarm labor contractors, and double counts workers employed by two farms, so 2.4 million is not a count of unique farm workers. The Current Population Survey included a December supplement through the 1980s, and it reported about 2.5 million farmworkers when annual average employment ranged between about 1.1 million to 1.3

³¹ 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 I. Incidence Rates of Nonfatal Occupational Injuries and Illnesses by Industry and Case Types, 2019](#)” [online table]. Accessed October 2020.

³² Quarterly Census of Employment and Wages, QCEW Searchable Databases [[databases](#)], Bureau of Labor Statistics.

³³ Quarterly Census of Employment and Wages, “[Table A. Coverage Exclusions in 2021, for Selected Workers](#)” [online table], Bureau of Labor Statistics.

³⁴ National Agricultural Statistics Survey, [2017 Census of Agriculture](#), U.S. Department of Agriculture, issued April 2019.

million, suggesting about two unique workers per year-round equivalent job, or 2.5 million to 3.4 million workers today based on QCEW data.³⁵

The U.S. Department of Labor’s National Agricultural Workers Survey (NAWS) reports the characteristics of crop farmworkers, excluding those who are migrants employed through the H-2A temporary work visa program for agriculture, but not their number. The NAWS reports that 44% of the non-H-2A crop workers were unauthorized immigrants in 2019–2020,³⁶ and as discussed above there were roughly 300,000 H-2A workers employed in the United States in 2022, 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.³⁷ The remaining farm workforce, roughly just under 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.³⁸ WHD also enforces two laws and their implementing regulations specific to agricultural employment. One is the Migrant and Seasonal Agricultural Worker Protection Act (MSPA), the major federal law that protects U.S. farmworkers. The other is the statute that establishes the H-2A program.

However, federal law exempts farmworkers from some of the basic protections that cover most other workers in the U.S. labor market. The National Labor Relations Act—the federal law that provides the right to form and join unions, and to engage in protected, concerted activities to improve workplace conditions, does not protect farmworkers. Only California and New York have enacted state legislation to allow farmworkers to have the rights covered by the federal NLRA. Farmworkers are partially covered by the FLSA, but not the FLSA’s overtime provisions that require

³⁵ Rural Migration News, “[Hired Farm Work Force Reports, 1945–87](#),” University of California, Davis, July 10, 2020.

³⁶ National Agricultural Workers Survey, [Data Tables for 2019–2020](#), Employment and Training Administration, U.S. Department of Labor.

³⁷ 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.

³⁸ Wage and Hour Division, U.S. Department of Labor, [Laws Administered and Enforced](#) (last accessed July 17, 2020).

most workers to be paid time and a half after working eight hours in a day or 40 hours in a week. Some states, including California and New York, have enacted laws that are gradually phasing-in the overtime threshold for farmworkers until it eventually reaches 8 hours per day and/or 40 hours per week, while a small number of states have enacted or are phasing-in overtime thresholds for farmworkers that require a higher number of hours worked per week before farmworkers get overtime pay, with some of the laws nevertheless still exempting many farmworkers from overtime pay.³⁹

Data on labor standards enforcement on farms reveal the biggest violators and raise new questions about how to improve and target efforts to protect farmworkers

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,⁴⁰ and Martin and I analyzed more recent data for a forthcoming EPI report that will be published later this year. The rest of this section highlights some of the key findings from those two reports.

The number of federal and wage and hour inspections continued to decline and hit a record low in 2022 under the Biden administration

This section analyzes WHD's aggregate enforcement data. WHD conducted over 34,000 investigations in U.S. agriculture between fiscal years 2000 and 2022, an average of almost 1,500 per year (1,485). The WHD data we use represent investigations that were closed by year (meaning they have been concluded or resolved), which means that some cases may have begun in earlier fiscal years, and some that began in the current fiscal year are not included because they have not yet been closed.

Figure D shows a clear downward trend in the number of closed WHD investigations of agricultural employers over the past two decades, from more than 2,000 a year in the early 2000s to 1,000 or fewer a year during the last two fiscal years, i.e., during the Biden administration. In 2022, WHD conducted only 879 investigations of agricultural employers, an average of 73 a month, and just over a third of the 2,431 agricultural investigations conducted in 2000, the peak year for WHD agricultural investigations.

³⁹ See for example, Daniel Costa and David Kallick, "[Victory on overtime for New York farmworkers](#)," *Working Economics* blog (Economic Policy Institute), October 28, 2022.

⁴⁰ 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.

FIGURE D

The number of federal wage and hour investigations of farms hit record low in 2022

Wage and Hour Division investigations of agricultural employers, fiscal years 2000–2022

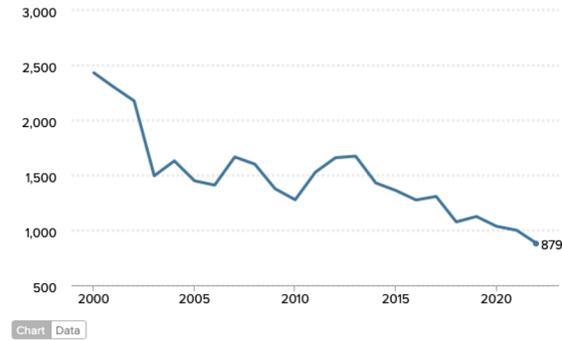


Chart Data

Source: Authors' analysis of U.S. Department of Labor, Wage and Hour Division, [Agriculture data table](#).

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Few investigations mean that most farms are never investigated by WHD

The Census of Agriculture (COA) reported over 513,000 U.S. farms with labor expenses for directly hired workers in 2017,⁴¹ and 112,134 agricultural establishments were registered with state unemployment insurance agencies in the third quarter of 2022, according to the QCEW.⁴²

At 879 WHD investigations of agricultural employers in 2022, and using the QCEW number of establishments in 2022 as a reference for the number of agricultural employers—which includes only farms registered in the unemployment insurance system—the probability that a farm will be

⁴¹ National Agricultural Statistics Service, [2017 Census of Agriculture](#), U.S. Department of Agriculture; and see discussion in Rural Migration News, "[COA Farm Labor Expenditures 2017](#)," University of California, Davis, September 9, 2019.

⁴² Bureau of Labor Statistics, Quarterly Census of Employment and Wages, QCEW Searchable Databases [[databases](#)], Series Id: ENUUS00020511, Series Title: Number of Establishments in Private NAICS 11 Agriculture, forestry, fishing and hunting for All establishment sizes in U.S. TOTAL, NSA, NAICS 11 Agriculture, forestry, fishing and hunting, Owner: Private, All establishment sizes, U.S. Department of Labor, accessed May 2023.

investigated for violating federal wage and hour laws in a given year is less than one percent: 0.7%.⁴³

Despite the low number of investigations, it is also true that when WHD investigators inspect an agricultural employer, they nearly always detect violations of wage and hour laws. As we reported in 2020 and will discuss below, WHD detects violations 70% of the time they conduct an investigation—a sign that many agricultural employers are violating the law. Among the 70% of investigations that detected violations between 2005 and 2019, almost 40% found one to four violations on the farm and 31% found five or more.⁴⁴

DOL's Wage and Hour Division is underfunded and understaffed

Why are there so few investigations of agricultural employers? A major reason is too little funding and staffing, a topic we have addressed before.⁴⁵ The Wage and Hour Division is responsible for enforcing provisions of several federal laws related to minimum wage, overtime pay, child labor, federal contract workers, work visa programs, migrant and seasonal agricultural workers, family and medical leave, and more. Yet, despite this broad portfolio and the 165 million workers who are covered by these protections,⁴⁶ funding for WHD has not kept pace with the growth of the U.S. labor force.

Figure E shows that, in inflation-adjusted 2022 dollars, WHD's budget in 2006 was \$241 million, and in 2022, \$246 million, an increase of just \$5 million over nearly two decades. Lack of funding for WHD reflects the general decline in overall labor standards enforcement spending across the federal government from \$2.4 billion in 2012 to \$2.1 billion in 2021 (in 2021 dollars).⁴⁷

⁴³ This number is derived by taking the number of WHD inspections of agricultural employers in fiscal year 2022 (879) and dividing by the QCEW number of agricultural establishments in the United States. The QCEW data include workers hired directly by farmers and those brought to farms by labor contractors and other nonfarm employers; the 513,000 number reported in the COA includes only farms that hire workers directly; almost 196,000 farms, often many of the same farms that reported direct-hire labor expenses, reported expenses for contract labor. Also, it is important to note that since the QCEW's number of agricultural establishments includes only those required to register and pay unemployment insurance taxes, it only represents only one-fifth of the farms with labor expenses in the COA, so the true probability that a farm will be investigated in any given year is likely less than 0.7%. Rural Migration News, "COA Farm Labor Expenditures 2017," University of California, Davis, September 9, 2019.

⁴⁴ 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.

⁴⁵ 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.

⁴⁶ For background on WHD's mandate and the number of workers protected by laws WHD enforces, see Wage and Hour Division, "About the Wage and Hour Division," fact sheet, U.S. Department of Labor.

⁴⁷ Daniel Costa, *Threatening migrants and shortchanging workers: Immigration is the government's top federal law enforcement priority, while labor standards enforcement agencies are starved for funding and too understaffed to adequately protect workers*, Economic Policy Institute, December 15, 2022.

FIGURE E

In 2022, funding for the Wage and Hour Division was roughly the same as in 2006

Funding for the Wage and Hour Division in the U.S. Department of Labor, fiscal years 2006–2022

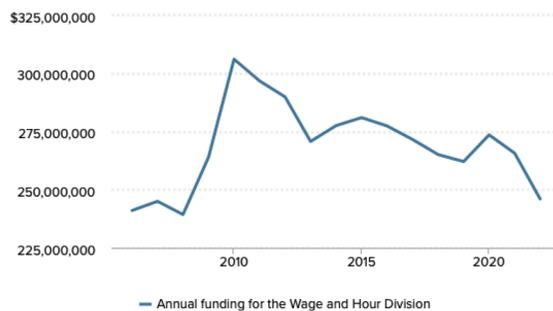


Chart Data

Note: Dollar amounts reported have been adjusted for inflation to constant 2022 dollars using the CPI-U-RS. As a result, the dollar amounts presented here may differ from the amounts reported in the source data.

Source: Department of Labor, *Budget, Performance, and Planning* reports, fiscal years 2008–2022, available at <https://www.dol.gov/general/budget>, accessed February 27, 2023.

Economic Policy Institute

Yet, in addition to the lack of funding and the more than 165 million workers WHD has a mandate to protect, the number of WHD investigators that the agency employs, who are primarily responsible for ensuring that federal wage and hour laws are actually followed on the ground across all 50 states and U.S. territories, is near an all-time low.

Figure F shows that there were only 810 WHD investigators at the end of November 2022 to enforce all federal wage and hour laws, two fewer than in 1973, the first year for which data are available, and 422 fewer than the peak year of 1978, when there were 1,232 WHD investigators. Meanwhile, the number of workers that WHD has a mandate to protect has increased sharply. The average number of WHD-covered workers in 2022 was 164.3 million, which amounts to 202,824 workers for every wage and hour investigator. Compare this to 1973, when there were

72,588 covered workers for every wage and hour investigator.⁴⁸ Investigators are now responsible for almost triple the number of workers than in 1973 (2.8 times more).

FIGURE F

Number of federal wage and hour investigators is near its historic low

Number of Wage and Hour Division investigators, U.S. Department of Labor, 1973–2022



Chart Data

Note: Numbers represent Wage and Hour Division investigators on staff at the end of each fiscal year (the federal government's fiscal year runs from October 1 to September 30), except for 2022, which represents the number of investigators on staff at the end of November 2022.

Sources: Author's analysis of Wage and Hour Division (WHD) data on number of investigators from unpublished Excel files provided by WHD staff members to the author. Source for 2020 and 2021 is Rebecca Rainey, "Wage-Hour Investigator Hiring Plans Signal DOL Enforcement Drive," *Bloomberg Law*, January 28, 2022. Source for 2022 is Rebecca Rainey, "Wage Division Enforcement Declines Again in Wake of Hiring Woes," *Bloomberg Law*, December 28, 2022.

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Another issue related to the funding and staffing challenges, has reportedly been WHD's "issues with recruiting and retaining employees." Bloomberg Law reported in December 2022 that WHD has "struggled to recruit new investigative staff" and WHD's overall back wages recovered, employees who received back wages, and total number of hours spent on investigations "all

⁴⁸ To derive this estimate, the number of covered workers in 1973 and 2022 were divided by the number of WHD investigators in those years. The number of covered workers is derived from the annual averages reported for the total civilian labor force, Bureau of Labor Statistics, Labor Force Statistics from the Current Population Survey, Series Id: LNU01000000, Not Seasonally Adjusted, Series title: (Unadj) Civilian Labor Force Level, ages 16 and over [data tables], U.S. Department of Labor.

dropped in fiscal year 2022 compared to the year prior” according to WHD data.⁴⁹ Despite WHD’s stated intention to hire 100 new investigators in the Biden administration, a heavy workload and inadequate funding from Congress appears to be hindering WHD from hiring enough staff for the tasks at hand.

Despite few investigations, the amount of back wages and civil money penalties assessed by WHD are on a generally upward trend

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 on a generally upward trend. Figure G shows the back wages owed and civil money penalties assessed in agriculture between 2000 and 2022. (Back wages are the amount that WHD assesses is due to be paid to the workers by their employers as the result of an investigation. Civil money penalties, or CMPs, are additional monetary fines levied by WHD to punish and deter employers from violating wage and hour laws.) Both back wages and CMPs have been on a generally upward trend over the 23-year period, although there was a significant dip in back wages in 2022. Back wages peaked at \$9.7 million in 2013 during the Obama administration, the same year that civil money penalty assessments peaked at \$9.2 million. (All amounts are adjusted to constant 2022 dollars.)

⁴⁹ Rebecca Rainey, "[Wage Division Enforcement Declines Again in Wake of Hiring Woes](#)," Bloomberg Law, December 28, 2022.

FIGURE G

Back wages owed and civil money penalties assessed in agriculture have been on a generally upward trend since 2000

Back wages and civil money penalties assessed (in millions of dollars) against agricultural employers by the Wage and Hour Division, fiscal years 2000–2022

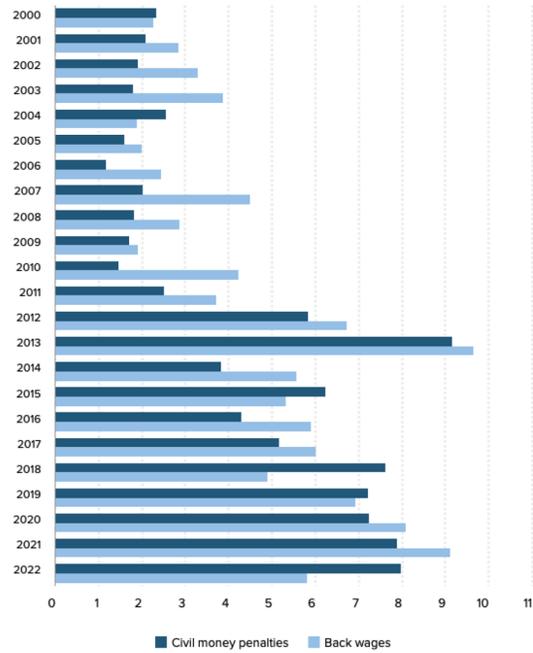


Chart Data

Note: Dollar amounts reported have been adjusted for inflation to constant 2022 dollars using the CPI-U-RS. As a result, the dollar amounts presented here may differ from the amounts reported in the source data.

Source: Authors' analysis of U.S. Department of Labor, Wage and Hour Division, [Agriculture data table](#) (last accessed February 26, 2023).

Economic Policy Institute

When WHD investigates, 70% of the time they detect employer violations

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

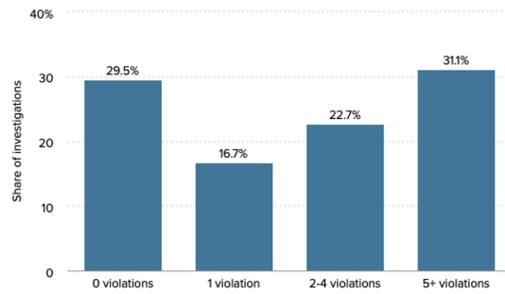


Chart Data

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).

Economic Policy Institute

Farm labor contractors are the worst violators of wage and hour laws in agriculture

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

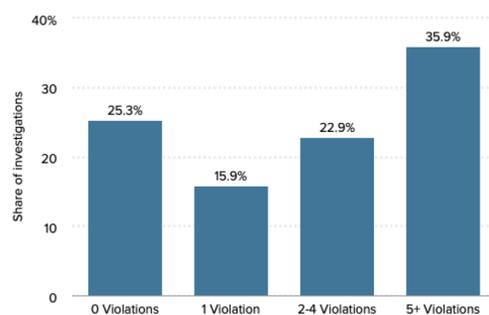


Chart Data

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

Economic Policy Institute

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 total 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 wage and hour 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.⁵⁰

⁵⁰ Rural Migration News, "[California: FLC Employment Down and Wages Up in 2020](#)," University of California, Davis, July 16, 2021.

FIGURE J

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

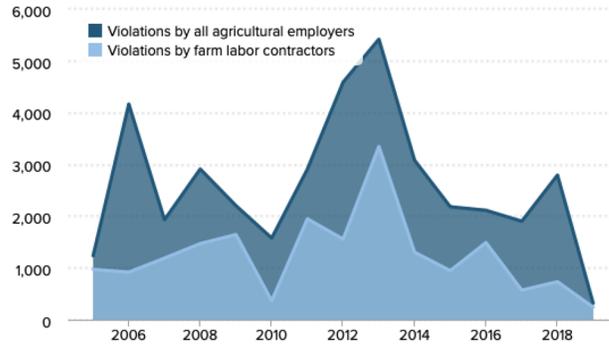


Chart Data

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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FIGURE K

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

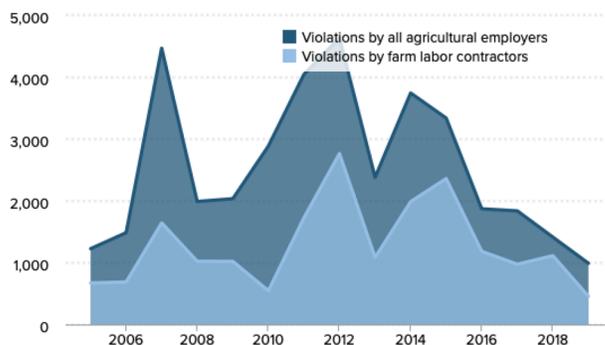


Chart Data

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).

Economic Policy Institute

Violations in the H-2A visa program account for a growing share of back wages owed and civil money penalties assessed in agriculture—rising to nearly three-fourths during the Biden administration

WHD's aggregate data on enforcement in agriculture list separately the violations detected when enforcing the three major federal employment laws and regulations covering farmworkers: (1) those that govern the H-2A visa program, (2) the Migrant and Seasonal Agricultural Worker Protection Act (commonly referred to as MSPA), the major federal law that protects U.S. farmworkers, and (3) the Federal Labor Standards Act (FLSA) along with all other wage and hour

laws that WHD enforces.⁵¹ FLSA is the law that requires minimum wages and overtime pay and regulates the employment of workers who are younger than 18.

In order to have a better sense of which laws are being violated, we summed the back wages owed and the CMPs assessed for the 23-year period for which data are available (fiscal years 2000-22), for violations of H-2A, MSPA, and FLSA et al. (FLSA plus all other violations).⁵² We divided the sum of back wages and CMPs under each law by the sum of total back wages and CMPs assessed by WHD for the entire 23-year period, which gave us the relevant shares of back wages and CMPs that correspond to each law. (Note that employers often violate several wage and hour laws at once; WHD categorizes cases by the three major laws and they may overlap, but the sum of the three major categories corresponds closely with the total back wages and CMPs assessed by WHD.)

We found that violations of H-2A rules account for much higher shares of back wages owed and CMPs assessed than violations of other laws, and now account for an overwhelming share of the back wages owed and CMPs assessed.

Table 1 shows the shares of total back wages owed and CMPs assessed (combined) by type of legal violation for the 2000-22 period. H-2A violations accounted for nearly half (46%) of all back wages owed to farmworkers and CMPs assessed over the 23-year period, and their share rose sharply during the two years of the Biden administration. As Table 3 shows, WHD investigations during the Trump administration found that H-2A violations accounted for roughly half of the back wages and CMPs owed by farm employers during 2017-20, but the H-2A share rose to 73%, almost three-fourths, during the Biden administration. As a result, WHD investigations that find H-2A violations now account for the vast majority of back wages owed and CMPs assessed.

⁵¹ In our 2020 report, we analyzed the data in those tables for the 2000-19 period in more detail. See 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.

⁵² Wage and Hour Division, “[Agriculture](#)” [data tables], U.S. Department of Labor, accessed March 2023.

TABLE 1

Violations of the H-2A visa program account for most of the back wages owed and civil money penalties assessed in agriculture

Share of total back wages owed and civil money penalties assessed by the Wage and Hour Division against agricultural employers, by type of legal violation, fiscal years 2000–2022

Fiscal Year	H-2A	MSPA	FLSA et al.
2000	8%	36%	54%
2001	24%	37%	36%
2002	12%	36%	49%
2003	19%	24%	55%
2004	11%	42%	41%
2005	27%	29%	42%
2006	11%	31%	56%
2007	11%	29%	58%
2008	31%	31%	37%
2009	27%	42%	30%
2010	17%	23%	59%
2011	33%	27%	37%
2012	52%	18%	30%
2013	70%	10%	20%
2014	41%	22%	36%
2015	59%	16%	25%
2016	44%	20%	36%
2017	49%	20%	30%
2018	47%	31%	22%
2019	42%	34%	23%
2020	52%	17%	30%
2021	73%	10%	17%
2022	73%	11%	16%
TOTALS	46%	22%	31%

Recommendations to improve farm employer compliance with wage and hour laws and better protect farmworkers

Based on my research and the evidence presented in this testimony, it is clear that the first step to improve employer compliance with wage and hour laws on farms should be to hire more investigators to detect more violations—which will require Congress to appropriate more funding to WHD. Outgoing Labor Secretary Marty Walsh recently expressed a similar sentiment to the *Washington Post*, noting that he hoped Congress would provide “more money for enforcement officers...[because] you can’t handle the number of complaints if you don’t have the number of officers.”⁵³ For fiscal year 2024, WHD has requested \$81 million in additional funds compared to their 2023 funding level, which would result in an increase of 398 full-time staff across the agency (not just WHD investigators).⁵⁴

Absent more funding from Congress, WHD will need to better target currently available resources, issue larger fines and more significant sanctions, and more frequently utilize existing legal mechanisms to encourage compliance, such as using the joint employment standard under the Fair Labor Standards Act and the Migrant and Seasonal Worker Protection Act, to hold farms accountable for FLC violations.⁵⁵ If farm operators are jointly liable for violations committed by the FLCs that bring workers to their farms, they will have incentives to police their FLCs to ensure FLCs comply with the law. The concept of joint employment is longstanding, but DOL could use it more often and strengthen H-2A regulations to make clear that farm employers will be held jointly responsible for the actions of their FLCs.

In addition, when serious violations of FLSA are found, WHD can file a lawsuit asking a federal court for an injunction that seeks to prohibit the shipment and distribution of goods produced in violation of FLSA’s minimum wage, overtime, or child labor requirements, with what’s known as the “hot goods” provision.⁵⁶ This supply-chain approach can be very effective because it sends a message to all businesses that they must not facilitate or acquiesce in wage and hour violations, and was used by former WHD administrator David Weil.⁵⁷

Third, Congress and the Administration must recognize that the farm workforce of 2.4 million is becoming more vulnerable and in need of additional protection⁵⁸—which requires both legislative

⁵³ Theodor Meyer, “[An exit interview with Labor Secretary Marty Walsh](#),” *Washington Post*, March 3, 2023.

⁵⁴ U.S. Department of Labor, [FY 2024 Department of Labor Budget in Brief](#), accessed April 2023, citing budget tables for Wage and Hour Division.

⁵⁵ See for example, Wage and Hour Division, “[Fact Sheet #35: Joint Employment and Independent Contractors Under the Migrant and Seasonal Agricultural Worker Protection Act](#),” U.S. Department of Labor, revised January 2020.

⁵⁶ See for example, Wage and Hour Division, “[Fact Sheet #80: The Prohibition against Shipment of “Hot Goods” Under the Fair Labor Standards Act](#),” U.S. Department of Labor, October 2014.

⁵⁷ David Weil, “[Testimony of Dr. David Weil, Wage and Hour Administrator, Wage and Hour Division, U.S. Department of Labor, Before the Subcommittee on Horticulture, Research, Biotechnology, and Foreign Agriculture, Committee on Agriculture](#),” U.S. House of Representatives, July 30, 2014.

⁵⁸ Philip Martin, [The Prosperity Paradox: Fewer and More Vulnerable Farm Workers](#), Oxford University Press, January 9, 2021.

and administrative action. About 70% of U.S. farmworkers were born in Mexico,⁵⁹ and they include two very vulnerable groups, the unauthorized immigrants who arrived in their 20s and 30s in the 1990s—and are now in their 50s and may lack the language and skills to find nonfarm jobs—and temporary migrant H-2A workers who are tied to their employers by contracts, which means that they lose their right to remain in the United States if they lose their jobs. Most of the 5% of farmworkers from Central America are likely to be in a similar situation and facing similar challenges.⁶⁰ Children and indigenous workers who hail from Latin America are also laboring in the fields and need protection.

A path to citizenship for unauthorized farmworkers, which would require legislation from Congress—or work authorization through deferred action or parole, which could be accomplished through the executive branch—could reduce the vulnerability of unauthorized farmworkers by allowing them to exercise their workplace rights. Options to increase the mobility of H-2A workers, such as regulations allowing them to more easily change employers, could be explored. The recent announcement by the Department of Homeland Security (DHS) that clarifies the process for how migrant workers in labor disputes can access immigration protections can bolster worker protections from retaliation.⁶¹ WHD and other agencies within the Labor Department should issue more letters and statements of interest in support of deferred action for farmworkers and coordinate with DHS to facilitate quick adjudications that reflect the unique pressures faced by unauthorized and H-2A farmworkers.

And fourth, absent additional funding and resources to conduct more investigations, WHD should strategically target for enforcement the employers most likely to violate wage and hour laws, including the farm labor contractors who account for the largest share of violations,⁶² and employers who hire farmworkers through the H-2A visa program. Among the farms found to have committed wage and hour violations, as we showed in our 2020 report, repeat violators account for a significant share of the violations found in particular commodities and regions, which suggests the need to develop enforcement strategies that identify and monitor farm employers whose business models seem to be based on violating the law.⁶³

⁵⁹ Authors' rough estimate taking the reported 63% of non-H-2A crop farmworkers who are born in Mexico as reported in the National Agricultural Workers Survey combined with 93% of the 300,000 H-2A farmworkers who are Mexican nationals as reported by the State Department. See Amanda Gold, Wenson Fung, Susan Gabbard, and Daniel Carroll, *Findings from the National Agricultural Workers Survey (NAWS) 2019–2020: A Demographic and Employment Profile of United States Farmworkers*, prepared for the Employment and Training Administration, U.S. Department of Labor, January 2022; and Bureau of Consular Affairs, *Nonimmigrant Visa Statistics* [data tables], U.S. Department of State, last accessed May 2023.

⁶⁰ Estimate of farmworkers born in Central America as reported in Amanda Gold, Wenson Fung, Susan Gabbard, and Daniel Carroll, *Findings from the National Agricultural Workers Survey (NAWS) 2019–2020: A Demographic and Employment Profile of United States Farmworkers*, prepared for the Employment and Training Administration, U.S. Department of Labor, January 2022.

⁶¹ See Department of Homeland Security, “[DHS Announces Process Enhancements for Supporting Labor Enforcement Investigations](#),” Press Release, January 13, 2023; Daniel Costa, “[The Department of Homeland Security took a positive step by clarifying and streamlining the process to protect migrant workers in labor disputes](#),” *Working Economics* blog (Economic Policy Institute), January 13, 2023.

⁶² 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.

⁶³ 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.

Creating a front-end screening process to prohibit employers from hiring through H-2A if they have a track record of violating wage and hour and labor laws, for instance, could make a significant impact and lessen the burden on WHD’s investigators.⁶⁴ And requiring program violators to submit certified payroll information periodically, and developing a mobile app for farmworkers to report their wages and hours, could give WHD early warning of potential violations as well as provide workers with a way to anonymously report violations.

Monitoring working conditions in the fields has always been challenging and is becoming more and more difficult. The Wage and Hour Division needs more investigators, more funding, and more effective strategies to protect farmworkers, which needs to be bolstered by political will in the legislative and executive branches to overcome opposition from those who believe that farm employers are somehow above needing to follow basic workplace laws. This is driven by a narrative of agricultural “exceptionalism”—which is the belief that agriculture is such a different industry with such unique operations that it lies outside of—and thus should not be regulated by—the usual labor and employment law framework. This view unfortunately has a well-established and harmful foothold in our laws and politics, resulting in legal carveouts of farmworkers from many of the bedrock labor standards protections that have covered workers outside of agriculture for decades at the federal and state level. Over the past half century, public acceptance of agricultural exceptionalism has finally begun to erode, but the job is far from complete. Additional enforcement resources are needed to ensure that farm employers play by the rules and that all farmworkers are guaranteed their basic rights for fair pay and working conditions.

[Are farmworkers overpaid? Dispelling the myths about farmworker wages and the H-2A visa program](#)

The public discourse around the wage of farmworkers has recently reached a fever pitch; with farm employers and industry associations arguing that the wages of farmworkers—but particularly temporary migrant farmworkers in the H-2A visa program—have risen too quickly and are out of control. As a response, farm employers and industry associations have called on and lobbied Congress to take action to reduce the required wage rates for H-2A farmworkers, known as the Adverse Effect Wage Rule (AEWR) and sued the U.S. Department of Labor (DOL) to invalidate the AEWR, which is designed to reflect the current wages in the farm labor market, with the intention of protecting wage standards for all U.S. and migrant farmworkers in the United States. This effort is underway despite the fact that, as noted above, most farmworkers are not covered by many basic federal labor and wage and hour law protections that other workers have, such as overtime pay.

⁶⁴ See for example, discussion of a similar proposal for a front-end screening process of employers in the H-2B visa program in Daniel Costa, [As the H-2B visa program grows, the need for reforms that protect workers is greater than ever: Employers stole \\$1.8 billion from workers in the industries that employed most H-2B workers over the past two decades](#), Economic Policy Institute, August 18, 2022

The most recent attempt to reduce the value of the AEWR has occurred in just the past month, with legislators in the House and Senate each proposing legislation to use the Congressional Review Act (CRA) to repeal the most recent update to the AEWR from DOL that went into effect on March 30, 2023—which made only a slight change to the existing methodology, impacting very few farmworkers and a miniscule share of farm employers’ labor costs. This section will briefly discuss the state of farmworker wages, take a historical look at the value of the AEWR over the past decade and in the most recent years, and discuss the recent proposal to use the CRA to repeal the latest iteration of the AEWR.

Farmworkers earn lower wages than workers in other low-wage industries

The most reliable data on farmworker earnings comes from the U.S. Department of Agriculture’s (USDA) National Agricultural Statistics Service (NASS), which conducts the Farm Labor Survey (FLS), the results of which are published twice a year in USDA’s Farm Labor report series, with data reported for reference weeks in January, April, July, and October.⁶⁵ As noted above, the minimum wage that employers are required to pay to H-2A farmworkers is in most cases the Adverse Effect Wage Rate (AEWR),⁶⁶ which varies by region and is set by DOL, based on the average hourly earnings of nonsupervisory field and livestock workers, as reported by farm operators in the FLS. DOL uses the FLS data to set H-2A wages so they reflect current real-world trends in the farm labor market.

Despite some documented real increases in wages the past few years,⁶⁷ the latest data show the wages of farmworkers are extremely low by any measure, even when compared with similarly situated nonfarm workers and workers with the lowest levels of education (see **Figure L**).

⁶⁵ See National Agricultural Statistics Service, “[Surveys](#),” for more background and to access Farm Labor Reports, U.S. Department of Agriculture.

⁶⁶ See Employment and Training Administration, “[Adverse Effect Wage Rates](#),” U.S. Department of Labor, accessed May 27, 2023.

⁶⁷ National Agricultural Statistics Service, [Farm Labor](#) [survey and report], United States Department of Agriculture, see various years.

FIGURE L

The farmworker wage gap in 2022: Farmworkers earn very low wages compared with other workers

Average hourly wage rate for nonsupervisory farmworkers nationwide compared with average hourly wages of other workers, 2022

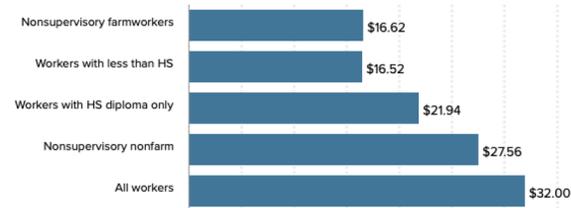


Chart Data

Notes: All values are for 2022 and in 2022 dollars. HS = high school. Nonsupervisory nonfarm workers' wage represents the average hourly earnings of production and nonsupervisory employees, total for the private sector, not seasonally adjusted. Nonsupervisory farmworkers' wage is the gross average hourly wage of field and livestock workers. Data for all workers, and for workers with a high school diploma and less than high school, can be found at the Economic Policy Institute State of Working America Data Library.

Source: Author's analysis of USDA [Farm Labor Survey](#) data and nonfarm wage data from the BLS Current Employment Statistics survey; [EPI analysis](#) of CPI-ORG microdata.

Economic Policy Institute

In 2022, the average wage of all nonsupervisory farmworkers (i.e. combined field and livestock workers, to use USDA's terminology and category) was \$16.62 per hour, according to USDA, which was a 7% increase in *nominal* terms from what farmworkers earned per hour in 2021, which was \$15.56 per hour. However, after adjusting for inflation, the real value of the 2021 average hourly wage of farmworkers was \$16.67 per hour—meaning that the real value of the average farmworker wage *declined* by 5 cents from 2021 to 2022, i.e. from \$16.67 in 2021 to \$16.62 in 2022.⁶⁸

The 2022 average farmworker wage of \$16.62 per hour is also just half (52%) of the average hourly wage for all workers in 2022, which stands at \$32.00 per hour. The average hourly wage for production and nonsupervisory *nonfarm* workers—the most appropriate cohort of nonagricultural workers to compare with farmworkers—was \$27.56.

⁶⁸ Author's analysis using U.S. Bureau of Labor Statistics "[CPI Inflation Calculator](#)," adjusting the value of the 2021 average wage from November 2021 to the value in November 2022. November was used because the average annual farmworker wages are published in November of each year.

In other words, farmworkers earned just under 60% of what production and nonsupervisory workers outside of agriculture earned. USDA has referred to this wage gap between farmworker and nonfarm worker wages as “slowly shrinking, but still substantial.”⁶⁹ In 2022, the farmworker wage gap remained substantial and virtually unchanged from the previous two years.⁷⁰

Farmworkers have very low levels of educational attainment. According to the NAWS, 26% completed the 10th, 11th, or 12th grade, and 14% completed some education beyond high school.⁷¹ Farmworkers earn the same or less than the two groups of workers with the lowest levels of education in the United States: Nonsupervisory farmworkers at \$16.62 per hour earned 10 cents an hour more than the average wage earned by workers without a high school diploma (\$16.53), nearly an identical wage, and farmworkers earned \$5.32 less per hour than the average wage earned by workers with only a high school diploma (\$21.94).

When it comes to the AEW, the required AEW wage varies by state. In 2022, it ranged from \$11.99 per hour to \$17.51. That means that for many H-2A workers, the wage they earned was even lower than the national average wage for all nonsupervisory farmworkers in 2022—meaning the gap between what many H-2A farmworkers and nonagricultural workers earn is even wider.

The AEW was higher than the national average farmworker wage of \$16.62 in three states—California, Washington, and Oregon. But in the other 46 states for which DOL published an AEW, it was lower than the national average. In Florida and Georgia—the top two states for H-2A employment, and where more than a quarter of all H-2A jobs were located in 2022, workers were paid much less than the national average wage. The AEW in Florida was \$12.41 per hour, \$4.21 less than the national average farmworker wage. And Georgia had the lowest overall state AEW, at \$11.99 per hour, which was \$4.63 less than the national average wage.

To reiterate, a quarter of all H-2A farmworkers in 2022 were paid over \$4 less per hour than the national average wage for farmworkers, with those in Georgia being paid the lowest permissible wage under the AEW. And H-2A farmworkers in most other states were also paid less than the national average wage for farmworkers. These were not exorbitant salaries that can be cut without harming farmworkers and their livelihoods, contrary to what agribusiness wants the public and lawmakers to believe.

Farmworker wages are so low, in fact, that even a nominal increase in the price that consumers pay for fruits and vegetables—\$25 per family per year—would raise farmworker wages by 40% and lift many out of poverty, as Philip Martin and I showed.⁷²

⁶⁹ Economic Research Service, “Wages of Hired Farmworkers,” in [Farm Labor](#), U.S. Department of Agriculture, last updated March 22, 2033.

⁷⁰ Economic Research Service, “Wages of Hired Farmworkers,” in [Farm Labor](#), U.S. Department of Agriculture, last updated March 22, 2033.

⁷¹ JBS International, [Findings from the National Agricultural Workers Survey \(NAWS\) 2019-2020: A Demographic and Employment Profile of United States Farmworkers. Research Report No. 16. January 2022](#), Employment and Training Administration, U.S. Department of Labor.

⁷² Daniel Costa and Philip Martin, “[How much would it cost consumers to give farmworkers a significant raise? A 40% increase in pay would cost just \\$25 per household.](#)” *Working Economics* blog (Economic Policy Institute), October 15, 2020.

The real, inflation-adjusted value of the Adverse Effect Wage Rate has changed little over the past decade

As noted in the introduction to this section, the value and the rate of increase of the AEWR has become a hot-button issue and many claims about its impact are being made by representatives of industry. For example, the American Farm Bureau has called the new AEWR “a blow to growers” and AmericanHort says they are “steep.”⁷³ This brief section examines the value of the AEWR over the past decade. My testimony in this section does not suggest that I know the what the appropriate AEWR for each state should be, or suggest that changes in the AEWR have no impact on farmers, or make any other bold claims about the AEWR. This section is simply an evidence-based look at the value of the AEWR over time, as a response to claims that the AEWR has risen sharply and quickly.

Many of the claims about year-to-year AEWR increases often do not adjust for inflation, which overstates the actual increase in terms of its dollar value. This is a basic mistake that misleads. Take for example, comments from Craig Regelbrugge from AmericanHort, who noted that “growers in Delaware, Maryland, New Jersey, and Pennsylvania will take the biggest hit, with a 9.6% increase” in the AEWR from 2021 to 2022, with California’s increasing “more than 8%.”⁷⁴ Regelbrugge calculates these increases in nominal terms—but what do the increases look like after one adjusts for inflation?

While the percentage increase from 2021 to 2022 was in fact the largest in the states of Delaware, Maryland, New Jersey, and Pennsylvania, after adjusting for inflation, the increase was just 2.3% in those states. A year-over-year real hourly average wage increase of 2.3% is not even large enough to be consistent with the wage gains that could be reasonably expected for an occupation where employers have argued that severe labor shortages exist. If there are in fact labor shortages, it is reasonable to expect wages to rise; that’s simply Economics 101. A raise of 2.3% is hardly one that is unreasonable given the circumstances, especially considering how low H-2A wages are relative to other occupations. And in California, what did the “more than 8%” AEWR increase that Regelbrugge cites for California amount to after adjusting for inflation? H-2A farmworkers in California only saw a real increase of less than one percent (0.9%) in 2022.⁷⁵

Now let’s turn to the AEWRs in all states over the past decade. **Table 2** (which is admittedly large and difficult to see, but will be posted shortly on EPI.org), shows the Adverse Effect Wage Rates for H-2A farmworkers in all reported states between 2013 and 2022, in values that have been adjusted to constant 2022 dollars, and shows the calculated total real change in terms of dollar

⁷³ Veronica Nigh, “[AEWR Methodology Change a Blow to Growers](#),” Market Intel, American Farm Bureau, March 30, 2023; American Hort, “[Why You Can Expect Steep H-2A Wage Increases in 2022](#),” Greenhouse Grower, December 11, 2021.

⁷⁴ Comments of Craig Regelbrugge in American Hort, “[Why You Can Expect Steep H-2A Wage Increases in 2022](#),” Greenhouse Grower, December 11, 2021.

⁷⁵ Author’s analysis of Adverse Effect Wage Rates for 2021 and 2022 for the listed states; AEWRs are from the Employment and Training Administration, U.S. Department of Labor. All values have been adjusted to constant 2022 dollars using the Consumer Price Index (CPI-U). Tables on file with the author, to be published in a forthcoming report.

value, as well as the real total percentage change, and the annualized real percentage per year, from 2013 to 2022. The AEWRs listed are ranked by number of H-2A workers, using approved petitions from USCIS as a proxy for the number of workers.

Let's examine the top five states for H-2A employment, which together account for more than half of all H-2A employment nationwide (52%). The table shows that in Florida, the biggest state for H-2A farmworkers—where 15% of H-2A farmworkers are employed—the value of the AEWR *decreased* by 17 cents between 2013 and 2022 (in constant 2022 dollars); that's a total decrease in value of 1.3% over the decade. In Georgia, the second-biggest state for H-2A employment—where 11% of H-2A farmworkers are employed, the value of the AEWR *decreased* by 35 cents over the decade, a total decrease of 2.8%, averaging a decrease of 0.3% per year.

The largest increase in the value of the AEWR (in constant 2022 dollars) was in California, which accounts for nearly 10% of H-2A employment. In California, the total real value of the AEWR increased by \$3.96 over the decade; a total percentage increase of 29.2%, which amounts to annualized percentage increase of 2.6% per year. Again, hardly an unreasonable average yearly increase for an occupation where employers claim there are severe labor shortages.

The AEWR increases over the decade in the next two biggest states for H-2A employment—Washington and North Carolina, respectively—were about half the value of the increase in California. The value of the AEWR in Washington increased by \$2.27 over the decade, a total increase of 15%, growing annually at an average of 1.4% per year. The value of the AEWR in North Carolina increased by \$1.95 over the decade, a total increase of 15.9%, growing annually at an average of 1.5% per year.

For the increases that occurred in the Pacific states, it is likely that those larger increases were driven by increases in the states' minimum wage laws, which then fed into the FLS. The minimum wage in California and Washington is more than double the minimum wage of \$7.25 in Georgia and more than \$4 more than the state minimum wage in Florida.

In total, as the table shows, there were 20 states where the annual average real increase in the AEWR was less than 1%, with four of those states seeing a decline in the value of the AEWR. There were 25 states where the annual average increase in the AEWR was between 1% and 2%, and the AEWR only grew by more than 2% per year in three states (Colorado and Nevada at 2.1% in addition to California). The average yearly percentage increase for each state over the decade was just over 1%, at 1.05%, and if weighted by the number of H-2A workers in the state, just under 1%, at 0.91%

Adverse Effect Wage Rates for H-2A farmworkers, total change and percentage change from 2013 to 2022, adjusted to constant 2022 dollars, and ranked by number of workers

State	Number of workers	Share of total H-2A workers	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022	Total real change	Real % change total	Real % change annualized
Florida	50,644	15.0%	12.58	12.73	12.62	13.09	13.32	13.20	12.91	13.27	13.06	12.41	-0.17	-1.3%	-0.1%
Georgia	37,720	11.1%	12.34	12.41	12.39	12.95	12.72	12.80	12.78	13.27	12.77	11.99	-0.35	-2.8%	-0.3%
California	33,575	9.9%	13.55	13.66	14.04	14.54	15.05	15.41	15.98	16.74	17.35	17.51	3.96	29.2%	2.6%
Washington	29,783	8.8%	15.14	14.73	15.39	15.52	16.02	16.51	17.26	17.94	17.66	17.41	2.27	15.0%	1.4%
North Carolina	25,191	7.4%	12.21	12.25	12.79	13.11	13.50	13.40	14.07	14.36	14.21	14.16	1.95	15.9%	1.5%
Louisiana	12,841	3.8%	11.99	12.25	12.61	13.07	12.43	12.54	13.01	13.41	12.84	12.45	0.46	3.9%	0.4%
Michigan	12,282	3.7%	14.26	14.26	14.32	14.70	15.27	15.27	15.55	16.32	15.91	15.37	1.11	7.8%	0.8%
Arizona	12,141	3.6%	12.28	12.37	13.06	13.70	13.11	12.23	13.78	14.63	14.78	14.79	2.51	20.5%	1.9%
New York	9,368	2.8%	13.77	13.92	13.95	14.36	14.83	15.00	15.21	16.19	16.20	15.66	1.89	13.8%	1.3%
Texas	8,802	2.6%	12.84	13.48	12.82	13.64	13.88	13.88	14.04	14.36	14.08	13.88	1.04	8.1%	0.8%
Kentucky	7,417	2.2%	12.36	12.53	12.74	13.27	13.08	13.08	13.35	14.05	14.01	13.89	1.53	12.3%	1.2%
South Carolina	7,292	2.2%	12.34	12.41	12.39	12.95	12.72	12.80	12.78	13.27	12.77	11.99	-0.35	-2.8%	-0.3%
Mississippi	6,932	2.0%	11.99	12.25	12.61	13.07	12.43	12.54	13.01	13.41	12.84	12.45	0.46	3.9%	0.4%
Idaho	5,696	1.7%	12.60	13.27	13.80	14.37	13.96	13.60	15.48	15.43	15.73	14.68	2.08	16.5%	1.5%
Tennessee	5,602	1.7%	12.36	12.53	12.74	13.27	13.08	13.08	13.35	14.05	14.01	13.89	1.53	12.3%	1.2%
Virginia	5,577	1.6%	12.21	12.25	12.79	13.11	13.50	13.40	14.07	14.36	14.21	14.16	1.95	15.9%	1.5%
Arkansas	5,364	1.6%	11.99	12.25	12.61	13.07	12.43	12.54	13.01	13.41	12.84	12.45	0.46	3.9%	0.4%
Iowa	4,553	1.3%	14.40	15.17	15.63	14.88	15.71	15.69	15.32	16.52	16.61	16.19	1.79	12.5%	1.2%
Indiana	4,249	1.3%	14.81	14.43	14.38	14.76	15.58	15.12	15.23	16.45	16.55	15.89	1.08	7.3%	0.7%
Ohio	3,767	1.1%	14.81	14.43	14.38	14.76	15.58	15.12	15.23	16.45	16.55	15.89	1.08	7.3%	0.7%
Oregon	3,679	1.1%	15.14	14.73	15.39	15.52	16.02	16.51	17.26	17.94	17.66	17.41	2.27	15.0%	1.4%
Colorado	3,528	1.0%	12.72	13.51	14.09	13.78	13.17	12.50	15.08	16.16	16.02	15.58	2.86	22.5%	2.1%
Illinois	3,418	1.0%	14.81	14.43	14.38	14.76	15.58	15.12	15.23	16.45	16.55	15.89	1.08	7.3%	0.7%
Minnesota	3,226	1.0%	14.26	14.26	14.32	14.70	15.27	15.27	15.55	16.32	15.91	15.37	1.11	7.8%	0.8%
Nevada	3,013	0.9%	12.72	13.51	14.09	13.78	13.17	12.50	15.08	16.16	16.02	15.58	2.86	22.5%	2.1%
Nebraska	2,778	0.8%	15.56	16.64	16.84	16.88	16.52	15.95	16.51	16.99	17.18	16.47	0.91	5.9%	0.6%
North Dakota	2,605	0.8%	15.56	16.64	16.84	16.88	16.52	15.95	16.51	16.99	17.18	16.47	0.91	5.9%	0.6%
Pennsylvania	2,560	0.8%	13.71	13.73	13.99	14.26	14.60	14.09	15.10	15.12	15.19	15.54	1.83	13.3%	1.3%
New Jersey	2,512	0.7%	13.71	13.73	13.99	14.26	14.60	14.09	15.10	15.12	15.19	15.54	1.83	13.3%	1.3%
South Dakota	2,145	0.6%	15.56	16.64	16.84	16.88	16.52	15.95	16.51	16.99	17.18	16.47	0.91	5.9%	0.6%
Wisconsin	2,132	0.6%	14.26	14.26	14.32	14.70	15.27	15.27	15.55	16.32	15.91	15.37	1.11	7.8%	0.8%
Alabama	1,940	0.6%	12.34	12.41	12.39	12.95	12.72	12.80	12.78	13.27	12.77	11.99	-0.35	-2.8%	-0.3%
Missouri	1,900	0.6%	14.40	15.17	15.63	14.88	15.71	15.69	15.32	16.52	16.61	16.19	1.79	12.5%	1.2%
Kansas	1,786	0.5%	15.56	16.64	16.84	16.88	16.52	15.95	16.51	16.99	17.18	16.47	0.91	5.9%	0.6%
New Mexico	1,634	0.5%	12.28	12.37	13.06	13.70	13.11	12.23	13.78	14.63	14.78	14.79	2.51	20.5%	1.9%
Utah	1,614	0.5%	12.72	13.51	14.09	13.78	13.17	12.50	15.08	16.16	16.02	15.58	2.86	22.5%	2.1%
Connecticut	1,287	0.4%	13.77	13.92	13.95	14.36	14.83	15.00	15.21	16.19	16.20	15.66	1.89	13.8%	1.3%
Oklahoma	1,276	0.4%	12.84	13.48	12.82	13.64	13.88	13.88	14.04	14.36	14.08	13.88	1.04	8.1%	0.8%
Maryland	1,262	0.4%	13.71	13.73	13.99	14.26	14.60	14.09	15.10	15.12	15.19	15.54	1.83	13.3%	1.3%
Montana	1,244	0.4%	12.60	13.27	13.80	14.37	13.96	13.60	15.48	15.43	15.73	14.68	2.08	16.5%	1.5%
Maine	1,152	0.3%	13.77	13.92	13.95	14.36	14.83	15.00	15.21	16.19	16.20	15.66	1.89	13.8%	1.3%
Delaware	721	0.2%	13.71	13.73	13.99	14.26	14.60	14.09	15.10	15.12	15.19	15.54	1.83	13.3%	1.3%
Wyoming	562	0.2%	12.60	13.27	13.80	14.37	13.96	13.60	15.48	15.43	15.73	14.68	2.08	16.5%	1.5%
Massachusetts	497	0.1%	13.77	13.92	13.95	14.36	14.83	15.00	15.21	16.19	16.20	15.66	1.89	13.8%	1.3%
Vermont	496	0.1%	13.77	13.92	13.95	14.36	14.83	15.00	15.21	16.19	16.20	15.66	1.89	13.8%	1.3%
New Hampshire	268	0.1%	13.77	13.92	13.95	14.36	14.83	15.00	15.21	16.19	16.20	15.66	1.89	13.8%	1.3%
West Virginia	268	0.1%	12.36	12.53	12.74	13.27	13.08	13.08	13.35	14.05	14.01	13.89	1.53	12.3%	1.2%
Hawaii	212	0.1%	16.05	16.02	16.08	15.46	15.74	16.80	16.91	16.88	16.82	16.54	0.49	3.1%	0.3%
Rhode Island	4	0.0%	13.77	13.92	13.95	14.36	14.83	15.00	15.21	16.19	16.20	15.66	1.89	13.8%	1.3%
Average													1.51	11.23%	1.05%
Weighted average													1.33	9.85%	0.97%

USDA data shows labor costs as a share of farm income have not risen over the past two decades

In addition to the discussion above about the real value of the AEWR, it is important to add some additional context about the AEWR and the broader agricultural industry.

In the preamble to the proposed version of the current AEWR rule,⁷⁶ DOL cited a key data point from the USDA's Economic Research Service (ERS) that contextualizes farmworkers wages within the broader trends in the agricultural industry:

The ERS data also indicates that labor costs as a share of total gross farm income has not risen significantly over the past two decades, with the ERS concluding that “[a]lthough farm wages are rising in nominal and real terms, the impact of these rising costs on farmers’ incomes has been offset by rising productivity and/or output prices,” and adding that “labor costs as a share of gross cash income do not show an upward trend for the industry as a whole over the past 20 years.”⁷⁷ [emphasis added]

As the ERS data DOL has cited show, farms have become more productive and increased income at the same time that labor costs have risen, and thus labor costs for farmers have not risen as a share of farm income for the past 20 years. Data on farmworker wages and the share of labor costs disprove that the claim which is often made and repeated by farm employers and agribusiness lobbyists and representatives—i.e., that wages are rising too quickly for farmworkers and that the AEWR for H-2A workers is too high and rising too quickly, and thus not consistent with labor market trends. In fact, such claims are not credible and not based on any data or evidence, as the previous section also explained.

Farmers also simultaneously claim that a labor shortage exists and that it is difficult to find agricultural workers, while expecting wages to remain the same and not rise in response to said shortage. As DOL rightly points out in the proposed rule, it is a rule of economics that wages rise in response to a labor shortage, and wages should “increase by an amount sufficient to attract more workers until supply and demand [are] met in equilibrium.”⁷⁸ It is irrational to claim that there is a labor shortage in the farm labor market, but not expect wages to rise—and therefore unreasonable to ask DOL to use the AEWR to protect farmers from the natural operation of the free market. The AEWR is not a magical instrument created out of thin air; it is simply a tool that reflects ongoing farm labor market trends in the United States and requires that H-2A wages mirror those trends. (Although it can be argued that AEWR wages are always lagging one year behind the current wage rates in the farm labor market, because USDA's surveyed wage rates in a given year are used to set the AEWR for the following year, without any estimated adjustment for future inflation.) The AEWR is a rational tool based on the available evidence in the real world that

⁷⁶ 86 Fed. Reg. 68185.

⁷⁷ 86 Fed. Reg. 68185, citing Economic Research Service, [Farm Labor](#), U.S. Department of Agriculture, last modified Aug. 18, 2021, at footnote 70.

⁷⁸ 86 Fed. Reg. 68185, citing 80 Fed. Reg. 24146, 24158-24159 at footnote 73.

is in place because DOL has a statutory mandate to prevent adverse effects to U.S. workers in its administration of the H-2A program.⁷⁹

Congress should reject misleading comparisons about the AEW and not craft policies based on them

Next, it is important to address how some employer groups are making unreasonable comparisons to support their argument that the AEW wage is too high and rising too quickly. For example, the National Council of Agricultural Employers (NCAE), in their comment on the proposed rule for the AEW, noted that H-2A wages are similar to the starting salaries for teachers in Nebraska who hold a college degree:

A starting teacher in rural Hemingford, Nebraska, with a BS in education can expect an annual salary of \$39,919. An H-2A worker or a domestic worker in corresponding employment with a 6th grade education working at the farm adjacent to the school, would receive an hourly AEW rate of \$16.47 or \$34,258 on an annualized basis. The AEW is making the case that maybe a high school or college education is not all that valuable, after all.⁸⁰

The NCAE's comparison is inappropriate on multiple fronts. First, it takes the Nebraska hourly AEW wage rate at the time and annualizes it for a farmworker working 8 hours per day and 40 hours per week for an entire year (52 weeks) at the AEW for Nebraska, \$16.47 per hour—and suggests that if H-2A workers are paid so handsomely at that hourly rate, it diminishes the value of a college degree. It would take an H-2A farmworker working an entire year at the AEW hourly wage to earn the cited wage of \$34,258. But teachers work for 180 days, far fewer than someone who works five or six days a week for 52 weeks (260 or 312 days, respectively), and would thus earn their salary of nearly \$40,000 with many fewer workdays than farmworkers.

Presumably, NCAE member must also be aware that most farmworkers do not work 40 hours per week for an entire 52 weeks. We know this is true because, for example, there is a discrepancy between data in the USDA's Census of Agriculture, which shows there are 2.4 million hired agricultural workers on farms, and the Quarterly Census of Employment and Wages (QCEW), which shows there are 1.5 million year-round full-time-equivalent (FTE) jobs in agriculture (as discussed earlier). Other research also shows that in California, the ratio of farmworkers to FTE jobs is two-to-one.⁸¹ Research I coauthored explains the large gap between FTE earnings and the actual earnings of farmworkers in more detail, showing that in 2015, workers in California who received their primary earnings from agricultural employers earned an average of \$17,500 in total—less than 60 percent of the average annual wage of a full-time equivalent (FTE) worker—and explains how employers and news reports often repeat this false narrative of farmworkers who earn well over \$30,000 per year, by annualizing the reported hourly average wage

⁷⁹ 8 U.S.C §1188.

⁸⁰ Comment submitted to the proposed rule by Robert Roy, President and General Counsel for the National Council of Agricultural Employers, January 25, 2022.

⁸¹ Philip Martin, Brandon Hooker, Muhammad Akhtar, Marc Stockton, [How many workers are employed in California agriculture?](#) California Agriculture, Volume 71, number 1, pages 30-34, August 23, 2016.

rates.⁸² When thinking about and analyzing the wages of farmworkers, it's of the utmost importance to consider what they're actually paid—not what they would earn if they worked full-time and year-round, since very few of them do.

In addition, the vast majority of H-2A workers, like U.S. farmworkers, also do not work 40 hours per week for 52 weeks. In fact, DOL disclosure data show that the average duration of H-2A job certifications is 6 months.⁸³ That means that the average H-2A farmworker in Nebraska is only likely to earn \$17,129 during their time in the United States.

Finally, the teacher example is misleading because it purports to use teaching jobs as an example of a good-paying jobs that offers a decent middle-class life. Unfortunately, there is reliable evidence showing that teachers in the United States are woefully underpaid, and numerous examples in news reports of teachers who, for example, work three jobs and donate plasma to make ends meet.⁸⁴ The underpayment of teachers around the country has led to many walkouts and strikes by teachers demanding better pay and working conditions in recent years. EPI data show that in Nebraska, teachers there see a weekly pay penalty of 17.7%.⁸⁵

Thus, using a profession like teaching where workers have been undervalued and underpaid for years, and comparing them to farmworker wages to argue farmworkers are overpaid, is dishonest, at best. What the NCAE's example does instead is support the arguments of those advocating for better pay for teachers: If anything, their pay has eroded so far that it is now being compared to the pay of farmworkers, who earn some of the lowest wages in the entire U.S. workforce according to just about any metric.

Congress should reject the proposal to use the Congressional Review Act to repeal the latest Adverse Effect Wage Rule

In late February of 2023, DOL issued a final rule updating the AEWR, which took effect on March 30, 2023.⁸⁶ The following month, resolutions of disapproval of the AEWR rule were introduced in the House and Senate,⁸⁷ pursuant to the Congressional Review Act, or CRA. (The CRA provides a legislative tool that Congress can use to reverse a recent rule issued by a federal agency. If both

⁸² Philip Martin and Daniel Costa, "[Farmworker wages in California: Large gap between full-time equivalent and actual earnings.](#)" *Working Economics* blog (Economic Policy Institute), March 21, 2017.

⁸³ See for example Philip Martin, "[The H-2A farm guestworker program is expanding rapidly: Here are the numbers you need to know.](#)" *Working Economics* blog (Economic Policy Institute), April 13, 2017.

⁸⁴ Katie Reilly, "'I work 3 jobs and donate blood plasma to pay the bills.' This is what it's like to be a teacher in America." *Time*, September 13, 2018.

⁸⁵ Sylvia A. Allegretto and Lawrence Mishel, "[Teacher pay penalty dips but persists in 2019: Public school teachers earn about 20% less in weekly wages than nonteacher college graduates.](#)" Economic Policy Institute, September 17, 2020.

⁸⁶ Employment and Training Association, [Adverse Effect Wage Rate Methodology for the Temporary Employment of H-2A Nonimmigrants in Non-Range Occupations in the United States](#), U.S. Department of Labor, Final Rule, 88 Fed. Reg. 12670 (February 28, 2023).

⁸⁷ See the Senate and House versions respectively on Congress.gov at [S.J.Res. 25](#) and [H.J.Res.59](#).

houses of Congress pass a resolution of disapproval and the president signs it, or Congress overrides a presidential veto, then the rule in question will be rescinded or not go into effect.)⁸⁸

The updated 2023 AEWR made only a slight change to the previously existing AEWR methodology and is arguably a slight improvement that will benefit a small number of farmworkers. The methodology change requires that a different data source—DOL’s Occupational and Employment Wage Statistics (OEWS) survey—be utilized for some H-2A jobs that do not fall under the occupations surveyed by the USDA’s Farm Labor Survey (FLS). Such jobs include farmworkers who are supervisors, and those working on construction, logging, and truck driving.⁸⁹

The number of workers in occupations such as these who are now eligible for the wage set by the OEWS is very small relative to the size of the entire H-2A program. In the preamble to the final rule, DOL says that “Based on the Department’s program estimates, 98 percent of H-2A job opportunities are classified within [the] six SOC titles and codes” which are covered by the FLS.⁹⁰ In other words, for 98% of H-2A workers, the AEWR methodology remains exactly the same as it was under the previous AEWR rule. And as a result, only 2% of H-2A farmworkers will fall under the new wage rates set by the OEWS; 2% of the roughly 300,000 workers in 2022 would amount to 6,000 H-2A workers.

In the preamble to the AEWR final rule, DOL also estimates the value of the additional wages that will go to farmworkers under the updated methodology.

The analysis in the preamble to the 2023 AEWR rule estimates that there will be a transfer of \$38 million from employers to workers, per year, as the ten-year average—meaning that \$38 million is the amount that H-2A farmworkers would be set to lose on average per year if the final rule is rescinded (see the table at Exhibit 8 in the final rule). To be clear, the Members of Congress who vote in favor of repealing the 2023 AEWR final rule will be voting to give migrant H-2A farmworkers a pay cut of \$38 million per year.

How much is \$38 million in the context of the profits earned by farmers? In 2023, net farm income is forecast to be \$136.9 billion.⁹¹ The \$38 million pay cut the CRA would lead to would constitute 0.03% of total net farm income. Labor expenses for farms in 2023 are forecasted to cost farmers \$42.1 billion.⁹² Thus, the CRA’s \$38 million pay cut would represent 0.09% of total farm labor expenses forecasted for 2023—less than one-tenth of one percent.⁹³

⁸⁸ For more background, see Congressional Research Service, “[The Congressional Review Act \(CRA\): A Brief Overview](#),” In Focus, updated February 27, 2023.

⁸⁹ Some of these jobs arguably should not be certified by the Office of Foreign Labor Certification because they fall outside the scope of the H-2A program.

⁹⁰ Employment and Training Association, [Adverse Effect Wage Rate Methodology for the Temporary Employment of H-2A Nonimmigrants in Non-Range Occupations in the United States](#), U.S. Department of Labor, Final Rule, 88 Fed. Reg. 12670 (February 28, 2023).

⁹¹ Economic Research Service, “[Farm Sector Income & Finances: Highlights from the Farm Income Forecast](#),” February 7, 2023.

⁹² Economic Research Service, “[Production expenses by category, 2014-2023F](#)” [data tables], accessed May 27, 2023.

⁹³ The actual amount of the H-2A farmworker pay cut in 2023 estimated by DOL will be \$14.57 million because the AEWR methodology will only be in place for half of the year, and 2024 will be \$30.98 million, but the ten-year average of \$38 million has been used in this example for consistency.

In sum, DOL's 2023 AEWR final rule is a slight change from the previous methodology, applying to a miniscule share of H-2A workers, and representing less than one-tenth of one percent of all money spent on labor by farm employers. Senators and members of the House of Representatives should consider these factors before voting to give farmworkers—already some of the lowest-paid workers in the entire U.S. labor force—another pay cut that will only benefit farmers—the same farmers who last year received *\$15.6 billion* in aid from Congress in the form of direct government payments.⁹⁴ I therefore urge all Senators and members of the House of Representatives to vote no on the CRA resolutions to rescind the AEWR if they come up for a vote.

[Recommendations to protect immigrant workers in the food supply chain and stabilize the workforce for employers](#)

Based on the research and testimony presented herein, I offer the following recommendations for actions that both Congress and the Biden administration should take if they wish to protect immigrant workers and help provide a more stable workforce for U.S. employers across the food supply chain:

1. Congress should invest much more in labor standards enforcement, so that labor, wage and hour, and workplace health and safety laws can be adequately enforced.
2. Congress should regularize the immigration status of immigrant workers, allowing them to have basic workplace rights and to integrate fully in economic and political life.
3. Congress should pass the DREAM and PROMISE Act to provide permanent residence to eligible TPS grantees and DACA recipients.
4. Congress should expand green card pathways and reform temporary work visa programs, so they provide a quick and direct path to permanent residence and citizenship, such as proposed in the Seasonal Worker Solidarity Act.
5. Congress should pass legislation that regulates foreign labor recruiters, to ensure transparency in the recruitment process for migrant workers and require that employers be held accountable for the actions of recruiters abroad.
6. Congress and the administration should expand permanent humanitarian pathways to respond to the urgent humanitarian need in the Western Hemisphere and across the globe, and explore ways to expand the definition of asylum to include additional categories, including those fleeing the impacts of climate change.

⁹⁴ Economic Research Service, "[Farm Sector Income & Finances: Highlights from the Farm Income Forecast](#)," February 7, 2023.

7. Congress should invest in asylum processing to allow all persons fleeing persecution to have a fair hearing and to benefit from any protections they qualify for.
8. Congress should pass the POWER Act to protect worker witnesses and victims from the threat of employer retaliation that can lead to deportation.
9. Congress should pass the PRO Act so that all workers, including immigrant workers, can freely exercise their freedom of association.
10. Congress should create an independent commission on employment-based migration to advise Congress on how to make the system more flexible and data-driven and depoliticize the adjustment of numerical limits.
11. The Biden administration should expand their use of Temporary Protected Status, designating and re-designating countries where appropriate to respond to the current urgent needs.
12. The Biden administration should halt its efforts to channel and misdirect asylum-seekers into indentured worker programs like the H-2A and H-2B visa programs.

[U.S. temporary work visa programs](#)

As noted above, a growing share of migrant workers in the food supply chain are employed through temporary work visas programs. Because of the role that temporary work visa programs now play in the food supply chain, the following sections will now shift to providing background on those programs, their flaws, and how to reform them to better protect migrant workers, and includes sections focused specifically on the H-2A and H-2B visa programs.

An introduction to 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, 2020,⁹⁵ 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 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. In recent months, it appears that some of the processing challenges have been resolved, but many still remain.

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

⁹⁵ Donald J. Trump, "[Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease \(COVID-19\) Outbreak](#)," (presidential proclamation), March 13, 2020.

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 were at one point 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.⁹⁶ 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.⁹⁷ 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.

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

⁹⁶ For the most part, these terms are interchangeable, and no one term is definitive or has been agreed to.

⁹⁷ 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.

that would otherwise be inevitable—for example, as the result of geopolitical changes; and (6) to allow for cross-border commuting.⁹⁸

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)”⁹⁹; 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.¹⁰⁰ 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.

As discussed earlier, 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.¹⁰¹ 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 million temporary migrant workers were employed in 2019, accounting for 1.2% of the U.S. labor force (see discussion in the following section).¹⁰²

⁹⁸ 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.

⁹⁹ Jill H. Wilson, *Immigration: Nonimmigrant (Temporary) Admissions to the United States*, Congressional Research Service, updated Sept. 10, 2019.

¹⁰⁰ For example, cap-exempt H-1Bs are available if an employer is a university, a university-affiliated nonprofit entity, or a nonprofit research organization.

¹⁰¹ Abby Budiman, “[Key Findings About U.S. Immigrants](#),” Fact Tank (Pew Research Center), Aug. 20, 2020.

¹⁰² 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.

The numbers in context: Temporary work visa programs grew under Trump, while permanent pathways shrunk

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 restricted¹⁰³—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), with the fallout still being felt today in mid-2023, despite significant improvements. 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.¹⁰⁴

Table 3 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.¹⁰⁵ 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 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.

¹⁰³ 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.

¹⁰⁴ 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.

¹⁰⁵ 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.

TABLE 3

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

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 [...](#)

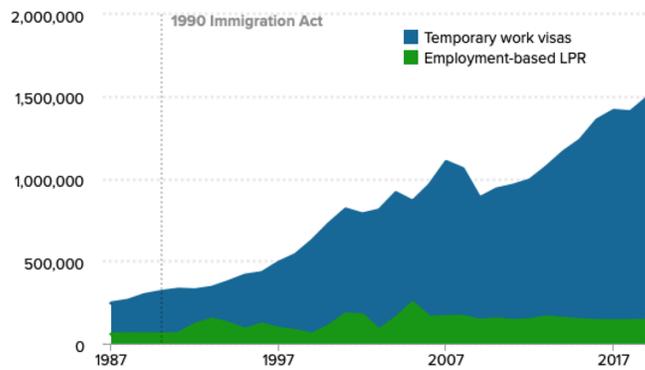
Economic Policy Institute

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 M** 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 2019.¹⁰⁶ 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 M

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



¹⁰⁶ 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.¹⁰⁷

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 led to many of the green cards available in permanent categories from not being issued,¹⁰⁸ although issuances appear to be finally normalizing—except in the case of green cards for refugees. The Biden administration raised the refugee cap significantly to 125,000 for fiscal years 2022 and 2023 as compared to under the Trump administration, but statistics show that federal agencies did not come close to processing that many green cards for refugees in 2022 and will not come close again in 2023.¹⁰⁹

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

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

¹⁰⁷ For a more in-depth discussion of these data, see Daniel Costa, "[Temporary Migrant Workers or Immigrants? The Question for U.S. Labor Migration](https://doi.org/10.7758/RSE.2020.6.3.02)," Russell Sage Foundation Journal of the Social Sciences 6, no. 3 (2020), <https://doi.org/10.7758/RSE.2020.6.3.02>.

¹⁰⁸ 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.

¹⁰⁹ See for example, Migration Policy Institute, "[U.S. Refugee Admissions & Refugee Resettlement Ceilings, FY 1980-2023 YTD*](#)" [data tool; accessed May 27, 2023].

though such fees are usually illegal.¹¹⁰ Those fees leave them indebted to recruiters or third-party lenders, which can result in a form of debt bondage.¹¹¹ (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.¹¹²) After arriving in the United States, temporary migrant workers may find out the jobs they were promised don't exist.¹¹³ 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.¹¹⁴

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.¹¹⁵

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 temporary migrant workers who are recruited abroad. Because workers are being selected by recruiters in countries

¹¹⁰ 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.

¹¹¹ 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 Giannmarino, [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 Commissioner 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.

¹¹² Michael Grabell, "[Who Would Pay \\$26,000 to Work in a Chicken Plant?](#)" *ProPublica*, Dec. 28, 2017.

¹¹³ Steven Greenhouse, "[Low Pay and Broken Promises Greet Guest Workers](#)," *New York Times*, Feb. 28, 2007.

¹¹⁴ 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.

¹¹⁵ 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: Kahu Lured Nurses to U.S. with Promises of High Pay. Prosecutors Say](#)," *Denver Post*, June 4, 2013.

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.¹¹⁶

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,¹¹⁷ and websites exist that allow employers to browse the profiles of workers on employment agency websites that advertise workers like commodities.¹¹⁸

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 deportable. This arrangement results in a form of indentured servitude.¹¹⁹ Further, as noted in the previous section, employers can punish temporary migrant workers for speaking out by not rehiring them the following year or

¹¹⁶ 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.

¹¹⁷ 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.

¹¹⁸ See, for example, jobofer.org.

¹¹⁹ See, for example, Christopher Lapinig, “How U.S. Immigration Law Enables Modern Slavery,” *The Atlantic*, June 7, 2017.

by telling recruiters in countries of origin that they shouldn't be hired for other job opportunities in the United States (effectively blacklisting them).¹²⁰

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.¹²¹

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.¹²²

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 for Global Development and the Cato Institute¹²³—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

¹²⁰ See, for example, Mary Bauer and Meredith Stewart, *Close to Slavery: Guestworker Programs in the United States*, Southern Poverty Law Center, Feb. 19, 2013.

¹²¹ 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.

¹²² Nikhil Swaminathan, “Inside the Growing Guest Worker Program Trapping Indian Students in Virtual Servitude,” Mother Jones, September/October 2017 issue.

¹²³ 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.

into question.¹²⁴ 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.¹²⁵ 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.¹²⁶ 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.¹²⁷

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.¹²⁸

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 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.¹²⁹ In the end, the company was required to pay back wages of \$40,000 plus a

¹²⁴ 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.

¹²⁵ 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.

¹²⁶ 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.

¹²⁷ 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.

¹²⁸ 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.

¹²⁹ Author’s analysis of historical data from Foreign Labor Certification Data Center, Online Wage Library, “72013 – 6/2014 FLC Wage Data,” <https://lccdatacenter.com/Download.aspx>, for Standard Occupational Classification codes 15-1142 and 49-2011, for region 36084, Oakland-Fremont-Hayward, CA Metropolitan Division (2013–2014).

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.¹³⁰

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.¹³¹ 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 workers¹³²—and growing research has shown that even modest amounts of employer monopsony power are utterly corrosive to workers’ ability to bargain for better wages.¹³³

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 with impunity.¹³⁴ 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.¹³⁵

¹³⁰ 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.

¹³¹ Lauren A. Apgar, *Authorized Status, Limited Returns: The Labor Market Outcomes of Temporary Mexican Workers*, Economic Policy Institute, May 21, 2015.

¹³² 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.

¹³³ Eric M. Gibbons et al., “Monopsony Power and Guest Worker Programs,” IZA Institute of Labor Economics, Discussion Paper no. 12096, January 2019.

¹³⁴ 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.

¹³⁵ Inna 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 as discussed earlier, the federal government appropriated twelve times more to enforce immigration laws as it did to enforce labor standards.¹³⁶

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.¹³⁷

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.

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.¹³⁸ 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

¹³⁶ Daniel Costa, *Threatening migrants and shortchanging workers: Immigration is the government’s top federal law enforcement priority, while labor standards enforcement agencies are starved for funding and too understaffed to adequately protect workers*, Economic Policy Institute, December 15, 2022.

¹³⁷ See, for example, Sankar Mukhopadhyay and David Osbrow, “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.

¹³⁸ William Kandel, *The Employment-Based Immigration Backlog*, Congressional Research Service, R46291, March 26, 2020.

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: Wage and hour enforcement statistics show that workers are vulnerable in the workplace

While the preceding sections discussed issues that cut across all U.S. temporary work visa programs, because of their role in the food supply chain and their prominent role in the public debate around immigration and labor, the following section focuses on the need to better protect H-2A and H-2B workers.

H-2A and H-2B are two of many U.S. temporary work visa programs.¹³⁹ 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.”¹⁴⁰ 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.¹⁴¹ 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 annually, and which took effect in fiscal year 1992.¹⁴² This annual numerical limit of 66,000 visas is often referred to as the H-2B annual “cap,” but has been raised in all but one fiscal year since 2016 through congressional appropriations riders.

The size of the H-2A program has expanded rapidly over the past decade, as well as the size of the H-2B visa program, despite its annual cap of 66,000 per fiscal year.

As **Figure N** 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 quadrupled since 2012. In 2012, DOL certified 85,248 jobs for H-2A, and in 2022,

¹³⁹ 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.

¹⁴⁰ *Immigration and Nationality Act of 1952*, Section 101(a)(15)(h)(ii).

¹⁴¹ *Immigration Reform and Control Act*, Section 301(a).

¹⁴² *Immigration Act of 1990*, Section 205(g)(1)(B).

there were 371,619 certified jobs. In 2012, the State Department issued 65,345 H-2A visas, and in 2022, issued 298,336.

FIGURE N

H-2A jobs certified and visas issued, 2005–2022, and petitions approved, 2015–2022

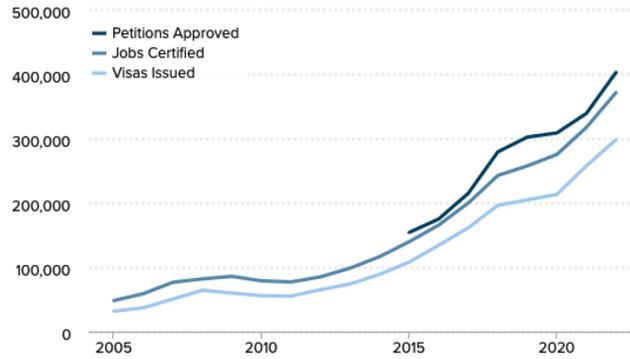


Chart Data

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](#).

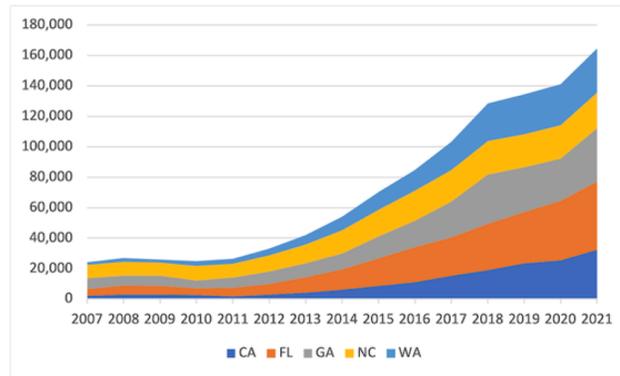
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Because three separate agencies are involved in managing the H-2A visa program, it is difficult to know the exact number of H-2A workers employed in the United States: DOL reviews and adjudicates applications for job certifications, USCIS in the Department of Homeland Security reviews and adjudicates petitions, and State issues 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 N).

Figure O 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.¹⁴³ 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 O

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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In terms of the H-2B program, it has also recently grown to record levels. 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

¹⁴³ Rural Migration News, "The H-2A Program in 2022." University of California, Davis, May 16, 2022.

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 2007.¹⁴⁴ 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. As **Figure P** shows, the number of H-2B workers in 2022 was nearly 156,000, much more than double the annual cap of 66,000.

¹⁴⁴ Andorra Bruno, [The H-2B Visa and the Statutory Cap](#), Congressional Research Service, R44306, updated February 28, 2020.

FIGURE P

The H-2B visa program is more than double the size of the original annual cap and set to grow larger in 2023

H-2B workers employed in the United States according to approved USCIS petitions and visas issued by the State Department, FY 2015–22

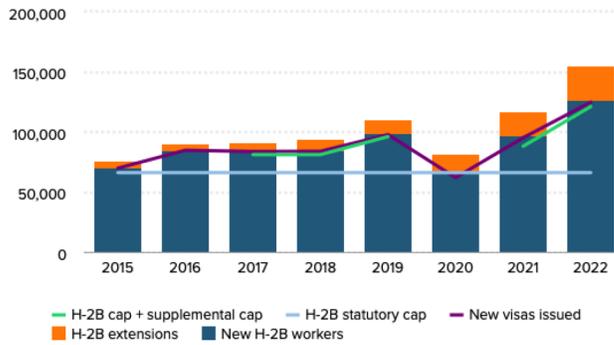


Chart Data

Notes: “New H-2B workers” represents the number of new H-2B workers estimated by United States Citizenship and Immigration Services (USCIS). “H-2B extensions” represents USCIS petitions for H-2B workers approved for continuing employment (i.e., visa extensions or extensions of status), as reported in the USCIS H-2B Employer Data Hub. Data on continuing employment may overcount the number of individual H-2B workers because those data also include H-2B workers who changed employers or amended their terms of employment with the same employer. “New visas issued” is the number of H-2B visas issued by the State Department.

Source: EPI analysis of data from United States Citizenship and Immigration Services, U.S. Department of Homeland Security, [H-2B Employer Data Hub](#), fiscal year 2015–2022 data files; *Characteristics of H-2B Nonagricultural Temporary Workers* reports for fiscal years 2015–2021, available at the USCIS [Reports and Studies](#) page; 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 2015–2022).

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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.

The need for additional and improved enforcement in agriculture, where H-2A workers are employed, was already discussed above, thus I will now turn to relevant data on the H-2B program. This following section discusses some of the available data on wage and hour enforcement in the major H-2B industries.¹⁴⁵

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

As just noted, the data 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.¹⁴⁶

Table 4 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 2021.¹⁴⁷

¹⁴⁵ For a more complete discussion of the data cited here, see Daniel Costa, *As the H-2B visa program grows, the need for reforms that protect workers is greater than ever: Employers stole \$1.8 billion from workers in the industries that employed most H-2B workers over the past two decades*, Economic Policy Institute, August 18, 2022.

¹⁴⁶ 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.

¹⁴⁷ To the extent that the N/A occupations fall within the seven industries, the actual share could be as high as 99.1%.

TABLE 4

Nearly all H-2B workers are employed in a small number of occupations

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

The published WHD enforcement data include tables for individual fiscal years in four different categories.¹⁴⁸ 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,” 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’ agreed to pay):** the number of employees who were found to be owed back wages as a result of the identified violations and to whom employers have agreed to pay the back wages owed
- **BW ATP (back wages agreed to pay):** the total amount of back wages that were assessed by WHD to be owed to workers and which employers have agreed to pay back 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, lawful permanent residents (i.e., 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 5** 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 5 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.

¹⁴⁸ Wage and Hour Division, “[Industries with High Prevalence of H-2B Workers: FY2000–FY2021](#)” [data tables], U.S. Department of Labor.

Employers have stolen \$1.8 billion in wages over the last two decades from workers in industries that employ H-2B workers

Back wages and civil money penalties assessed for wage and hour violations in industries with a high prevalence of H-2B workers, by industry, fiscal years 2000–2021

Industry	Cases	Cases with violations	Employees involved in violation	Employees owed back wages	Back wages assessed (2021\$)	Average back wages owed per employee (2021\$)	Civil money penalties assessed (2021\$)
All seven industries	225,227	180,451	1,835,805	1,666,195	\$1,792,259,236	\$1,076	\$14,791,387
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

Notes: Tables include all violations of laws enforced in the selected industries by the Wage and Hour Division of the U.S. Department of Labor. The violations and back wages owed do not represent enforcement actions by the Wage and Hour Division 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, lawful permanent residents (i.e., green card holders), H-2B workers, or workers of any other immigration status, including unauthorized immigrant workers. 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 2000–2021].

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Table 5 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 an average of 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.¹⁴⁹

It's also important to remember that \$1.8 billion represents only the extent of wage theft detected in the cases WHD investigated. We have no way of knowing the actual amount of wages stolen in these industries. We do know that workers—both U.S. and migrant workers—often hesitate to report wage and hour and labor violations for fear of retaliation.¹⁵⁰ We also know that WHD has limited investigative capacity.¹⁵¹ For these reasons, we suspect the actual extent of wage theft is higher—perhaps significantly higher—than \$1.8 billion.

In addition to the column headers available in the WHD tables, Table 5 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, \$64.6 million (representing more than half of the total penalties), was assessed in food services. Construction accounted for nearly 18% of the CMPs assessed, at \$20.5 million.

[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.

¹⁴⁹ 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.

¹⁵⁰ See, for example, Laura Huizar, "[Exposing Wage Theft Without Fear: States Must Protect Workers from Retaliation.](#)" National Employment Law Project, June 2019; and Susan Ferriss and Joe Yerardi, "[As Guest Workers Increase, So Do concerns About Wage Cheating.](#)" The Center for Public Integrity, March 2, 2022.

¹⁵¹ See, for example, Ilna 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.

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.”¹⁵² 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.”¹⁵³

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.”¹⁵⁴

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,”¹⁵⁵ 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.”¹⁵⁶ 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.”¹⁵⁷

Another recent example is what has been referred to as Operation Blooming Onion in Georgia, which 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.”¹⁵⁸ In that case, H-2A workers who were allegedly trafficked “primarily

¹⁵² Polaris, *Labor Trafficking on Specific Temporary Work Visas: A Data Analysis 2018-2020*, July 2022.

¹⁵³ Polaris, *Labor Trafficking on Specific Temporary Work Visas: A Data Analysis 2018-2020*, July 2022.

¹⁵⁴ Colleen Owens, Meredith Dank, et al., *Understanding the Organization, Operation, and Victimization Process of Labor Trafficking in the United States*, Urban Institute, October 2014.

¹⁵⁵ U.S. Government Accountability Office, “[What GAO Does](#).”

¹⁵⁶ 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.

¹⁵⁷ 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.

¹⁵⁸ Drew Favakch, “[Operation Blooming Onion: Federal indictment reveals 'modern-day-slavery' in Georgia](#),” Savannah Morning News, December 1, 2021.

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 the workers to other conspirators As a result of workplace conditions, at least two workers died, according to the indictment.¹⁵⁹

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,¹⁶⁰ 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 final 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) has proposed legislation to reform and improve the H-2B visa program. 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

¹⁵⁹ Drew Favakeh, “[Operation Blooming Onion: Federal indictment reveals 'modern-day-slavery' in Georgia](#),” Savannah Morning News, December 1, 2021.

¹⁶⁰ 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 I-1 Cultural Exchange Workers](#), Southern Poverty Law Center, 2013; Jamie Chung, [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.

quick path to permanent residence that they control on their own.¹⁶¹ 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 fairer to all workers and provides a direct pathway to permanent residence and citizenship, allowing migrant workers to fully integrate into American life.

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, authority which the Biden administration used this year to increase the H-2B cap to 130,716. 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.¹⁶² (In total it has been eight 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.)¹⁶³

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.¹⁶⁴ 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

¹⁶¹ Office of Rep. Joaquin Castro, “[Congressman Castro introduces H-2B visa reform bill to strengthen protections for seasonal workers](#),” Press Release, April 22, 2022.

¹⁶² Andorra Bruno, [The H-2B Visa and the Statutory Cap](#), Congressional Research Service, R44306, updated February 28, 2020. 163. For a more detailed explanation, see Andorra Bruno, [The H-2B Visa and the Statutory Cap](#), Congressional Research Service, R44306, updated February 28, 2020.

¹⁶⁴ 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.

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 were 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,¹⁶⁵ and there have been bipartisan statements from leaders in Congress—including in this Committee—arguing that the budget riders usurp the authority of the relevant committees of jurisdiction in Congress.¹⁶⁶ Nevertheless, enough 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 reject proposals to make 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. Because it would immediately provide basic labor and employment 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.

¹⁶⁵ New York Times Editorial Board, “[Why Guest Workers Are Easily Exploited](#),” *New York Times*, July 1, 2016.

¹⁶⁶ 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.

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 be of a temporary or seasonal nature—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 at the time, mostly in greenhouse and nursery production (155,000) and animal production and aquaculture (264,000).¹⁶⁷ 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.¹⁶⁸

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

¹⁶⁷ 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).

¹⁶⁸ See for example, Congresswoman Lucille Roybal-Allard, "[Appropriations Committee Approves Fiscal Year 2020 Homeland Security Funding Bill.](#)" Press Release, June 11, 2019.

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.

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.¹⁶⁹ 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.

¹⁶⁹ 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.

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 program.¹⁷⁰ 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 now co-sponsored by Democratic Sens. Richard Blumenthal of Connecticut, Sherrrod Brown of Ohio, and Bernie Sanders of Vermont, and a bipartisan version was introduced last Congress in the House of Representatives, co-sponsored by Democratic Reps. Bill Pascrell of New Jersey and Ro Khanna of California.¹⁷¹

Another piece of legislation, proposed by Sens. Durbin (D-Ill.), Blumenthal (D-Conn.), Klobuchar (D-Minn.), Padilla (D-Calif.), Hirono (D-Hawaii), and Brown (D-Ohio), 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.¹⁷²

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.¹⁷³

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,¹⁷⁴ but preferably no longer than 18 months. The aforementioned

¹⁷⁰ [H-1B and L-1 Visa Reform Act of 2022](#), S. 3720, 117th Cong. (2021-22).

¹⁷¹ [H-1B and L-1 Visa Reform Act of 2022](#), S. 3720, 117th Cong. (2021-22). See also Rep. Bill Pascrell, "[Pascrell, Grassley, Durbin, Gosar, Khanna, Pallone, Gooden Lead Overhaul to H-1B, L-1 Visa Programs: Bipartisan, Bicameral Reforms Will Protect American Workers and Improve Fairness for Skilled Labor Applicants](#)" (press release), May 22, 2020.

¹⁷² Sen. Richard Durbin, "[Durbin, Colleagues Introduce Legislation To Retain International Graduates With Advanced STEM Degrees](#)" (press release), February 11, 2022.

¹⁷³ Office of Rep. Joaquin Castro, "[Congressman Castro introduces H-2B visa reform bill to strengthen protections for seasonal workers](#)" Press Release, April 22, 2022.

¹⁷⁴ 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.

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.

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 system¹⁷⁵ 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.¹⁷⁶

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 March 2023 by Reps. Judy Chu (D-Calif.) and Rep. Bobby Scott (D-Va.) and is supported by various unions and migrant worker advocacy organizations.¹⁷⁷ 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),¹⁷⁸ 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.

¹⁷⁵ Daniel Costa, [Threatening migrants and shortchanging workers: Immigration is the government's top federal law enforcement priority, while labor standards enforcement agencies are starved for funding and too understaffed to adequately protect workers](#), Economic Policy Institute, December 15, 2022; 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.

¹⁷⁶ 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.

¹⁷⁷ Rep Bobby Scott, ["Reps. Chu, Scott Re-Introduce POWER Act to Create Safe, Just Workplaces for Every Worker in America."](#) Press Release, March 28, 2023.

¹⁷⁸ 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,¹⁷⁹ 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.¹⁸⁰ Bipartisan legislation has been introduced to achieve this, most recently the Visa Transparency Anti-Trafficking Act,¹⁸¹ 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,

¹⁷⁹ 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.

¹⁸⁰ 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.

¹⁸¹ [S. 3406 - Visa Transparency Anti-Trafficking Act of 2021](#), 117th Congress (2021-2022); [H.R. 7056 - Visa Transparency Anti-Trafficking Act of 2021](#); 117th Congress (2021-2022). For press releases on previous versions of VTAT, see 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).

assessment methodologies, and processes to efficiently adjust migrant worker flows to match employers' needs while protecting U.S. labor standards.¹⁸²

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.¹⁸³

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 legislation¹⁸⁴ and should be considered again, either as a standalone proposal or as an integral component of a comprehensive immigration reform package.

¹⁸² See, for example, Ray Marshall and Ross Eisenbrey, "[Commission Needed to Solve Immigration](#)," *The Hill*, June 10, 2010.

¹⁸³ 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, August 1, 2018.

¹⁸⁴ 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).

TESTIMONY

Adam Lytch
L&M Farms

May 31, 2023

U.S. Senate Judiciary Committee

*Full Committee Hearing
From Farm to Table: Immigrant Workers Get the Job Done*

My name is Adam Lytch, and I'm the North Florida regional manager for L&M Farms in East Palatka, Florida. Our operations span several states, including Florida and Georgia, and we produce a variety of specialty crops, including potatoes, cabbage, broccoli, greens, onions, melons, tomatoes and more.

Like many farm kids, I grew up wanting to do the same thing my dad did. I grew up in the fields alongside him and other workers doing everything from chopping cotton to cropping sand lugs – it was all hard work. I remember over 30 years ago when it started to become harder for my family to find workers. Our existing workforce had begun to age out and others no longer pursued this type of work.

During this time a man from Mexico, Ruben, stopped by asking for a job. He shared with me the love he had for the place he called home and the importance of making sacrifices for your family. He simply wanted to work here in the U.S. so that his family in Mexico could have a better life. As the years went by, Ruben started to recruit more workers from Mexico. Our family operation had no other way to meet our seasonal work needs. That is how from an early age – I began to understand that American agriculture was dependent on immigrant workers to get the jobs done.

Fast forward over 30 years and not much has changed. There have been no fixes to the problem that I witnessed firsthand all those years ago and America's food system still requires seasonal workers.

As American farmers, we face a variety of challenges, most of these are things we cannot control like weather, market conditions, rapid inflation, and supply disruptions like we saw during the COVID-19 pandemic.

However, the single biggest issue we face is the unprecedented shortage of domestic labor and the restricted access to a guest workforce. The good news is this is something we can correct, but we must have the help of Congress.

Growers in the Southeast, particularly Florida and Georgia, have had to turn to the H-2A program in increasing numbers as a result of the domestic workforce crisis. Florida and Georgia are consistently two of the largest users of the H-2A program making up nearly one quarter of all positions annually. But the program is greatly flawed and made more challenging by the federal agency entrusted to administer it, with a volatile wage structure and program restrictions, such as seasonal need, which do not fit as well in this era of modern agriculture. Allow me to expand on these issue areas.

Volatile wage structure

Under the H-2A program, a self-inflating Adverse Effect Wage Rate (or AEWR) is set each year for workers, the methodology for which lacks visibility, accuracy, and stability for growers. It's important to note that the AEWR is a wage floor. Many of our H-2A workers are offered the ability to earn a higher wage, including piece rate pay.

The AEWR was originally created to protect American workers who performed the same duties as those working on H-2A contracts so they would not be adversely affected, but that is no longer the case since there are no American workers to fill our jobs. In fact, American families are the ones adversely affected, as agriculture's workforce crisis will drive food prices even higher. If nothing changes, there will most certainly be sharp decreases in production affecting not only farmers and farmworkers, but the rural communities in which we operate who depend on agriculture.

For 2023, the AEWR in Florida increased 15.5%, and we received notice of this increase just 38 days before it went into effect on January 1st. We had workers on the way from Mexico when we found out we had nearly a \$2 per hour increase coming.

At the same time, our crops were mostly all planted, giving us no time to react. When you include the costs of housing and transportation that H-2A employers are required to provide, this year's minimum wage could account to more than \$23 per hour per worker.

Our crops are grown for retail purposes, to be sold in the grocery store. Most are touched by human hands at every step of the production, harvest and packing process. Labor alone makes up between 40% and 50% of the total cost to grow and harvest many of our crops. As a result of the AEWR change for this year, my company will see a \$1.4 million dollar payroll expense increase over the prior year. Imagine trying to set a budget for your company with no certainty as to what wages might be from one year to the next.

This wage instability coupled with the low margin business of farming is simply not sustainable. In Georgia and Florida alone, the totals are staggering, with many of my fellow farmers reporting similar payroll expense increases ranging from half a million to millions of dollars.

Program restrictions

While my operation is lucky to have access to the H-2A program, there are many in the agriculture industry who do not. The program's use is limited to work performed that is "seasonal in nature." However, the Department of Labor routinely limits seasonal need to 10 months, despite their own definition of "less than one year." This subsequently eliminates the last two months, which are crucial to many Florida growers. Some of my fellow farmers are denied access to the program for a need of even 10 months and one week.

This is increasingly restrictive to Florida growers and others with longer seasons (greater than 10 months but not year-round). Additionally, the "seasonal in nature" language more broadly prohibits use of the program by year-round farmers, including several nursery and horticultural employers, dairy, and other agricultural employers.

Further, other agricultural employers, such as farm labor contractors and cooperatives, have limited use of the program due to the use of outdated statutory definitions. For example, a farm labor contractor cannot employ H-2A workers to haul produce off the farm to the packing house down the road or pack produce at a packing house in town, though I could as the farmer. Farm labor contractors serve an integral role in agricultural production and harvesting, and frequently are the service that allows smaller farms to use the H-2A program and remain in business.

Department of Labor abuses in rulemaking and bias

In late March, the Department of Labor (DOL) made effective the final rule regarding the methodology used to determine the hourly AEWRs for the H-2A program. Under this new rule, my operations and other growers will now see different wage rates for different jobs on the farm rather than the singular AEWR that we are accustomed to in the industry.

The new AEWR methodology is based on Occupational Employment and Wage Statistics (OEWS) survey data, and I understand that farmers and ranchers are not even surveyed for this data. It's unclear how this then can even be applied to farm jobs when non-farm jobs are surveyed. The labor department summarily rejected several practical suggestions that would have made the rule more workable by the industry. Their hardlined approach means more H-2A applications and increased administrative costs for growers like me, just to hire for the same jobs we've always offered.

This and other recent actions by the Department of Labor are concerning. For instance, in April, a senior DOL official made public comments deriding the H-2A visa program and growers use of it. The claims were not based in fact, and it was concerning as a grower to hear such bias on record by a DOL official. What's worse, these comments and the bias behind them seem to be commonplace in the agency, rather than just a one-off opinion.

Farmers want to work as partners to a federal agency like the USDA, who sees farmers as key stakeholders, as opposed to being viewed as abusers of the system by the Department of Labor.

Impossible to compete with imports

Additionally, these rising labor costs tied to the H-2A program, exacerbated by the new labor department wage rule mentioned above, make it nearly impossible to compete with imports produced in countries that pay a fraction of what we do for their workforce. For example, H-2A workers in Florida make more in an hour than they would in an entire day in Mexico.

You have no doubt read of the extraordinary challenges that domestic growers are experiencing amidst surging imports from Mexico, and labor costs are a contributing factor to the declining competitiveness of the U.S. seasonal produce industry.

Potential solutions to agriculture's workforce crisis

I would urge Congress and this Committee to be supportive of a bill that makes meaningful improvements to the H-2A program and affords increased access and wage stability for farmers, and provides legal status to the hundreds of thousands of skilled farmworkers who are working without authorization. Recent attempts like the Farm Workforce Modernization Act were helpful bipartisan efforts to achieve these goals, but more could have been done to ensure a stable workforce that farmers like me need.

The agricultural workforce provisions included in the bipartisan Dignity Act, which was recently re-introduced in the House of Representatives, come much closer to providing a complete solution.

The passage of a Congressional Review Act (CRA) resolution to nullify the DOL's new AEWB methodology rule would be a short-term solution. Passage of the Farm Operations Support Act, commendably introduced by Senators Jon Ossoff and Thom Tillis, is also a potential solution. However, it would only maintain the status quo and protect farmers from a 90% wage increase in some instances, and time is running out for the intended effects of these bills to be helpful.

In addition to tackling H-2A visa program challenge head on, Congress should also invest in automation and mechanization for specialty crops via the 2023 Farm Bill. Given the research and capital investment required for farmers to implement more automation, this is one of the long-term solutions that my company is already seeking to do.

Food security is National Security

It is often said that food security is national security. That could not have been clearer than during the recent COVID-19 pandemic. While millions of Americans worked from home, our farmers and farmworkers pressed on to meet the fresh produce needs of consumers. During those turbulent times, we at L&M were proud to be able to supply millions of pounds of safe, wholesome and healthy fruits and vegetables to America's food bank networks.

And so, I will close with a question for you all to consider: If we do not further support our American food system, will our foreign competitors step up and meet our food and nutrition needs the next time our supply chain is so greatly disrupted?

We need support from Congress to seed real change on this issue before it is too late. The future of American agriculture, especially the fresh fruit and vegetable industry, depends on it.

Thank you.

U.S. SENATE COMMITTEE ON THE JUDICIARY**Hearing on****“From Farm to Table: Immigrant Workers Get the Job Done”****May 31, 2023****WRITTEN TESTIMONY OF LEON R. SEQUEIRA**

Good morning, Chairman Durbin, Ranking Member Graham, and members of the Committee. I appreciate the invitation to testify about the importance of farmworkers to our economy and how to best address the shortage of workers on our nation’s farms.

I am an attorney in private practice and a significant part of my work involves advising employers and trade associations about employment and immigration issues, including the H-2A temporary agricultural visa program. My clients range in size from small farms with only a handful of employees to large family farms 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 for nearly 20 years, including as a staffer in this body, as an Assistant Secretary of Labor in the George W. Bush administration, and representing clients in private practice. I had the privilege of testifying before this Committee two years ago on the difficulties that American farmers face in trying to remain competitive in an international marketplace while participating in the H-2A program. Two years ago, I noted that poorly thought-out and poorly implemented U.S. Government policy was threatening the viability of labor-intensive agriculture in America. Since that time, both government policy and the domestic labor shortage have become worse.

USDA has projected that this year the United States of America will reach an alarming milestone by importing more food than it exports. Everyone could have seen this coming if they bothered to look. America has been a net importer of fruits and vegetables for 30 years and that trend has accelerated in recent years with the gap between imports and exports widening to more than \$37 billion in 2022.¹

These depressing statistics are the result of ill-advised government policy, including the misguided approach of the U.S. Department of Labor in administering the H-2A temporary agricultural visa program. Each year farmers with labor intensive crops face escalating costs imposed by the Department of Labor and ferocious competition from low cost imported fruits and vegetables.

The Department of Labor has administered the H-2A visa program since its inception in 1986 and administered the H-2 program before that. From the beginning, the Department seemed intent on making the program difficult and expensive to use, and often adopted a hostile approach towards farmers. Despite pleas for reform and more even-handed administration and

¹ See CRS In Focus IF11701, *Seasonal Fruit and Vegetable Competition in U.S.-Mexico Trade* (Feb. 22, 2023).

enforcement, the Department's unnecessarily adversarial approach and even contempt for farmers has persisted throughout much of the program's history.

Unfortunately, that continues to this day. We were reminded earlier this month of the Department's harsh view of farmers and the H-2A program when the outrageous remarks of a senior career enforcement official of the Department of Labor came to light. That senior official was quoted as saying that employers in the H-2A program were involved in the "purchase of humans to perform difficult work under terrible conditions" and that wage theft was part of how the H-2A program operates.²

Of course, such views are just wrong and unfairly malign the thousands of honest and hard-working American farmers who participate in the H-2A program each year. After learning of those comments, Senate Health Education and Workforce Committee Ranking Member Cassidy and Senator Budd wrote to Acting Secretary Su seeking additional information about her Department's bias towards farmers and "disregard for the evenhanded enforcement of our nation's laws."³

In addition, just last week, in response to repeated processing delays of farmers' time-sensitive H-2A labor certification applications, House Education and Workforce Chairwoman Foxx and Workforce Protections Subcommittee Chairman Kiley wrote to the Acting Secretary inquiring whether the Department's processing delays also result from "hostility to the H-2A program and to the agricultural employers who participate in the program."⁴

Department of Labor AEW Regulations

Against this backdrop, recent H-2A regulatory changes implemented by the Department have caused further concern about the Department's view of farmers and understanding of the agricultural economy. It appears that the Department believes farmers operate like other businesses and when their input costs go up, they can just increase the prices they charge their customers. But farmers are not like other businesses in the larger economy, and they do not get to set the price of their products based on their cost of production. Rather, the sale price of crops, including specialty crops that require extensive amounts of hand labor to harvest, are set on the open market. Thus, every time the Department of Labor drives up a farmer's costs with mandatory increases in wage rates and other regulatory burdens, they put U.S. farmers at a greater competitive disadvantage in the international marketplace. And that leads to domestically grown produce being replaced on grocery store shelves with lower cost imports.

The Department's primary role in the H-2A program is to approve employer applications with job terms that will not result in an adverse effect on the wages and working conditions of similarly employed U.S. workers. Toward that end, the Department imposes a minimum hourly

² See <https://www.help.senate.gov/ranking/newsroom/press/ranking-member-cassidy-budd-call-out-shocking-dol-comments-bias-against-american-farmers>.

³ *Id.*

⁴ See <https://edworkforce.house.gov/news/documentsingle.aspx?DocumentID=409210>.

wage that must be paid to H-2A workers and U.S. workers performing the same work on the farm. That minimum hourly wage is referred to as the Adverse Effect Wage Rate (“AEWR”).

Over the past five years, the Department has increased the AEWR on average nationwide by some 25% to more than \$16 per hour. In Washington and Oregon, the wage is up to \$17.97 per hour and California has the highest rate in the nation at \$18.65 per hour. At the same time, U.S. farmers face intense competition from imports. Most of these imports come from Mexico, where wages are a fraction of what is required to be paid in the U.S. While the U.S. Department of Labor mandates H-2A wages that average more than \$16 per hour, in addition to free housing and transportation for workers, the “required” minimum wage rate in Mexico is about the equivalent of \$1.35 per hour (depending on the exchange rate). Just considering hourly wages and no other benefits, production costs for U.S. farmers are, on average, 12 times higher than their competition.

And if this was not bad enough, the Department of Labor recently devised yet another way to ratchet farmers’ costs higher. The Department’s new AEWR regulations, which take effect⁵ in the coming days, change how the AEWR is calculated for certain tasks performed on farms. These changes will result, according to the Department’s calculations, in more than \$38 million in additional annual costs for farmers in the H-2A program. But contrary to the Department’s estimates, which are based on selective data and questionable assumptions, commenters on the proposed rule estimated this change in wage rates could easily result in more than \$100 million in increased annual costs to farmers.

The Department’s claimed rationale for this rule change does not match up with the realities of the agricultural labor market, nor with the purpose of the H-2A program. As a result, the Department’s AEWR changes are currently being challenged by farmers and agricultural associations in two different lawsuits pending in federal courts.

With these new AEWR rules, in furtherance of supposedly preventing *potential* adverse effects on U.S. farmworkers, the Department is actually imposing substantial adverse effects on U.S. farmers. This is contrary to the intent of Congress in establishing the H-2A program, which requires that the Department balance the interests of farmers and U.S. farmworkers when setting wage rates. In these new AEWR rules the Department changes how it will calculate the minimum wage for certain tasks performed on the farm and will now use data collected from *non-farm employers* to set wage rates for work performed on the farm. These new wage rates will come from the Occupational Employment and Wage Statistics (“OEWS”) program of the Bureau of Labor Statistics. Wage rates for other tasks on the farm would continue to be set by the Department with data collected *from farmers* through the USDA Farm Labor Survey.

The Department has targeted for higher wage rates certain tasks, such as driving a truck loaded with the farmer’s produce or driving a van to transport workers to the field or erecting a fence to keep livestock contained. But the Department does not mandate the higher wage be paid just

⁵ The new regulations took effect on March 30, 2023, for H-2A labor certification applications filed on or after that date. See 88 Fed. Reg. 12760 (Feb. 28, 2023). Work pursuant to an H-2A labor certification typically begins as soon as 60 days after an H-2A labor certification is filed with the Department of Labor.

when the H-2A worker is performing that specific task. Instead, the Department also requires the H-2A worker be paid the higher wage for time spent performing every other (lower wage) task throughout the day.

A simple example illustrates the Department's new approach. In 2022, an H-2A farmworker in New York who harvests apples would be classified as a farmworker and paid the traditional AEW of \$15.66 per hour that applies to the state. But suppose that farmworker also spends 5 minutes driving his coworkers from the farmworker housing to the orchard each morning and spends 5 minutes driving his coworkers from the orchard back to the housing at the end of the day. For 7 hours and 50 minutes of the day, that farmworker is in the orchard harvesting apples alongside his colleagues, but for 10 minutes of the day he is driving a van transporting his coworkers to and from the orchard.

In the past, those driving duties would have just been part of his job as a farmworker. As a result of the rule change, however, DOL now says this farmworker will be classified as a "chauffeur" – and must be paid as a chauffeur – simply because at some point during the day he transports his co-workers in a van. In 2022 in New York, DOL says chauffeurs (SOC 53-3053) earn on average \$20.29 per hour, which is 30% more than a farmworker.⁶ And so, the farmworker who spends just 10 minutes a day driving his coworkers in a van now will be paid 30% more than his coworkers for every hour he works, including during the 98% of his workday when he is doing the exact same work as his coworkers harvesting apples. This makes no sense.

But it does not end there. DOL's H-2A rules also require that every other H-2A and U.S. worker performing any of the same work described on the H-2A application also must be paid the same wage rate. So, in the example above, if the farmer needs 12 farmworkers to harvest apples and just one of those farmworkers will drive a van for 10 minutes a day, then that "job" is now classified as a combination of a "farmworker" and a "chauffeur" and the higher wage rate for a chauffeur must be paid to everyone performing *any* work described in that labor certification.

The result is that the 12 farmworkers who should be paid \$15.66 per hour to harvest apples, instead must be paid \$20.29 per hour simply because one of them drives his coworkers in a van for just 10 minutes out of an 8-hour workday. Just like that, the Department has increased this farmer's labor costs by 30 percent. Based on same estimates of hours worked during a season that were utilized by the Department in the rulemaking, the 30% increase in wages would cost the employer in this example about \$50,000 in one season.⁷ One could hardly design a more effective policy if the goal was to inflate U.S. farmers' costs to make them less competitive in the international marketplace and eventually drive them out of business.

The Department claims that it must impose these rules for H-2A workers in order to avoid any potential adverse effect on the wages of similarly employed U.S. workers. Except that the Department of Labor has never produced any evidence that H-2A workers have adversely

⁶ See OEWS estimates by standardized occupational classification at https://www.bls.gov/oes/current/oes_ny.htm.

⁷ This example demonstrates that the Department's estimate of \$38 million in additional wage payments resulting from the rule is not realistic. There were more than 18,500 labor certifications issued by the Department in 2022 covering more than 371,000 positions and this example concerns just one hypothetical labor certification for 12 positions.

affected the wages of similarly employed U.S. workers. In fact, rather than putting downward pressure on farmworker wages, the evidence indicates the opposite: that mandated H-2A wage rates are leading to wage inflation, as farmworker wages have increased at a far faster pace than other sectors of the economy in recent years.

The entire reason for the Department to set the AEW rule is supposed to be to avoid adverse effect on *similarly employed* U.S. workers. But in the example above, U.S. chauffeurs employed year-round driving limousines in New York City are not similarly employed to a farmworker driving a van on a farm during harvest season in upstate New York. Yet, in this rule the Department claims the wages paid to New York City chauffeurs should be included in determining the wage rate paid to farmworkers driving a van on a farm. Thus, in an attempt to avoid an adverse effect that theoretically might possibly happen, but for which it can produce no evidence showing that it has happened, the Department is imposing untold millions of dollars in annual costs on farmers based on wage rates paid to people who do not perform work on farms.

In recognition of the misguided approach of the Department of Labor and the severe harm this rule will cause for American farmers, Senator Scott and 32 other Senators, including many members of this committee, have cosponsored S.J.Res. 25, disapproving of the AEW rule pursuant to the Congressional Review Act. In addition, the House of Representatives has also addressed this issue by passing the Secure Border Act of 2023 that contains a provision nullifying the AEW rule.⁸

Domestic Farmworker Shortage

The shortage of domestic farmworkers gets worse with each passing year and so it is no wonder that there has been dramatic growth in the H-2A program. Even when available farmworker jobs are advertised nationwide – as the Department of Labor does in connection with each H-2A application – few U.S. workers respond. U.S. workers do not fill even one percent of these available jobs. In fact, U.S. workers do not fill even one-half of one percent of these jobs. The Department of Labor's H-2A data shows that U.S. workers fill only six one-hundredths of one percent (0.06%) of available farmworker job openings.

In 2022, out of more than 368,000 advertised farmworker job openings, only about 250 positions were filled by U.S. workers. Said another way, out of every 10,000 H-2A farmworker job openings in 2022, just 6 were filled by U.S. workers. And 2022 was not an unusual year. It is abundantly clear that America does not have enough domestic workers willing to perform labor on our nation's farms.

Given the obvious and longstanding shortage of seasonal farmworkers, one would think that the federal government and the Department of Labor would be devoting resources and extraordinary efforts to help America's farmers meet their workforce needs. But in reality, the opposite is true. Each year, Congress provides the Department with nearly \$100 million for the National Farmworker Jobs Program to train domestic farmworkers to take other non-farm jobs in the economy. No one would argue with workers improving their skills and moving up the economic

⁸ See H.R. 2, 117th Cong. § 816 (2023).

ladder. But it is hard to understand why the Department is actively working to decrease to the already limited supply of U.S. farmworkers, and thereby increasing farmers' reliance on the H-2A program, while at the very same time making the H-2A program more difficult and expensive to utilize when that is farmers' only viable labor source.

The Department's approach makes no sense and seems designed to intentionally make it difficult for farmers to remain competitive in the international marketplace. Instead, the federal government should be trying to improve U.S. farmers' market position in competing against imported food. But the Department of Labor offers no help to farmers. And when the Office of U.S. Trade Representative negotiated the 2020 United States-Mexico-Canada Agreement to updated to North American Free Trade Agreement, they included no provisions to protect specialty crop farmers from low cost imported fruits and vegetables. And so, our food trade deficit continues to grow.

In the near term, it will be our farmers who bear the brunt of this. But that suffering is going to trickle down to the U.S. companies and workers who supply tractors, trucks, seed, fertilizer and all the other inputs used on the farm. The jobs lost in farming will lead to job losses in the broader economy. And eventually the U.S. consumer and the nation as a whole will suffer when can no longer feed ourselves.

It is very fashionable these days to fret over the fact that America does not produce enough semiconductors to power all the various electronic devices we use in our daily lives. Of course, the reason for the lack of U.S. semiconductor production can be traced back to decades of illogical government policy that caused production to move offshore. The same thing happened with the U.S. production of cars, televisions, phones, clothes, furniture, and many other consumer goods.

With semiconductors being crucial to every aspect of our economy, as well as our military, policy makers have belatedly realized that having to rely on computer chips produced in foreign countries is a national security threat. And so, in an attempt to correct this problem, the Biden Administration and Congress recently provided more than \$200 billion through the CHIPS and Science Act of 2022 to encourage domestic semiconductor manufacturing.⁹

A generation from now – or even sooner – people are finally going to ask: “why doesn't America grow the food it needs to feed its citizens, and instead relies on other nations to feed us?” The answer to that question will be: “Because bad government policy drove the American farmer out of business.”

Despite the mountain of evidence of the labor crisis facing our farms and the international competition facing U.S. agriculture, the government, and especially the Department of Labor, seems intent on pursuing policies that are driving farmers out of business. The U.S. government needs to change course and enact policies that support farmers and that will save labor-intensive agriculture before it is too late. That needs to begin with significant reform of the H-2A program.

⁹ See Pub. L. No. 117-167 (2022).

Throughout its history, the H-2A program has been plagued by complicated regulations, bureaucratic inefficiencies, high costs, processing delays, artificial limits on the types of agricultural employers that can participate, and hostility from the Department of Labor. Despite its drawbacks, the H-2A program remains the only option for farms to meet their seasonal workforce needs. Going forward, we must improve the H-2A program to ensure that all sectors of agriculture have access to needed labor, and that the program is administered in a fair reasonable manner.

But too often in Washington, the focus has been on other policy priorities that are sold to farmers as solutions for the agriculture workforce shortage when they actually are not. A prime example is the Farm Workforce Modernization Act (FWMA) that passed the House of Representatives in the last Congress. While the FWMA included some minor changes to the H-2A program, it also contained several provisions that would make the H-2A program more unpredictable, complicated, costly, and would subject farmers to significant increased legal liability. Rather than improve the situation, that legislation would have made many things worse for farmers, especially those currently participating in the H-2A program.

Another difficulty with the FWMA is that it puts legal status for farmworkers who lack work authorization ahead of a long-term workforce solution for agriculture. This repeats the same mistakes of the past. The U.S. legalized more than a million undocumented farmworkers in 1986. That did not solve our agricultural labor crisis then and there is no reason to believe it would solve our labor crisis today. After the 1986 legalization, those workers began almost immediately to leave farms for other opportunities in the larger economy. By the early 1990s, the newly legalized workers represented only about 10 percent of the agriculture workforce.¹⁰ With legal status came endless new economic opportunities and legalized farmworkers pursued those opportunities. And who can blame them. Moving up the economic ladder is central to the American dream.

Congress may decide that legalizing the undocumented farm workforce (or even other undocumented workers) is a worthy public policy. But history shows us that legalizing undocumented workers will not produce more farmworkers and will not solve agriculture's workforce shortage. The thousands of open positions created by the exodus of legalized agricultural workers in the late 1980s and early 1990s was a significant contributor to the next wave of illegal immigration. To avoid repeating this cycle, Congress must establish a predictable future workforce solution that provides farmers to access needed labor with a fair and predictable cost structure that enables them to remain competitive in the modern international marketplace. Hopefully, this Committee will have an opportunity to consider such legislation in the near future. An updated H-2A program must be simpler, more efficient, less costly, and accessible to all agricultural employers.

Time is running out to solve this national security problem. Unlike semiconductor production, which we may be able to recover by spending \$200 billion and building new fabrication plants,

¹⁰ See Martin, Philip L., *Immigration Reform and Agriculture*, ARE Update 15(2):5-8 (2011), University of California Giannini Foundation of Agricultural Economics.

we will not be able to just build new fruit and vegetables farms in the future. Once a farm ceases production, that farmland is lost forever. Idle farms become housing developments, office parks, shopping centers, and semiconductor factories.

Testimony of Diana Tellefson Torres, UFW Foundation CEO**U.S. Senate Judiciary Hearing “From Farm to Table: Immigrant Workers Get the Job Done” on Immigrant Workers, Agriculture and the Need for Immigration Reform
May 31, 2023**

Chairman Durbin, Ranking Member Grassley, and distinguished members of the Committee, thank you for the opportunity to testify today about the important contributions that farm workers make to our nation and to address needed solutions to challenges that impede the progress of farm workers and the agricultural sector.

My name is Diana Tellefson Torres, and I am the Chief Executive Officer of the UFW Foundation and the granddaughter of a Bracero guest worker. I have advocated for the rights and well being of our nation’s farm workers for almost two decades. The UFW Foundation, founded in 2006, is a 501(c)(3) charitable organization based in California and serving farm worker families around the country. Whether it’s through our pandemic relief assistance, food distribution programs, vaccination events, house meetings, outreach and education efforts, or immigration legal services, the UFW Foundation has a simple mission: to help farm workers find resources and the means so that they and their children may thrive. We also tirelessly support immigration reform that provides a path to citizenship for undocumented farm workers and their families, as well as an end to discriminatory employment laws so that farm workers may access equal rights they so richly deserve. We work towards a future in which farm workers are treated with dignity and respect.

To feed the nation, approximately 2.4 million farm workers plant, tend and harvest fruits and vegetables, work with dairy cows for milk production, tend livestock for our meat, and do many other tasks that uphold our nation’s agricultural and food system. In fact, farm workers were designated as “essential workers” during the COVID-19 pandemic. According to the federal government, about half of farm workers are either citizens or lawful permanent residents^[1].

Despite the challenging and dangerous nature of the work, agricultural workers often live in poverty and struggle to feed their own families. National estimates indicate that farm workers’ mean and median personal incomes are in the range of \$17,500 to \$19,999, with the mean and median total family income in the range of \$20,000 to \$24,999.¹ The cruel irony is that despite their central role in ensuring that American families have food on our tables, farm workers in certain parts of the country

¹ U.S. Department of Labor, *Findings from the National Agricultural Workers Survey (NAWS) 2015-2016*; published January 2018. Available at https://www.dol.gov/sites/dolgov/files/ETA/naws/pdfs/NAWS_Research_Report_13.pdf.

experience food insecurity and some rely on emergency food programs for their own families.² The economic insecurities farm workers face are often the driving factor behind child labor in the fields. Some children of farm workers work alongside their parents to help contribute to the household income and due to lack of affordable childcare. Because of their low incomes, many farm workers live in substandard housing with crowded conditions. Many farm workers experienced even greater economic insecurity in the face of the COVID pandemic and the many recent wildfires and floods in California.²

And yet farm work is a career, and farm workers across the country are proud of the decades they have worked in agriculture. Take Esther from California, for example. Esther has worked as a farm worker and lived in this country for more than 25 years picking grapes, vegetables, mandarin, oranges, and other produce. She says, “I wish to tell our lawmakers in Congress to please pass legalization for farm workers so we may see our families without fear, that we may work without fear, and that we may contribute to this country without fear.”

Today, the U.S. has a choice. We can recognize the incredible value of farm workers and work towards a day when the industry is characterized by workers who work and live without fear because they have a way to earn citizenship and enjoy equal labor rights. This choice will enable farmworkers to stay in agriculture and help the industry and our rural communities thrive. This entire vision starts with legalization of the undocumented workers here in the US today.

We should not continue to ignore the fact that too many farm workers suffer because they must work without legal authorization. Nor should we ignore the fact that the H-2A visa program has become the worst source of human trafficking among U.S. visa programs, deprives farm workers of basic freedoms, and subjects US and foreign workers to widespread violations of their rights.

The failure of Congress to pass bipartisan agricultural immigration reform that respects the women and men who feed us is an active choice to support a system that thrives on abuse of the very workers who feed our nation and harms the ability of law-abiding employers to compete in the marketplace.

Lack of legal status and a shameful history of excluding the industry from basic labor laws – such as overtime pay or the right to join a union – make farm workers vulnerable to a range of abuses. The threat of immigration enforcement is a form of coercion that employers can use against undocumented workers. Under the H-2A program, workers

² Chabria, A. (6 October 2020). Many California farm workers fear a winter of hunger and homelessness amid the pandemic. *Los Angeles Times*, <https://www.latimes.com/california/story/2020-10-26/central-valley-farmworkers-hunger-evictions-coronavirus-covid19>

know that if they are fired, they lose their housing, their job and their right to stay in the country, and probably the opportunity for future H-2A visas.

U.S. citizens and work-authorized colleagues also often work in fear, as they know that they can easily be replaced by more vulnerable workers. In fact, a report by the Economic Policy Institute (EPI) finds that most DOL investigations in agricultural workplaces find violations of basic rights, including wage theft, housing protections and more.³

It is frankly hard to tell the stories that I am about to share. Everyday, I talk to farm workers who are resilient, faithful and proud. These women and men literally give me purpose, but I want you to understand the realities when approximately 50% of the people that work in agriculture either don't have status or are here on an H-2A visa.

Wage theft

In many instances, modern agriculture has broken the tie between farmer and worker. Workers are often hired by labor contractors, often with the goal of shielding employers from direct wage and workplace violations. And even these labor contractors often put another layer between themselves and workers.

Recently, we were asked to help workers in Georgia who were paid in cash by the people who drove them to the worksite in the morning – people who took a cut of their wages.

These farm workers shared that foremen do not pay the farm workers directly but instead pay the people who give farm workers a ride to and from work; this driver then pays the workers in cash. The farm workers I spoke with knew that they should not be paid in cash and they were dismayed that they often were not paid the wages that they were owed. Although the farm workers were well-aware of the wage theft, they expressed that they were scared to say anything due to their undocumented status. They also could not afford vehicles of their own, so they did not want to anger the person who provided them rides. Additionally, the farm workers were concerned that they were not provided paycheck stubs as they had no proof of working in agriculture—how would they be able to qualify for a future immigration reform program without this proof?

When I asked whether this type of agreement between the intermediary was made with just one foreman, the workers said, “No, almost all of the foremen do that and there are many people who provide rides who are the ones who pay the workers—that’s the way it works here.”

³ Costa, D., Martin, P. & Rutledge, Z. (15 December 2020). “Federal labor standards enforcement in agriculture,” *Economic Policy Institute (EPI)*, available at <https://files.epi.org/pdf/213135.pdf>

This structure leads to extreme worker vulnerability, as the workers rarely know the name of the company or the full name of the foreman. Sometimes the brand of the fruit or vegetable is on the boxes into which they pack the product, but that is not always the name of their employer. Some of the workers also did not know how to read or write in Spanish or English, as their first language was an indigenous language from Mexico. How can a farm worker, who overcomes the fear of retaliation, file a complaint with an enforcement agency, if they do not know the name of their employer?

Sexual Harassment

Of the over 2 million farm workers in the US, at least 700,000 are women. The #MeToo movement shed light on the rampant sexual harassment and sexual violence these women endure. When women have been interviewed, as many as 8 out of 10 farmworker women have experienced harassment.⁴ Sadly, these women, for the most part, do not speak out because a lack of immigration status or financial insecurity leaves them in fear of retaliation and job loss.

To give you an idea, a 17-year old farm worker girl who worked harvesting and packing grapes for a large grape company in Kern County, California, was sexually harassed repeatedly by her supervisor. The harassment included statements by her supervisor of “having a large penis, telling her he wanted to have sex with her and stating that once he was able to grab her body, she would want to have sex with him too.”⁵

The farm worker girl repeatedly told the supervisor to stop. Finally she could not take it any longer and shared what was happening with her mother. The girl and her family members reported harassment. Instead of addressing the harassment the company fired the farm worker and told them they needed to vacate the employer’s housing.

Heat deaths, bathrooms and pesticide exposure.

While farm workers ensure our nation’s food supply through their strenuous work in fields, dairies, and ranches, they often toil under extreme temperatures, wildfires, pesticides, and other dangerous conditions. Occupational death and injury rates in agriculture are disproportionately high while the wage rates for these critically important jobs are often very low.

Let me share the story of Maria Isabel Vasquez Jimenez, a 17 year old pregnant farmworker who collapsed after laboring more than 9 hours without accessible shade or water. She fell to the ground due to the heat, the foreman left her on the ground then put her in the back of a hot flatbed truck. The foreman never called 911 and asked Maria

⁴ <https://www.aclu.org/news/womens-rights/female-domestic-and-agricultural-workers-confront>

⁵ Confidential Report to UFW and UFW Foundation

Isabel's fiance to lie about the events. The foreman had planned to take Maria Isabel to her home but her fiance finally convinced the foreman to let him take her to a nearby clinic instead, but it was too late. She died the next day with her body temperature reaching over 100 degrees. Her story galvanized a change in California where there is now a workplace standard to improve safety when there is extreme heat.

For most farm workers there remains no requirement that farmworkers have access to water, shade or periodic breaks to bring their body temperature down in extreme conditions, as California is one of only 5 states with a heat standard. The lack of a standard, when combined with tenuous immigration status, leads workers to work past the body's physical limits. Take Miguel Angel Guzman Chavez, an H-2A guest worker, who died in 2018 only a few days after arriving in Georgia from Mexico – he was 24 years old. The day he died picking tomatoes, the heat index was 103 degrees. A UFW Foundation employee in Georgia, trying to ensure other workers weren't in danger, found where Miguel had been living. He saw barrack style housing where 5-6 workers slept in a room without any air conditioning that could help their bodies recuperate from the long hours they spent working in the direct heat. Miguel's co-workers looked jaundiced and thin, they were eating Cup O'Noodles soup and drinking Pedialyte, not much to nourish them after the 16 hour days they'd worked; mind you, their work contract said they'd be working 10 hour days. Some of the solutions are simple – where this is the law in California, you see portable tents for shades and water stations in the fields. Congress should pass a heat stress standard so that more people will not die.

In addition to the dangerous threats of heat, too often workers don't have access to basic field sanitation as required by OSHA. Early last year, I took a tour of the state of Georgia, one of the states in which the UFW Foundation has a presence. During my trip, I met with women farm workers who shared their many hardships and lack of resources, including the fact that there are often no accessible toilets in the field. As a result, these women and other workers are forced to relieve themselves in the open air, where they try to find a tree or more privacy. The women expressed that men could easily urinate anywhere, even in the fields. This clearly creates both human rights and food safety dilemmas. Although OSHA's field sanitation standard requires employers to provide toilets within a quarter-mile walk for workers, our conversations revealed that even this minimal requirement is violated, with little consequence for employers due to the lack of oversight and enforcement. In addition to the sanitary condition of the fields, the impact of not providing toilets has severe health consequences for women: they expressed that they try to drink less water to avoid having to relieve themselves, resulting in greater vulnerability to heat stress and urinary tract infections from not going to the restroom.

Another major occupational safety challenge in farm workers' lives is the constant threat of pesticide exposure. In 2017, Vicenta Rivera began to feel pesticide drift that had been sprayed on a nearby citrus field. She and 48 farm workers, predominantly women, were in a field in Central Valley when she smelled a strong odor, a taste in the back of her throat, numb lips, itchy skin and watery eyes. Some workers continued picking and packing while trying not to breathe, workers were terrified of the repercussions of walking away.⁶ These low wage workers often accept the risks of exposure. Indeed, it was not until 2015, after considerable pressure on policy makers and farm worker advocates, that there was a requirement that pesticide applicators be 18 years old. Vigilance in this area is particularly important because we hear from families that it is routine for children as young as 12 to work alongside their parents in the fields. Pesticides can cause a range of illnesses and even death, and are harmful to children's development. We must care about pesticide exposure because we are literally harming the development of children when these rules are ignored.

The H-2A Agricultural Guestworker Program

I have just shared with you stories of the conditions endured by farmworkers that I hear over and over again. What I fear is that these conditions will be amplified as we increase our reliance on the H-2A program in its current form.

The number of H-2A jobs approved by the Department of Labor has increased rapidly in recent years. The U.S. Department of Labor (DOL) certified 79,000 positions in 2010. By 2017, the number of H-2A visas more than doubled as DOL certified 200,049 H-2A jobs. The program accelerated growth and almost doubled again 5 years later, with DOL approving over 371,619 H2A jobs nationwide in FY 2022.⁷

In order to qualify to bring a worker into the US through the H-2A guestworker program, employers must show that there are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services involved in the petition, and that the employment of a foreign worker will not adversely affect the wages and working conditions of similarly employed workers in the United States.

⁶ Branch, J. and Lipton, E. (2018) 'Dismissing Science', *New York Times*, 27 December.

<https://www.nytimes.com/interactive/2018/12/26/us/politics/donald-trump-environmental-regulation.html>

⁷ See

<https://www.ers.usda.gov/amber-waves/2021/september/use-of-h-2a-guest-farm-worker-program-more-than-triples-in-past-decade/> and Department of Labor. (22 September 2022). *Office Of Foreign Labor Certification H-2A Temporary Agricultural Program – Selected Statistics, FY 2022*

https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/H-2A_Selected_Statistics_FY2022_O4.pdf Department of Labor. (22 September 2022). *Office Of Foreign Labor Certification H-2A Temporary Agricultural Labor Certification Program - Selected Statistics, Fy 2017*

https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/H-2A_Selected%20Statistics_FY2017_O4.pdf

One of the principal ways the Department ensures that US workers are not adversely affected by foreign workers is to ensure that the wages paid by H-2A employers to U.S. and foreign workers are not depressionary by setting a wage floor through the use of the Adverse Effect Wage Rate or AEWR. The AEWR is set annually for each state based on surveys of agricultural employers' wage rates. In addition, H-2A workers are provided transportation to their work site and housing. These modest protections for H-2A and U.S. workers, however, are only as good as federal enforcement efforts.

Unfortunately, federal law excludes H-2A workers from one of the few Federal labor protections farm workers have – the Migrant and Seasonal Agricultural Worker Protection Act (AWPA or MSPA).⁸ The exclusion of H-2A workers from AWPA deprives workers of labor protections, remedies, and the ability to enforce their rights on their own in federal courts.

While I know there are farms that treat their foreign workers well, there are all too many instances of abuse, and the stories I am sharing are not isolated. What we hear and see from H-2A workers is disturbing and should shock the conscience of this country.

Illegal Recruitment Fees

H-2A workers too often begin their journey to the US after paying a recruiter a fee in order to be chosen for a visa.⁹ Once in the US, the H-2A workers are often so fearful of losing their jobs and being able to pay back the debt that they will not challenge unfair or illegal employment practices. The Department of Labor tells employers and their recruiters that recruitment fees are illegal but does virtually nothing about this practice in the foreign country. The DOL should impose responsibility and liability on the employers and their recruiters throughout the labor supply chain for illegal recruitment fees.¹⁰ In an infamous case in Georgia, the U.S. District Court for the Middle District of Florida found that three defendants had charged workers between \$1,000 to \$2,000 before workers arrived in the United States. The defendants used the debt to coerce workers to continue working in unlawful conditions and confiscated workers' passports to discourage workers from fleeing.¹¹

Because H-2A workers come to this country largely indentured, are completely dependent on one employer for their immigration status, and will only be chosen to come back to the US in future years if they don't complain—they are very vulnerable to abuse. That is not an appropriate model for employment in a freedom-loving nation

⁸ 29 U.S.C § 1801-1872

⁹ See <https://cdmigrante.org/wp-content/uploads/2020/04/Ripe-for-Reform.pdf#page=7>

¹⁰ See <https://prismreports.org/2023/04/14/h2a-visa-wage-theft-exploitation/>

¹¹ See

<https://www.justice.gov/opa/pr/three-defendants-sentenced-multi-state-racketeering-conspiracy-involving-forced-lab-or-mexican>

and the abuses that arise from it must be addressed through enforcement and policy change.

Human trafficking

The Polaris Project has found that workers on the H-2A visa program are disproportionately represented in reports of labor trafficking. Their report on human trafficking in the H-2A program highlights that 61 percent of the victims reported receiving threats to be reported to immigration officials as a form of coercion.¹²

Modern-day human trafficking involving H-2A agricultural guest workers was uncovered in South Georgia. Operation Blooming Onion was a wake-up call to the abuses and corruption that the H-2A program can exacerbate.¹³ The conspirators required workers to pay unlawful fees for transportation, food, and housing while illegally withholding their travel and identification documents, and subjected the workers to perform physically demanding work for little or no pay, housing them in crowded, unsanitary, and degrading living conditions, and threatening them with deportation and violence. Exploitation of the workers included being required to dig onions with their bare hands, paid 20 cents for each bucket harvested, and threatened with guns and violence to keep them in line. The workers were held in cramped, unsanitary quarters and fenced work camps with little or no food, limited plumbing and without safe water.

The charges brought by U.S. Attorney's office in the Operation Blooming Onion case also included allegations of rape, kidnapping and threatening or attempting to kill some of the workers or their families. The charges include allegations that some of the employer defendants sold or traded the workers to other conspirators. At least two of the workers died as a result of workplace conditions.

Violations of Housing and Sanitation Requirements

As an outgrowth of abuses found in the infamous Bracero program¹⁴, such as workers living in encampments with no sanitation, employers are required to provide housing to H-2A workers, many of whom are brought here during peak harvesting season.

¹² Polaris. (2021). *Labor Exploitation and Trafficking of Agricultural Workers During the Pandemic*. https://polarisproject.org/wp-content/uploads/2021/06/Polaris_Labor_Exploitation_and_Trafficking_of_Agricultural_Workers_During_the_Pandemic.pdf

¹³ U.S. Attorney's Office, Southern District of Georgia. (2021, November 22) *Human smuggling, forced labor among allegations in south Georgia federal indictment* [Press Release]. <https://www.justice.gov/usao-sdga/pr/human-smuggling-forced-labor-among-allegations-south-georgia-federal-indictment>

¹⁴ <https://www.farmworkerjustice.org/resource/bracero-program/>

An H-2A worker from NY shared that when he first arrived to work, he lived in a garage. There was a designated place to prepare their food but they did not have a sink to wash their food or utensils. There was only a portable toilet outside of the facilities. They had no showers in the garage. In order to bathe, they had to go to the house that was next to the garage where eleven workers lived. Workers had nowhere to wash their clothes so they had to wash their items in buckets. As for the condition of the garage, there were often many ants, cockroaches, and rats.

In Arizona, during the Trump Administration, the Department of Labor was able to get a preliminary injunction against an employer accused of providing illegal and life-threatening living conditions to its employees. The employer forced its workers to sleep in converted school buses and semi-truck trailers in violation of numerous safety, sanitation and fire code regulations. The buses and trailers were dangerously overcrowded, with beds stacked end-to-end, and had inadequate ventilation systems, which allowed daytime temperatures to exceed 100 degrees Fahrenheit.

We worry that as this program expands, the enforcement resources of DOL will be so stretched that violations like these will increase.

Discrimination

There are two kinds of discrimination that are growing in the agricultural sector because of the H-2A program – discrimination against US workers and discrimination against women.

More and more, we find employers replacing available career farmworkers for H-2A workers – workers who are often preferred because employers can handpick their ideal demographic workforce of young men and exercise control over these captive workers.

In Mississippi, 11 employers were part of a U.S. Department of Labor investigation dealing with allegations of wage theft and illegal displacement of African American U.S. workers. Many of these U.S. workers trained H-2A workers from South Africa who ended up replacing them.¹⁵

In Washington, the Attorney General investigated a mushroom farm in Sunnyside which fired its largely female and Washington-based workforce and replaced them with male foreign guest workers hired through the H-2A Program, in violation of the Washington Law Against Discrimination.¹⁶

¹⁵ <https://www.dol.gov/newsroom/releases/whd/whd20221121>

¹⁶ <https://www.atg.wa.gov/news/news-releases/sunnyside-mushroom-farm-will-pay-34-million-violating-civil-rights-its-workers>

Georgia is also one of the states where there is substantial documentation of discrimination against farm workers who were U.S. citizens, as the two largest H-2A users in Georgia have both been sued for their discrimination against domestic workers in favor of a more captive H-2A workforce.¹⁷

The discrimination against women is also deeply troubling. Because workers are recruited abroad – where our government does not enforce anti-discrimination laws – the industry is able to select a workforce almost exclusively of young men.

Employers come to prefer H-2A workers who are here without families or other outside obligations and can work as demanded by the employer.

Employer complaints

Agricultural employers claim that the H-2A program is not responsive to their needs but the rapid growth of the program and the DOL's approval of almost all employer applications shows that these complaints are unjustified. Some growers bitterly complain about the H-2A program wage rates but they are merely set at market rates to comply with law. While employers complain about government oversight of their H-2A participation – we see a lack of enforcement of the rules that leads to deadly consequences. Some farm operators with year-round jobs, particularly at dairies, have pressed to expand the H-2A program to year-found jobs, which we have opposed because the program was based on the difficulty of finding sufficient workers for jobs that are only seasonal.

We have however, during every legislative negotiation aimed at garnering legalization for undocumented workers, found areas of compromise, including on H-2A program issues. We have agreed to legislation that would change the H-2A program by:

- Expanding the program to include a CAPPED number of year- round agricultural jobs.
- Allowing most farmers to file a single application for staggered seasonal needs.
- Reducing costs of visa processing by allowing H-2A workers to obtain 3 year visas.
- Eliminating mid-year/mid-contract wage fluctuations for most jobs.
- Providing employer financial incentives for improving and expanding farmworker housing.

¹⁷ See <https://www.eeoc.gov/newsroom/hamilton-growers-pay-500000-settle-eeoc-race-national-origin-discrimination-laws-iii>; see also settlement agreement in *Leach v Bland Farms* (“Respondent admits liability for intentional violations of the Complainants’ civil rights under 8 U.S.C. 1324b”).

We have also agreed to E-verify for all workers in the agricultural sector so long as current workers have the opportunity to obtain lawful immigration status and eventual citizenship.

We have only agreed to these compromises as part of a comprehensive reform that includes a path to citizenship for our nation's undocumented farm workers and provisions to address the international recruitment process and actual improvements in the H-2A program. For instance, we have insisted that H-2A workers be afforded equal rights with other farm workers and at our insistence recent legislative compromises would grant H-2A workers coverage under the Migrant and Seasonal Agricultural Worker Protection Act. And we have insisted on expanded pathways for H-2A workers who have worked in US agriculture for multiple years to obtain green cards and become citizens.

Congress Should Choose a Path that Promotes Dignity for Farm Workers

By not passing bipartisan agricultural immigration reform that honors the women and men who feed us, Congress is making an active choice to support a deeply flawed system, harming both workers and law abiding employers.

We cannot turn away from the workers that feed us.

In the words of Leticia, a Washington farm worker who has worked for more than 15 years in agriculture in apple, cherry, grape, blueberry, pear, asparagus, and hops, “We have to work in extreme climates, for example, in high temperatures. The temperature can reach up to 115 degrees. During these times we have to pick the fruit in the dark due to the extreme heat. Our days start as early as 2 in the morning picking fruit with headlamps. We are asked to work in extreme conditions. We have no choice but to work to feed our families. We deserve dignified treatment, with respect, and equality. A path to citizenship would mean a lot to my family and me, it would mean that I can express my opinions and fight for my rights without fear of being deported. Personally, my life would improve in many ways. I shouldn't have to feel like I'm living in the shadows or in constant fear. My family and I could have a better quality of life and more opportunities, and my children could continue their education freely. We would have a real shot at achieving the American Dream.”

That is why we have worked for decades to craft bipartisan solutions to enable career farm workers to gain legal status and to reform the H-2A program. The farmworker movement, led by the United Farm Workers, has come to an agreement with most of the nation's major grower associations to move forward bipartisan agricultural immigration bills that have won majority votes in the House or Senate during the administrations of Presidents Bush, Obama, Trump and Biden. Indeed, many of you here today have been

part of those efforts. We have come so frustratingly close in passing agricultural immigration bills. We remain ready to partner again.

Thank you for the opportunity to speak to you about the important work that farm workers do.

QUESTIONS SUBMITTED TO DANIEL COSTA
BY SENATOR HIRONO

1

QUESTIONS FOR MR. COSTA***Labor Protections and Wages***

Hawaii has some of the strongest labor protections for farmworkers in America, including worker's compensation for agricultural workers. Hawaii agricultural workers also average higher wages, at over \$20 per hour compared to national wages of about \$18 per hour.

QUESTIONS:

1. What lessons do you think the rest of the country can learn from Hawaii's example, and does this show the benefits of stronger labor protections for all workers, whether immigrant or native-born?

Labor Protections and Trafficking

Because of the broken immigration system, at least 40 percent of immigrants working in agriculture are undocumented. Further, as you highlighted in your testimony, over 70 percent of labor trafficked victims enter the United States on a lawful visa, with the most common type being an H2-A or H2-B visa.

Preying on these vulnerable individuals, traffickers use threats of deportation to coerce many immigrants into working for lower wages and continuing to work many years after their visas have expired.

Furthermore, private contractors recruit laborers with promises of good-paying jobs, causing the workers to enter illegal debt contracts that the workers have virtually no possibility of repaying. Unlike unauthorized border crossings, forced labor traffickers leverage abuse of an otherwise legal process.

QUESTIONS:

1. In light of these grave circumstances for laborers, would increased labor protections such as overtime pay and improved workplace conditions help decrease abuse of agricultural workers?
2. Would stronger labor protections for agricultural immigrant workers also improve working conditions and pay for American workers throughout the food supply chain?

Economic Benefits of Humanitarian Programs

When we discuss the economic benefits of immigration, we should also include the economic benefits from our country's humanitarian protections system. Helping people fleeing for their lives is not only a moral imperative, but it can also help expand the workforce and boost our economy.

Unfortunately the last administration drastically reduced the number of refugees resettled in the United States.

QUESTION:

1. Do you agree that our humanitarian protection system benefits our country's economy, and can you elaborate on your testimony's call for expanded humanitarian pathways?

Health Benefits for Immigrant Workers

Immigrant workers tend to work in more dangerous occupations than native-born workers. Many work in agriculture, which is one of the most dangerous professions in the U.S. Yet despite how dangerous their work is and how much our nation's food supply chain depends on them, many immigrants, including lawfully present immigrants, cannot access certain federal benefits that protect their health.

Legislation such as my Lift the Bar Act would eliminate many restrictions preventing lawfully present immigrants from accessing benefits.

QUESTION:

1. You have written about how native-born farmworkers can protect their health by accessing programs like Medicaid. Immigrant workers cannot protect their health in this way. What impact does this have on the resiliency of the food supply chain?

Senate Judiciary Committee
From Farm to Table: Immigrant Workers Get the Job Done
May 31, 2023
Questions for the Record
Senator Amy Klobuchar

For Adam Lytch, Operations Manager, L&M Farms:

A pork processing plant in Windom, Minnesota is set to close this week due to bankruptcy. Once the plant closes, hundreds of workers who hold H-2B employment visas will be left to find a new H-2B qualified employer on short notice or face deportation. Local Minnesota businesses who are interested in hiring these workers have reported that they are concerned that U.S. Citizenship and Immigration Services may not be able to finish processing their applications to transfer employers before the employees will be required to leave the country.

- How have long processing times affected your business's ability to use seasonal immigration programs, including the H-2B and H-2A programs, to meet your business's workforce needs?
- How would decreasing processing times for applications for visas help small business owners, like yourself, in areas facing workforce shortages?

QUESTIONS SUBMITTED TO DIANA TELLEFSON TORRES
BY SENATOR HIRONO

QUESTIONS FOR MS. TORRES

Importance of Families to Food Supply

Family unity and economic success are the same thing for many immigrants. Their families provide support, help in finding jobs, and even directly support many farmworkers, as caretakers provide unpaid work to allow the immigrant to work long hours in the fields.

If we are looking to strengthen and reform our farmworker visa system, farmworkers' families must be included in the conversation.

QUESTION:

1. Ms. Torres, in your statement you included testimony from several workers who talked about how important a pathway to citizenship would be for them and their families. Can you talk more about how important family members are to many farmworkers and how the farmworkers rely on their families?

Questions for the Record from Senator Tillis
for Diana Tellefson Torres
Senate Committee on the Judiciary Hearing
“From Farm to Table: Immigrant Workers Get the Job Done”

1. On June 10, 2022, the U.S. Department of Agriculture (USDA) announced¹ a pilot program to “Invest up to \$65 Million to Strengthen Food Supply Chain, Reduce Irregular Migration, and Improve Working Conditions for Farmworkers.” In that announcement, it was stated that USDA will “partner with the United Farm Workers of America (UFW) through a technical assistance cooperative agreement to inform USDA of the challenges faced by agricultural workers and to inform development of the pilot program.”
 - What involvement have you, or your employer the UFW Foundation, had in the development and implementation of this program?
 - Will UFW or the UFW Foundation receive funding from the federal government for its technical assistance efforts and what percentage will UFW or the UFW Foundation be able to retain for salaries and expenses?
2. On October 4, 2022, USDA announced² that the UFW Foundation was awarded \$97,836,293 to administer the Fiscal Year 2023 Farm and Food Workers Relief Grant Program.
 - What percentage of this funding will the UFW Foundation be able to retain for salaries and expenses?
 - To date, how much of the \$97,836,293 that the UFW Foundation was awarded by USDA has been distributed to farm and food workers?
3. What legal protections and employment standards are guaranteed under the H-2A visa program that are not guaranteed under the Migrant and Seasonal Agricultural Worker Protection Act (MSPA)?
4. With the exception of a private right of action against employers, what protections are guaranteed under MSPA that are not guaranteed under the H-2A program?

¹ <https://www.usda.gov/media/press-releases/2022/06/10/us-department-agriculture-invest-65-million-pilot-program>

² https://www.ams.usda.gov/sites/default/files/media/2023_FFWR_DescriptionOfFundedProjects.pdf

RESPONSES OF DANIEL COSTA TO QUESTIONS
SUBMITTED BY SENATOR HIRONO

1

QUESTIONS FOR MR. COSTA

Labor Protections and Wages

Hawaii has some of the strongest labor protections for farmworkers in America, including worker's compensation for agricultural workers. Hawaii agricultural workers also average higher wages, at over \$20 per hour compared to national wages of about \$18 per hour.

QUESTIONS:

1. What lessons do you think the rest of the country can learn from Hawaii's example, and does this show the benefits of stronger labor protections for all workers, whether immigrant or native-born?

RESPONSE:

The most recent available information from the USDA Farm Labor report, for April 2023¹ shows that Hawaii has about 5,000 farmworkers, 4,000 of whom worked 150 days or more in agriculture. Farmworkers in Hawaii averaged 35.9 work hours per week, the fewest of all the regions surveyed by USDA across the United States. The average wage for field and livestock workers (combined) in Hawaii was \$18.43 an hour, compared to the nationwide average of \$16.99 per hour.

It is difficult to know exactly why the wages of farmworkers in Hawaii are higher on average than those across other regions in the United States, but the fact that farmworkers are fully covered under Hawaii's workers' compensation law, with no exceptions, is likely to be a major contributing factor, and Hawaii's state law that requires overtime pay for farmworkers is also likely a very strong contributing factor – and both should be emulated by states without such laws, in order to improve labor standards for farmworkers. However, it should be noted that Hawaii's overtime law is somewhat flawed, especially compared to California's farmworker overtime law which is being phased in to cover all farmworkers after 8 hours per day and 40 hours per week.² Hawaii's law, in contrast, requires overtime pay for farmworkers after 48 hours, but a provision allows many employers to avoid paying it for much of the year; employers are allowed to select 20 weeks per year where they do not have to pay overtime.³ Nevertheless, this is a much stronger protection than in most states which have no overtime coverage for farmworkers, or a higher number of required work hours and other exemptions for employers.

Other factors may also be at play. Hawaii has a history of unionization when it comes to agricultural workers, even if it is no longer the case today. In the past, farmworkers on plantations were represented by the International Longshoremen's and Warehousemen's Union.⁴ One example of the power of Hawaii's organized farmworkers happened in 1974, when, as the NY Times reported, Hawaii's sugar and pineapple workers went on strike, cutting off

¹ <https://downloads.usda.library.cornell.edu/usda-esmis/files/x920fw89s/dj52xk49x/0r968j49d/fmla0523.pdf>

² <https://www.dir.ca.gov/dlse/Overtime-for-Agricultural-Workers-FAQ.html>

³ See for example, this Overtime Map from Farmworker Justice, <https://www.farmworkerjustice.org/overtime-map/>, citing Haw. Rev. Stat. § 387-3(e), available at https://www.capitol.hawaii.gov/hrscurrent/vol07_ch0346-0398/hrs0387/HRS_0387-0003.htm

⁴ <https://www.degruyter.com/document/doi/10.7560/726390-005/html>

access to markets on the mainland – which showed that workers could put significant pressure on producers to improve wages and working conditions.⁵ While not all strikes by Hawaii farmworkers have been successful, the one in 1974 mostly was, resulting in having most of the union’s demands met.⁶

Data from the USCIS H-2A Employer Data Hub shows that there were just over 200 H-2A workers approved to work in Hawaii in fiscal year 2021. It is possible that the very small share of farmworkers in Hawaii who are H-2A workers – who are vulnerable and exploitable by virtue of the H-2A program’s legal framework – also insulates Hawaii’s farm labor market from the downward pressure on wages and working conditions that the H-2A program could lead to.

Although the number of H-2A farmworkers in Hawaii is relatively small, the state has not been insulated from scandals and abuses of the H-2A program. In 2011 EEOC filed its largest ever trafficking suit against Global Horizons,⁷ which brought hundreds of Thai workers to farms in Hawaii in Washington, in what was considered one of the largest human trafficking schemes in U.S. agricultural history at the time. DOJ indicted Global Horizons but later dropped the human trafficking charges in 2012.⁸ WHD obtained a judgment requiring Global Horizons to pay \$347,000 in back wages and penalties, and de-barred them from using the H-2A program for three years.⁹

Labor Protections and Trafficking

Because of the broken immigration system, at least 40 percent of immigrants working in agriculture are undocumented. Further, as you highlighted in your testimony, over 70 percent of labor trafficked victims enter the United States on a lawful visa, with the most common type being an H2-A or H2-B visa.

Preying on these vulnerable individuals, traffickers use threats of deportation to coerce many immigrants into working for lower wages and continuing to work many years after their visas have expired.

Furthermore, private contractors recruit laborers with promises of good-paying jobs, causing the workers to enter illegal debt contracts that the workers have virtually no possibility of repaying. Unlike unauthorized border crossings, forced labor traffickers leverage abuse of an otherwise legal process.

QUESTIONS:

1. In light of these grave circumstances for laborers, would increased labor protections such as overtime pay and improved workplace conditions help decrease abuse of agricultural workers?
2. Would stronger labor protections for agricultural immigrant workers also improve working conditions and pay for American workers throughout the food supply chain?

⁵ <https://www.nytimes.com/1974/04/08/archives/pineapple-workers-begin-haw-all-strike.html>

⁶ <https://www.nytimes.com/1974/04/30/archives/hawaii-sugarpineapple-strike-ends-special-to-the-new-york-times.html>

⁷ <https://www.eeoc.gov/newsroom/eeoc-files-its-largest-farm-worker-human-trafficking-suit-against-global-horizons-farms>

⁸ <https://www.civilbeat.org/2012/07/16529-feds-give-up-on-global-horizons-human-trafficking-case/>

⁹ <https://www.dol.gov/newsroom/releases/whd/whd20110519>

RESPONSE

(1) Yes, increased labor protections for farmworkers could help decrease the abuses that are occurring. One improvement that would make a large impact would be to provide farmworkers with the right to collective bargaining and freedom of association under the National Labor Relations Act (NLRA). Union organizing is always a challenge in the agricultural sector, and the reason for the exclusion of farmworkers from the NLRA is rooted in racist policy. In the 1930s, when key pieces of modern labor law were put into place, the majority of Black workers in the South were either farm laborers or domestic workers. The New Deal Era legislation that guarantees organizing rights and overtime to most private-sector workers—the NLRA and FLSA—specifically excluded domestic workers and farmworkers to appease southern Dixiecrat lawmakers intent on maintaining economic white supremacy and blocking Black-led and multiracial worker organizing.

Today, farmworkers and domestic workers are still excluded from the NLRA and FLSA, the two main laws that protect the right to join and form unions and the right to fair wage and hour standards, respectively. The vast majority of today's farmworkers are immigrants, hailing overwhelmingly from Mexico and Central America.

The NLRA protects workplace democracy by providing employees at private-sector workplaces the fundamental right to seek better working conditions and to designate bargaining representatives without fear of retaliation. A few states, including California and New York, have enacted laws to provide farmworkers with rights similar to those that they would have under the NLRA, but those rights are only enforceable within those states.

If farmworkers had the protections of the NLRA, many would be able to join unions more easily, which would provide significant benefits, including better wages and working conditions, as numerous studies have shown. Even without NLRA protections, passing the PRO Act would also benefit farmworkers and immigrants more broadly, by making it easier to join unions.

Congress should also amend the law to provide farmworkers with the protections they are excluded from under FLSA, especially overtime pay. Some states have implemented overtime pay thresholds for farmworkers, but even many of the states that have some overtime pay coverage for farmworkers have numerous exceptions that in practice leave farmworkers earning much less than the overtime pay required for most workers, which is after 8 hours per day or 40 hours per week (as discussed above in the first question). Requiring overtime pay will also nudge farm owners onto the economic high road. By raising wages, it will reduce turnover for employers who will then save significantly on recruiting and training costs. Where farm owners have the option, it will also nudge them toward more effective use of work time and investments in equipment that increase productivity, making farms more sustainable in the long run.

In addition, most farmworkers are immigrants, and a majority of them either lack an immigration status or have a precarious and temporary immigration status that their employers control, making it nearly impossible in practice for them to assert their workplace rights or to seek out unions and worker rights organizations. As I mentioned in my testimony, the most important reform that Congress could make to help farmworkers and stabilize the farm workforce would be to pass a broad legalization for farmworkers who lack an immigration

status. This would have the effect of granting farmworkers labor rights that they can enforce in practice, and would raise wages, as studies have shown – including those looking at the impact of IRCA, the 1986 legalization that legalized farmworkers and other immigrants. To maximize the benefits, farmworkers should be able to adjust to permanent lawful resident status quickly – rather than the multi-year waits that many legislative proposals often impose. The Farm Workforce Modernization Act, for example, requires farmworkers who are eligible for temporary status and eventually green cards, to first work for four or eight years, depending on how long they have worked in the U.S. as farmworkers, and would require them to work a minimum amount of work hours per year on farms – which would have the effect of giving employers even more power over workers, who will know that farmworkers will be desperate to work enough hours to be eligible to remain on the path to a green card. (This will occur at the same time that the share of the farm workforce comprised of H-2A workers expands rapidly.) Under IRCA, where legalized workers saw wage gains, most immigrants were able to adjust to green cards within a matter of months, not years.

The other way to improve labor standards for farmworkers is to adequately fund US labor standards enforcement agencies. As I discussed in detail in my written testimony, the Labor Department’s Wage and Hour Division – which is primarily tasked with ensuring that all workers, including farmworkers, are paid appropriately and that employers obey wage and hour and other workplace laws – is woefully underfunded and understaffed. With just over 800 inspectors to police a labor market of 165 million people, WHD has an impossible task on its hands. Funding for WHD is at 2006 levels after adjusting for inflation, and funding and staffing should be tripled at least, in order to make a significant impact on protecting worker rights.

(2) Yes, strengthening labor protections for agricultural immigrant workers would also improve working conditions and pay for American workers throughout the food supply chain. Any new protections and benefits provided for agricultural workers would benefit both immigrant and American workers. In addition, improving pay and working conditions in agriculture will attract additional U.S. worker to farms, who would be more likely to view farm jobs as a viable job option if they paid fairly and offered decent and safe working conditions.

Economic Benefits of Humanitarian Programs

When we discuss the economic benefits of immigration, we should also include the economic benefits from our country’s humanitarian protections system. Helping people fleeing for their lives is not only a moral imperative, but it can also help expand the workforce and boost our economy.

Unfortunately the last administration drastically reduced the number of refugees resettled in the United States.

QUESTION:

1. Do you agree that our humanitarian protection system benefits our country’s economy, and can you elaborate on your testimony’s call for expanded humanitarian pathways?

RESPONSE:

(1) Yes, I agree strongly that our humanitarian protection system benefits America's economy. It is true that the previous administration took numerous actions that greatly reduced the number of refugees to the United States. But perhaps more importantly, they also gutted the infrastructure that was in place to process and assist refugees, which has resulted in the Biden administration not being able to come anywhere close to its targets for refugees in any of the fiscal years since they have been in control of federal agencies. To its credit, the Biden administration raised the refugee cap significantly as compared to under the Trump administration, to 125,000 for fiscal years 2022 and 2023, but statistics show that federal agencies did not come close to processing that many green cards for refugees in 2022 and will not come close again in 2023.¹⁰

There are numerous studies that show the economic benefits of admitting refugees, and showing how they play key roles in important industries, including meat packing and transportation – both of which are key to the food supply chain¹¹ – and as both workers and business owners. Studies show that refugees see substantial wage gains once they are established in the United States, and sometimes start businesses at higher rates than U.S.-born residents.¹² A study published just this week shows that refugees pay tens of billions of dollars in taxes each year, and show a particular willingness to make long-term investments in the country through their entrepreneurial ventures.¹³

In fact, there are many examples of refugees becoming business owners, including in the food supply chain. In some areas where refugees have become farmworkers, they have also become important farm owners. In Madison, WI, for example, there are enough Hmong-owned farms for a Hmong Farm Association.¹⁴ News stories like the one of a Syrian family becoming restaurant entrepreneurs in the California Bay Area, are not uncommon.¹⁵

There is less clear research on asylum seekers and the labor market, but the impacts are likely to be similar, in part because both can be employed without restrictions (unlike visa-tied workers in the H-2 programs, who are indentured to employers and cannot easily change jobs), and asylum seekers can be on the path to a green card, which also leads to wage gains for them and other economic benefits. The main difference between refugees and asylum-seekers is that asylum seekers have a statutory six-month waiting period before they can apply for employment authorization – which in practice may take closer to a year because of bureaucratic delays and backlogs – and which delays the ability of asylum seekers to begin working and earning, impacting the economic benefits and delaying the ability of employers to hire people who are ready and willing to work. Asylum seekers also do not get the financial assistance that is provided to refugees. Although refugees do not receive significant sums of assistance, what they

¹⁰ See for example, Migration Policy Institute, “U.S. Refugee Admissions & Refugee Resettlement Ceilings, FY 1980-2023 YTD” [data tool: accessed May 27, 2023].

¹¹ https://www.tent.org/wp-content/uploads/2021/09/TENT_FPI-Refugees-as-Employees-Report.pdf

¹² <https://www.americanprogress.org/article/refugee-integration-in-the-united-states/>

¹³ <https://www.americanimmigrationcouncil.org/research/economic-impact-refugees-america>

¹⁴ <https://www.hmongfarmers.com/>

¹⁵ <https://www.mercurynews.com/2018/11/04/from-refugees-to-entrepreneurs-how-one-family-started-over/>

do receive nevertheless assists them in their ability to quickly become established and integrate into communities and the labor market.

Health Benefits for Immigrant Workers

Immigrant workers tend to work in more dangerous occupations than native-born workers. Many work in agriculture, which is one of the most dangerous professions in the U.S. Yet despite how dangerous their work is and how much our nation's food supply chain depends on them, many immigrants, including lawfully present immigrants, cannot access certain federal benefits that protect their health.

Legislation such as my Lift the Bar Act would eliminate many restrictions preventing lawfully present immigrants from accessing benefits.

QUESTION:

1. You have written about how native-born farmworkers can protect their health by accessing programs like Medicaid. Immigrant workers cannot protect their health in this way. What impact does this have on the resiliency of the food supply chain?

RESPONSE:

(1) With the caveat that I have not written extensively or published original research on access to healthcare for farmworkers, I believe strongly that if immigrant farmworkers could better access medical care, it would improve conditions in the fields and help stabilize the food supply chain. This is truly a no-brainer: if workers are healthy, they will be more productive, leading to better earnings, but also higher profits for their employers. If farmworkers and others in the food supply chain are out because they're sick – they'll be less able to work and produce – and if they can't access medical care when they are sick, they will be unable to work for longer than would otherwise be necessary. And not getting medical care for illnesses jeopardizes the long-term health of workers and their families and the health of the communities they live in. Workers who don't have access to health care will also feel pressure to return to work, especially if they don't have access to paid sick days, which federal law does not require – and may be pressured by their bosses to return to work as soon as possible, especially in situations where there may be a time-sensitive harvest period. If workers return to their workplaces while sick, they risk their own health and well-being, and will jeopardize the safety of their co-workers, and in situations where customers are present (for example grocery stores and restaurants), the health of customers will also be jeopardized.

There are numerous surveys, studies, and reports about the importance of improving health outcomes and access to health care for farmworkers, including a few that are recent, which support these claims about the benefits of improving access to health care for farmworkers. One is a study published last year from the University of California, Merced,¹⁶ and another is from

¹⁶ https://clc.ucmerced.edu/sites/clc.ucmerced.edu/files/page/documents/fvhs_report_2.2.2383.pdf

2021, the COVID-19 Farmworker Study from the California Institute of Rural Studies,¹⁷ which provides evidence that the pandemic amplified existing injustices that have long been endured by farmworkers.

Passing legislation such as the Lift the Bar Act – which would remove the current five-year statutory waiting period for accessing federal public benefits for green card holders - would greatly increase the ability of immigrants to access care and benefits, including Medicaid. Not just green card holders would benefit, but also those with Deferred Action for Childhood Arrivals (DACA), and individuals granted Special Immigrant Juvenile Status (SIJS), and others who are lawfully present.

¹⁷ <https://cirsinc.org/covid-19-farmworker-study/>

RESPONSES OF ADAM LYTCH TO QUESTIONS
SUBMITTED BY SENATOR KLOBUCHAR

From Farm to Table: Immigrant Workers Get the Job Done
Responses to Questions for the Record
Adam Lytch, L&M Farms
June 20, 2023

How have long processing times affected your business's ability to use seasonal immigration programs, including the H-2B and H-2A programs, to meet your business's workforce needs.

L&M Farms employs H-2A workers to plant and harvest a variety of vegetables across multiple states. To submit an H-2A application, we submit separate applications and petitions to three different federal agencies and one state agency within a 60-day period for workers to arrive on time.

Here is how that process plays out:

- The **State Workforce Agency** (SWA) posts our H-2A job order to recruit U.S. workers and inspects our employer-provide housing.
- The **U.S. Department of Labor** (USDOL) certifies that there are no U.S. workers willing, able, and qualified for the job.
- After we submit our USDOL labor certification, the **U.S. Department of Homeland Security** (USDHS) approves our petition for H-2A visas.
- Finally, using our USDHS visa approval, we apply to the **U.S. Department of State** (USDOS), to issue visas to nonimmigrant workers.

Any hiccup along the way can result in a processing delay which prevents H-2A workers from arriving at our farm on time. Even a one-week delay can have devastating effects, as perishable crops cannot wait on administrative delays to be harvested.

In December of 2021, our H-2A application had been approved by every agency, and we were on track to begin harvesting on time. The state department only needed to issue the visas to the individuals we had recruited to work for us. That's when we found out that the state department denied issuing the visas, with no explanation why. The workers we were scheduled to receive ended up being delayed nine days at the consulate after their scheduled appointments. Besides the processing delays we also had crops that were maturing ahead of schedule. With no option to receive the workers early and with the delays in processing the visas, in total, we lost nearly 160 acres of broccoli and cabbage in the field. The total financial loss for the crops was a little over \$600,000. In addition to the loss of crops in the field, we also had over \$35,000 of costs related to per diem and hotel expenses in Monterrey while the workers waited past the date of their scheduled interviews for visas.

The state department told us that the visa application was under an administrative hold for additional processing. The state department is authorized by section 221(g) of the Immigration and Nationality Act to hold an application for further processing but often does so without communicating any details to the employer. The employer is therefore left without any means to correct an application. It is very much like a black hole. Some H-2A employers have learned that the state department uses this opportunity to verify that an employer still has a job available for the H-2A worker, which seems unnecessary given the labor certification process we'd just gone through.

There are plenty of opportunities for delay throughout the rest of the process, too. Sometimes, a SWA may not inspect the employer-provided housing in time, delaying USDOL from issuing the labor

certification. If USDOL finds a deficiency in the application, they essentially consider that the application does not have to follow its prescribed timeline. Though there are legitimate reasons for USDOL to issue a notice of deficiency, a deficiency is just as often raised because the analyst does not understand the program or the agency's own rules.

For U.S. Citizenship and Immigration Services (USCIS), a part of USDHS, the greatest cause of delay is how the agency receives and transmits communications. All visa petitions are submitted to USCIS by mail, and all notifications from USCIS are transmitted by mail. If a petition contains any small error, it takes several days for an applicant to receive notice of it. Though we do get an electronic notification when our visa petitions are approved, we must wait for the actual approval to be received in the mail, which affects how quickly we can schedule interviews with the state department.

The H-2A program is fraught with red tape that presents any number of issues for delay. One small error can mean that farmers like me don't have a workforce on time, meaning the fruits and vegetables that we produce rot in the field.

How would decreasing processing times for applications for visas help small business owners, like yourself, in areas facing workforce shortages?

The H-2A application process already operates on an expedited timeline. When the reviewing agencies stick to the timeline, I can hire workers to start on time. But there are too many opportunities for delay. When an agency fails to approve a visa application on time, the burden of that failure falls on farmers like me. Despite having gone through great time and expense, we are left with no workforce – a workforce we were guaranteed.

These improvements should not take an act of Congress. Many processing delays could be improved by allowing electronic processing (USCIS), training, or simple communication with the employer. Certainly, Congress should ensure that these agencies have the staff and resources needed to fulfill these functions, but these agencies already have so many efficiencies available that they are not using.

Ultimately though, Congress is responsible for the H-2A program and the agency actions which contribute to the larger labor issue that agriculture is facing. Congress's decades-long inaction on this issue has allowed these agencies to operate in a vacuum, creating a bureaucratic monster that farmers like me are supposed to navigate. This is why it is important for Congress to quickly pass comprehensive agriculture labor reform, granting full program access to farmers and agricultural employers and modernizing the administration of the H-2A program.

RESPONSES OF DIANA TELLEFSON TORRES TO
 QUESTIONS SUBMITTED BY SENATOR HIRONO

QUESTIONS FOR MS. TORRES

Importance of Families to Food Supply

Family unity and economic success are the same thing for many immigrants. Their families provide support, help in finding jobs, and even directly support many farm workers, as caretakers provide unpaid work to allow the immigrant to work long hours in the fields.

If we are looking to strengthen and reform our farm worker visa system, farm workers' families must be included in the conversation.

QUESTION:

1. Ms. Torres, in your statement you included testimony from several workers who talked about how important a pathway to citizenship would be for them and their families. Can you talk more about how important family members are to many farm workers and how the farm workers rely on their families?

There are an estimated 2.4 million farm workers in the United States. According to the most recent National Agricultural Workers Survey conducted by the U.S. Department of Labor, more than half of surveyed workers were married and half were parents.

The average farm worker family has 1 to 2 children under the age of 18 and the average annual income for farm worker families is between \$25,000 to \$29,999. An estimated 20% of farm workers have family incomes below the federal poverty level.¹ Due to a lack of affordable or accessible care, family members are often relied on to provide child care or care for disabled or elderly individuals in the household.

Furthermore, farm workers may rely on their family members to provide translations when accessing health care and other services. More than half of farm workers are limited English proficient.² A growing number of farm workers are from indigenous communities in Mexico and Guatemala and are not proficient in Spanish. Workers often rely on English proficient family members, often children, to provide translations, especially in indigenous languages where there are even fewer interpreters available.

Farm worker women, in particular, are relied upon in the fields and at home. Thirty-four percent of farm workers are women. In addition to their work in the fields and their contribution to the household income, they cook meals for their families, provide care for their children and other family members, and manage the household.

It is also important to note, the growth of the H-2A program has destabilized farm worker family in numerous ways. Unlike the domestic work force that is made up of thirty-four percent of farm worker women, over 95% of H-2A workers that are recruited to work as seasonal-temporary worker are men. In addition, an H-2A worker's spouse and unmarried children under the age of twenty-one may seek an H-4 visa but these visa requests on behalf of H-2A workers are

¹ 2019-2020 National Agricultural Workers Survey

² *IBID*

extremely rare, resulting in family separation for several months at a time. As a result, immigrant farm workers miss out on many family milestones, celebrations, funerals, and key moments in their family life as a result of trying to provide a better life for their families.

In many communities, H-2A workers have displaced local workers. Despite the regulatory protections in place, discrimination against U.S. workers is rampant. One common form of discrimination is the inclusion of restrictive experience requirements, lifting requirements, and productivity standards in job orders.³ These restrictions most often discriminate against farm working women. A recent example of the displacement of female workers for H-2A workers occurred at Ostrom Mushroom Farm in Sunnyside, WA. An investigation and lawsuit by the Attorney General's office found that in 2022, the farm fired its largely local female workforce and replaced them with male H-2A workers. The workers were replaced with 65 H-2A workers, 63 of whom were male, and employed only 50 local workers, reducing the female workforce by over 60%.⁴ The displacement of local workers by H-2A workers has a rippling effect in their homes and communities. It reduces the income of already low-wage farm worker families, particularly farm working women. Displaced farm workers may leave farm work entirely or may migrate to other areas of the country where there may be more opportunities.

³ The requirements can be simultaneously specific and broad. We have seen requirements such as: lifting ability of 75 pounds or more, the ability to operate agricultural equipment "with or without direction," understanding and operating GPS systems, the ability to work on holidays, and the ability to work in 100+ degree temperatures "with or without reasonable accommodations."

⁴ WA State Office of Attorney General, Press Release – Sunnyside mushroom farm will pay \$3.4 million for violating civil rights of its workers, May 17, 2023, <https://www.atg.wa.gov/news/news-releases/sunnyside-mushroom-farm-will-pay-34-million-violating-civil-rights-its-workers>.

Questions for the Record from Senator Tillis
for Diana Tellefson Torres

Senate Committee on the Judiciary Hearing

“From Farm to Table: Immigrant Workers Get the Job Done”

1. On June 10, 2022, the U.S. Department of Agriculture (USDA) announced¹ a pilot program to “Invest up to \$65 Million to Strengthen Food Supply Chain, Reduce Irregular Migration, and Improve Working Conditions for Farmworkers.” In that announcement, it was stated that USDA will “partner with the United Farm Workers of America (UFW) through a technical assistance cooperative agreement to inform USDA of the challenges faced by agricultural workers and to inform development of the pilot program.”
 - What involvement have you, or your employer the UFW Foundation, had in the development and implementation of this program?

Neither the UFW Foundation nor I have any involvement in the implementation of this program. A representative of the UFW Foundation spent an hour providing information about UFW Foundation perspectives to the UFW as part of the UFW’s work for USDA to interview dozens of agricultural employers and organizations that expressed an interest in sharing input about the pilot program.

- Will UFW or the UFW Foundation receive funding from the federal government for its technical assistance efforts and what percentage will UFW or the UFW Foundation be able to retain for salaries and expenses?

The UFW Foundation has not received nor will the UFW Foundation receive any funding from the Federal government for this pilot program. The United Farm Workers will receive less than three tenths of 1 percent of the total anticipated USDA pilot grant. The amount the UFW receives will cover expenses and salaries incurred by the UFW in service of technical assistance for this pilot program.

2. On October 4, 2022, USDA announced² that the UFW Foundation was awarded \$97,836,293 to administer the Fiscal Year 2023 Farm and Food Workers Relief Grant Program.
 - What percentage of this funding will the UFW Foundation be able to retain for salaries and expenses?

As defined by the grant program guidelines, all of the non-profit organizations that have been awarded a grant to implement the Farm and Food Workers Relief (FFWR) Program by the US Department of Agriculture must disseminate at least 80% of the funds in disaster relief payments to farm and/or food workers. In order to disseminate FFWR relief payments to farm workers in

¹ <https://www.usda.gov/media/press-releases/2022/06/10/us-department-agriculture-invest-65-million-pilot-program>

² https://www.ams.usda.gov/sites/default/files/media/2023_FFWR_DescriptionOfFundedProjects.pdf

50 states and 3 US territories and remain in compliance with the grant, the UFW Foundation can use up to 20% of the funds to cover salaries and expenses incurred by the UFW Foundation and its nine subrecipient nonprofit organizations to execute the grant.

- To date, how much of the \$97,836,293 that the UFW Foundation was awarded by USDA has been distributed to farm and food workers?

As of the week of June 19, 2023, the UFW Foundation has distributed \$22,415,400 to farm workers.

3. What legal protections and employment standards are guaranteed under the H-2A visa program that are not guaranteed under the Migrant and Seasonal Agricultural Worker Protection Act (MSPA)?

The H-2A program and the Migrant Agricultural Seasonal Worker Protection Act (MSPA) both protect the rights of agricultural workers in the United States. However, there are some key differences in the legal protections afforded to farmworkers under the laws.

The H-2A visa program has no numerical cap on the number of visas. *The lack of a numerical cap on the H-2A visa program means employers can hire an unlimited number of workers on the H-2A visa program as long as employers meet the program requirements. Because there is no numerical cap on the H-2A visa program, Congress sought to protect the jobs, wages, and working conditions of U.S. farmworkers by implementing regulations to ensure that there is no "adverse effect" on domestic workers. The protections guaranteed for workers in the H-2A visa program that are not guaranteed under the Migrant and Seasonal Protection Act are set forth below. It is important to recognize that none of these protections can be enforced by the workers themselves:*

- ***Wage protections:*** *H-2A employers must provide certain wage protections. For example, H-2A workers must be paid at least the highest of the following: the adverse effect wage rate (AEWR); the prevailing wage; the collective bargaining rate; or federal or state minimum wage. The Adverse Effect Wage Rate specific to each region of the country is determined by a survey conducted by USDA of agricultural employers within each region of the pay the employers are providing at the time of the survey. Thus, the AEWR for any given year is derived from the average wage paid in the region the previous year.*
- ***Housing protections:*** *H-2A employers are required to provide housing that is free of charge and meets certain standards.*
- ***Transportation protections:*** *H-2A employers are required to provide transportation for their H-2A workers to and from the country of origin and the worksite.*
- ***Meal Requirements:*** *H-2A employers are required to provide H-2A workers with three meals a day or provide free and convenient cooking facilities.*
- ***Tool Requirements:*** *H-2A employers are required to provide tools and other equipment to H-2A guest workers at no cost.*

- **3/4 Guarantee:** H-2A employers must guarantee that H-2A guest workers will receive employment (or the equivalent in pay) for at least a total number of hours equal to at least 75% of the workdays in the contract period.
- **Workers' Compensation Insurance Requirement:** Employers must provide workers compensation insurance at no charge to H-2A guest workers.
- **Fifty percent (50%) Rule:** In addition, employers who employ H-2A workers are required to provide employment to any qualified, eligible U.S. worker who applies for the job opportunity until 50% of the period of the work contract has elapsed.
- **Domestic workers in corresponding employment** are entitled to all of the same protections, although the transportation and housing requirements are limited to US workers who are not within normal commuting distance.

Legal status tied to employment at single employer- Importantly, the legal status of H-2A workers is tied to their employment with the petitioning employer, which means they cannot seek work elsewhere or transfer to another employer during the duration of their visa. This creates a power imbalance in the employment relationship, as H-2A workers may be afraid to speak out against or object to oppressive or unlawful working conditions for fear of retaliation, such as being fired or deported and put on a "banned list" from future employment.

Financial incentives from government for employers of H-2A visa program – In addition, H-2A employers also receive a tax benefit for hiring H-2A workers. The Tax Cuts and Jobs Act of 2017 included a provision that allows employers who hire H-2A workers to claim a credit against their payroll taxes. The credit is equal to 35% of the wages paid to H-2A workers, up to a maximum of \$1,000 per worker per year.

Laws on the books are not the laws in the fields - Unfortunately, current legal protections are inadequate to protect either domestic or H-2A workers. The Department of Labor (DOL) lacks the resources to enforce the regulations, there is no Federally protected right to join a union or to engage in concerted activity, and there is no private right of action, so farmworkers face difficulty seeking legal compliance. United States law cannot enforce the payment of illegal recruitment fees outside the United States – creating debt for workers in the H-2A visa program when they arrive in the United States and keeping U.S. employers from knowing which labor recruiters are ethical. Additionally, the high number of farm labor contractors, recruiters and other labor intermediaries make it difficult for farmworkers to know who is responsible for enforcing their rights – and difficult for government enforcement to be effective. Finally, the poverty and financial instability of many farmworkers, as well as the vulnerable immigration status of both H-2A workers and many domestic farmworkers, make them reluctant to challenge employers who violate their rights.

4. With the exception of a private right of action against employers, what protections are guaranteed under MSPA that are not guaranteed under the H-2A program?

In addition to a private right of action against employers that all other workers in the United States have, there are some legal protections that are available under the MSPA that are not available under the H-2A program, such as:

- **Whistleblower protections:** MSPA workers who report violations of the law to the government are protected from retaliation.
- **Working arrangements:** Employers and farm labor contractors who hire migrant and seasonal agricultural workers under the MSPA must provide workers with a written contract that accurately reflects the terms of employment, safe and sanitary housing, transportation to and from the worksite, the opportunity to earn at least the prevailing wage, and the opportunity to file a complaint with the Department of Labor if their rights are violated. Employers and farm labor contractors who violate these requirements may be subject to civil penalties or criminal prosecution.
- **Definition of Joint employer:** The definition of joint employer under the Migrant and Seasonal Agricultural Worker Protection Act (MSPA) is the same as the definition under the Fair Labor Standards Act (FLSA) that outlines labor protections for non-agricultural workers.
- **Transportation requirements:** Employers and farm labor contractors who hire migrant and seasonal agricultural workers under the MSPA must ensure that workers are transported safely and in a humane manner. This includes ensuring that vehicles are in good condition, drivers have a valid driver's license, workers are seated in a safe and comfortable manner, and workers are provided with adequate ventilation and temperature control. Employers and farm labor contractors who fail to comply with these requirements may be subject to civil penalties or criminal prosecution.

AFL-CIO

STATEMENT FOR THE RECORD

Senate Judiciary Committee Hearing
Farm to Table: Immigrant Workers Get the Job Done
Wednesday, May 31, 2023

The AFL-CIO is a democratic federation of 60 affiliated unions representing more than 12.5 million workers across all sectors of our economy. Our members work in every state in the country and they come from every region of the world. We represent working people with all types of immigration status, including undocumented workers, DACA and TPS holders, non-immigrant visa beneficiaries, legal permanent residents, refugees, and citizens. Together, we work to ensure fairness in the workplace and equal and enforceable rights for all working people, including those in our food chain.

As the federal government considers the acute challenges facing our workforce today, it is essential to acknowledge the core, underlying issues that prevent people from taking or keeping jobs in many industries. Looking to immigration policy alone to meet purported labor shortages without addressing pressing concerns around worker rights and labor standards risks perpetuating unsafe and unjust conditions in workplaces across the country. Unions stand ready to work with lawmakers to advance real solutions that will support a diverse, sustainable, well trained, and empowered workforce. To do that, we must commit to fix the systems that are failing working people, of which our immigration system is one of many.

This statement will highlight the unjust realities workers face in our increasingly precarious global economy and explain why we urge Congress to focus on five concrete recommendations.

Real solutions:

- #1 – Strengthen and enforce our labor laws and standards***
- #2 – Regularize the status of our current immigrant workforce***
- #3 – Expand permanent humanitarian pathways***
- #4 – Reform abusive temporary work visa programs***
- #5 – Support a robust role for unions***

Overview

For our economy to grow, our workforce must grow. In a historically tight labor market, and given current demographic trends, much of the new workforce growth will need to come through immigration. But how people come matters. That is why a more just immigration system must be designed to meet the real needs of people, rather than the purported needs of employers.

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

Successive waves of immigrants and refugees have always helped to build, serve and feed our nation. Today is no different. Far from posing a threat, newly arriving migrants can make valuable contributions to our society when afforded the proper supports to allow them to effectively and safely integrate into our communities.

The labor movement is committed to welcoming more refugees, asylum seekers and other forced migrants and helping them to integrate into the workforce with good union jobs. That is how we use immigration policy to expand the workforce while also ensuring full rights and protections, not only for migrants, but for the existing workforce. By contrast, guestworker programs as currently structured pose a real threat. Expanding this approach delivers an on-demand, disposable workforce that is separated from their families and denied political rights—in other words, totally disenfranchised. This is not a future of work we can or should accept.

We hear a lot about a labor shortage these days, but far too little about the crisis caused by the shortage of good jobs. Workers are no longer willing to risk their lives to work for meager wages without childcare support, paid leave or basic safety protections. Around the country, workers are taking collective action in record numbers to demand a fair share of the wealth we help to create, and for the first time in decades, working people are seeing significant gains in pay and standards for work that has been chronically undervalued.

Employment-based immigration proposals must be carefully considered within this broader context. Any policy that creates tiered rights in our labor market is unjust and bad for workers. This is why we cannot accept a subclass of millions of exploitable undocumented workers and must fight for a path to citizenship for all. It is also why we must not allow expansion of immigration to be driven solely by corporate interest. When workers come to our country with their status under the control of employers, this constrains their rights and agency, making them vulnerable to exploitation in much the same way as when they lack status entirely.

If migration pathways are expanded in ways that fuel further occupational segregation and suppression of rights and standards, workers and their unions will rightly object. Now is the time for policy makers to soundly reject the low wage immigration approaches that have fueled discrimination, exploitation and excess corporate profits for long enough. Instead, we need high road, value-added approaches that are fair for migrants and the existing workforce alike. Such approaches exist, and are outlined in more detail below.

Real Solution #1 – Strengthen and Enforce our Labor Laws and Standards

All workers in our labor force need equal and enforceable rights. It is clear that we are in a historically tight labor market, but it is also clear that many industries are churning through workers and failing to retain them due to low pay and unfair, unsafe and unacceptable working conditions. Simply put, we need better, safer jobs that ensure full rights and pay family-sustaining wages. To support this, Congress should:

Pass the PRO Act (118th: S.567, H.R.20). Congress must pass legislation to strengthen the rights of all workers to form or join a union and engage in collective bargaining and protected concerted activity to improve their working conditions.

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Every worker deserves a voice on the job, but a collective bargaining agreement disproportionately helps those who need it most. Unions underpinned the growth of the middle class, and even today a unionized worker makes 10% more on average than comparable non-union worker, and has better access to many benefits. Comparatively, a union job helps women more than men, black workers more than white, and Latinas most of all. Indeed, a union contract may be the single best tool we have to close racial and gender gaps in pay and conditions. Removing the barriers to union organizing is particularly important for those, like immigrants, who have been marginalized and structurally excluded in our economy.

Pass the POWER Act (118th: H.R. 1828). If we want to combat rampant wage theft, reduce death and injury on the job, and halt the resurgent abuse of child labor in the 21st century, we need workers to be willing to report violations and speak up when they see problems. And when immigrant workers find the courage to take action that helps enforce our labor laws, we must protect them.

For too long, employers have used immigration threats as a tool to scare workers into silence, thus allowing often egregious abuses to persist unchecked. These abuses, in turn, drive down wages and conditions throughout the industries in which they occur. Now, thanks to new procedures the POWER Act would support, instead of being at risk when they speak up, workers will be protected when they speak up—in fact, they will be protected *because* they speak up, and in so doing, help to keep all of us safe on the job.

Importantly, this legislation will also help to ensure that workers' rights are not chilled by employer threats to withdraw employment-based visa sponsorship.

Promote living wages and quality job creation. To create an environment in which we can attract and retain workers and continue to welcome and effectively integrate more immigrants and refugees, we must commit to expanding access to dignified and meaningful work for all. Creating more precarious, low wage jobs is not going to cut it. We must raise the federal minimum wage and find innovative ways to revitalize communities that have lost their economic base, strengthen our public services and safety net, and commit to building and making things in our country again. The pandemic helped raise awareness of the essential nature of many service sector and seasonal jobs that have historically been undervalued, so we must see substantial elevation in wages and working conditions there as well.

Shift enforcement priorities to protect workers, rather than punish migrants. It is striking—and tragic—that decades of enforcement-only immigration approaches have prioritized the detention and deportation migrant families over the protection of workers. Now is the time to strengthen and utilize mechanisms to protect all working people, regardless of immigration status. We call for a shift of emphasis away from viewing migrants as criminals, and toward holding employers accountable for criminal violations of worker rights. The United States currently spends twelve times as much on immigration enforcement as it does on labor standards enforcement, with similarly disproportionate staffing. Lawmakers should rebalance this investment to ensure adequate oversight of labor migration programs and protect migrant workers who take action to promote safe and fair workplaces.

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Real Solution #2 – Regularize the Status of our Current Immigrant Workforce

There is no way to accurately assess workforce need until we regularize the status of those who have been forced to work in the shadow economy, often for decades. The right way to use immigration policy to lift wages and standards is by expanding rights and protections to as many workers as possible. Here's how we lift the floor:

Enact a broad and inclusive pathway to citizenship for all those who live and work here.

Nearly four decades of Congressional failure to pass meaningful immigration reforms has created a near permanent subclass of millions of exploitable workers in our country. That is unacceptable, and it is how immigration policy becomes cheap labor policy.

From the perspective of the labor movement, the right way to fix this prolonged injustice is to enact a path to citizenship for all those whose labor helps our country to prosper. The fight for a broad pathway to citizenship has proven a long one, but it remains our North Star.

Pass the DREAM and PROMISE Act (117th: H.R. 6). As a down payment on that broader goal, we support an immediate path to permanence for DACA and TPS holders whose status was threatened by the Trump administration, and who play such a vital role in our workforce, our communities, and our unions. In the Senate, we are calling for aligned passage of the DREAM (118th: S. 365) and SECURE (118th: S. 879) Acts.

Urge the administration to make expansive use of the TPS statute. Only Congress can deliver the permanent protections workers expect and deserve. However, we must not allow Congressional gridlock to prevent incremental progress through other lawful means. Unions have consistently called for executive action to protect workers while we continue to push for legislative solutions.

Congress gave the President the power to designate Temporary Protected Status for countries that have been destabilized by conflict and disasters. The Biden administration has been using this tool in helpful ways, and we urge them to do still more. If DHS were to designate or redesignate all the countries that meet the statutory conditions, millions more people could become eligible for work permits. Given the current workforce realities, that would have far reaching benefit, particularly as we prepare to implement the important new federal infrastructure investments. And securing temporary status for more people now will provide working families with a measure of stability while we keep up the fight for permanence.

Close gaps in our social safety net. Many of the policy changes we need to support our current immigrant workforce are not directly about immigration reform. If we want people to be able to live and work safely, that means they need access to quality healthcare and education, including higher education. They need driver's licenses and the safety net of unemployment insurance for rough times. Many of these decisions are made at the state level, where we see both progress and shameful attacks, up to and including recent efforts to rollback basic child labor protections.

Pass the Keep STEM Talent Act (117th: S. 3638, H.R. 5924). Foreign-born, American-trained professionals need a high-road, empowered pathway to permanent status after completing their training.

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Real Solution #3 – Expand Permanent Humanitarian Pathways

In the context of escalating mass human displacement, the imperative to increase resettlement commitment and capacity is real. Indeed, now is the time to radically center and scale up humanitarian pathways. By welcoming more refugees, asylum seekers and climate migrants and effectively integrating them into the workforce, we can also promote economic growth. But workers need the right kind of growth—we need worker-centered growth that generates shared prosperity and closes gaps in income and opportunity, rather than growth that accelerates the concentration of wealth and power in the hands of few. We urge lawmakers to:

Restore and enhance asylum processing. The United States has obligations under national and international law to ensure that people will not be returned to dangerous situations—obligations the government cannot meet through expedited legal proceedings and removals. Our laws require a fair hearing for asylum seekers regardless of their country of origin. The AFL-CIO rejects any proposed changes that would limit due process for vulnerable populations at the border or run counter to established U.S. and international norms regarding the detainment of children and refugees.

Rather than limiting access, policymakers should explore possibilities to expand criteria for asylum to include victims of gender-based violence, gang violence, and climate change. A pilot regional program for climate migrants would be an important step forward.

Set ambitious refugee resettlement numbers, including a target for the region. Amidst unprecedented levels of global displacement, resettlement needs are enormous and ever expanding. After nearly shutting down our refugee program in the previous administration, the U.S. should renew our commitment as a world leader in resettlement. Doing so would have the added benefit of helping to expand the workforce, including in industries within the food chain that have historically relied on refugee workers.

Do not allow immigrant parole programs to replicate the abuses of guestworker programs. In recent years, the government has increasingly relied on parole programs to help meet pressing human need and respond to world events. Unions support and sympathize with these motivations. However, as with any new migration pathways, we want to ensure that adequate guardrails are in place to prevent exploitation, and we also have concerns about the path forward for hundreds of thousands of people who are being admitted to our country and our workforce on a temporary basis. The limited duration of the programs, the lack of a clear process for renewal, and the possibility of termination by future administrations requires us to think proactively now about how to protect the lives and livelihoods of parolees in the near future.

In particular, we are concerned that the structure of parole programs creates a potential for abuse by those seeking to exploit its sponsorship aspect.¹ Such concerns are heightened by new proposals to more explicitly use parole as a tool to address purported labor shortages in critical industries. Such proposals generate many important questions that must be carefully considered before creating new temporary pathways with potentially profound long-term

¹ <https://www.nbcnews.com/news/latino/scammers-target-hopeful-applicants-bidens-humanitarian-parole-program-rcna68694>

workforce ramifications. Unions expect to be consulted in such discussions, and continue to call on lawmakers to focus on improving and expanding permanent humanitarian pathways that would give migrant families the stability necessary to live and work in our country safely and with dignity.

Real Solution #4 – Reform Abusive Temporary Work Visa Programs

As workers, through collective action, begin to make long overdue gains in pay and conditions, it is critical that lawmakers think carefully about how to respond to the employer clamor to use immigration policy to expand the workforce. To spur just and inclusive growth, we must ensure that any new workers joining our labor force do so with full rights and protections. That cannot happen through the current model of abusive temporary work visa programs.

Rewarding industries that churn through workers with access to a ready pool of temporary nonimmigrant workers with constrained rights could perpetuate low pay and abusive conditions in ways that turn temporary shortages into structural shortages. Instead, we urge Congress to:

Fundamentally reform work visa programs. 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. Unions have outlined concrete recommendations for reforms that will promote good jobs, worker empowerment, employer accountability, fair recruitment, and racial and gender equity.

The need for more robust worker protections across our alphabet soup of work visa programs is clear, as is the need to ensure basic labor rights and standards within the exchange programs overseen by the Department of State. The AFL-CIO has endorsed the Seasonal Worker Solidarity Act (117th: H.R. 7549) and the H-1B and L-1 Visa Reform Act (118th: S. 979), as models of the types of reforms that are needed to protect all workers in relevant industries. In addition, unions and business groups have been sitting down together to develop a package of H-2B reforms that would make much needed improvements.

Unless and until fundamental reforms are implemented, it is important to highlight the growing workforce within these programs are not, in fact, *immigrants*, but rather, by definition, *nonimmigrants* with severely constrained rights and little to no ability to stay permanently. While this distinction may appear technical, it lies at the heart of the injustices in the structure of these programs and is a primary why reason unions object to increasing our reliance on these flawed pathways to meet basic workforce needs.

Regulate foreign labor recruiters. The international labor recruitment industry that fuels work visa programs is rife with abuse and should be regulated through mandatory, enforceable mechanisms rather than voluntary programs, with a view to eliminating discriminatory and exploitative practices. The U.S. government should adhere to the ILO's "General Principles and Operational Guidelines on Fair Recruitment". In particular, unions are calling for the creation of an employer and recruiter registry system, and an absolute ban on charging workers recruitment or breach fees, which can lead to debt bondage and forced labor.

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

Reduce dependency on temporary labor with severely constrained rights. If we continue on our current path, the challenge of meeting workforce needs will deepen, because instead of expanding permanent immigration and resettlement pathways, we are seeing a major expansion of temporary work visa programs. This risks turning temporary shortages into structural shortages. How?

Guestworker programs allow people to come here at the behest of employers and work, usually for low pay—but not to stay. Workers in these visa programs are generally separated from their families, so that means no next generation growing up in our communities to help bend the population curve. Relying on the unfettered expansion of temporary labor migration is a short-term fix that will result in bigger problems down the road as we fail to build and invest the future of our workforce.

As a result, industries will develop greater and greater dependency on these visa schemes that disempower and disenfranchise workers and shrink the pool of trained permanent employees in our workforce. That is not a future of work we want to see, which is why we push instead to expand permanent migration pathways and improve efforts to successfully integrate newly arriving refugees and asylum seekers into communities and industries where workers are needed.

Real Solution #5 – Support a Robust Role for Unions

Like it was for generations before, the labor movement is a natural home for immigrants and refugees struggling to achieve economic security and social justice. Everyone who has a job should have the chance to join a union, particularly those who are at the greatest risk of abuse when seeking to navigate workplace issues on their own. With union membership comes representation at work, the added protection of a collective bargaining agreement, increased training opportunities, and a means to promote social cohesion with the existing workforce.

A value-added immigration framework requires labor rights that are available to all workers precisely for the task of building worker solidarity and worker power. Workers and their unions are a critical axis of social democracy and when we are weakened, it imperils other core democratic institutions. Our rights to a ballot, a union, and a just path to migrate are linked, and we must purposefully advance them together. We urge lawmakers to:

Interrogate labor shortages claims. In a tight labor market, employer claims of worker shortages may gain more surface validity, but they often obscure important realities. Unions across all sectors of the economy have deep expertise regarding the workforce needs and realities in their industries², as well as clear recommendations on how best to address them. We implore lawmakers to engage with unions before accepting one-sided assessments of the labor market and proposing policy responses that could entrench structural problems.

² See, for example: <https://www.aft.org/teacher-shortage-task-force-report>, <https://www.aft.org/healthcare/healthcare-staffing-shortage-task-force-report>, and <https://www.nationalnursesunited.org/protecting-our-front-line-report>

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Promote workforce development and training. Relying on immigration alone to meet routine staffing needs is neither sustainable nor ethical. Permanent immigration pathways may be a part of the staffing formula, but we need a broader, inclusive, grow-your-own approach that aligns with efforts to improve job quality and worker retention.

The federal government should recognize that registered apprenticeships, and other union-management training programs, are among the most effective vehicles we have to prepare a diverse, skilled workforce for the future. Extending work authorization to more members of our current workforce will open up such skilled training pathways and remove barriers that prevent many immigrants from working on federally funded projects.

Promote effective workforce integration of newcomers. We have seen many cautionary tales from our own country and around the world of what can happen when policymakers fail to plan effectively for community and workforce integration of newly arriving migrant populations. The potential for increased levels of immigration and refugee resettlement to fuel right wing populist backlash is real and foreseeable, so we must think not just about how many people will come, but where they will live, what they will do, and how to foster authentic social bonds that help to bridge divides in workplaces and communities. For our part, unions are committed to welcoming more immigrants, refugees and asylum-seekers into our communities and helping them integrate into the workforce safely, into good union jobs.

Require community benefits and workforce agreements on federally funded projects. As vitally important new federal investments roll out, it is essential that we harness those resources to create good, safe jobs and inclusive opportunities. For example, new revelations continue to unfold regarding the extent of worker abuses in the auto manufacturing sector in the South, including exploitation of guestworkers, incarcerated workers, undocumented workers, and child migrants. Absent interventions to improve these deplorable conditions, critical federal investments in domestic electric vehicle production could perpetuate child labor and other egregious violations. Requiring community benefits agreements that include clear commitments on labor standards, workers' rights and workforce development pathways on such projects will ensure that companies that seek to access federal incentives sit down with unions and community organizations to promote fair and equitable workplaces, high quality family-supporting jobs, and the ability for employers to attract and retain a diverse, skilled and stable 21st century workforce.

Conclusion

Workers are ready to help shape a just transition for our economy, and we believe that increased levels of immigration can be part of that vision. However, when immigration policies are structured solely to serve corporate interests, workers of all backgrounds lose, and the task to build support for welcoming policies becomes harder. In order to meet the humanitarian imperatives of our time, we must reject low wage immigration policy and chart a course forward that truly does respect and protect all working families.

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The fact that increased immigration grows GDP and creates wealth—as many advocates taut—does not mean that those gains are shared evenly or fairly. To address pernicious injustices in our economy, we must pursue a policy agenda that centers equity, workers' rights and labor standards.

Adding more workers alone will not resolve our current workforce staffing issues. Unless and until employers address deplorable working conditions, inadequate compensation, and lack of basic dignity and respect on the job, they will be unable to attract and train new workers quickly enough to replace those who will continue to leave.

Unions have outlined a set of concrete and practical solutions to address these urgent structural issues. Let's work together to reduce the shortage of good jobs in our country and build an immigration system that ensures equal and enforceable rights for all workers, regardless of where we were born. It's time for real solutions.

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ELIZABETH H. SHULER
PRESIDENT

FREDRICK D. REDMOND
SECRETARY-TREASURER



**Statement for the Record of Alianza Nacional de Campesinas, Inc. for U.S. Senate
Judiciary Committee
“Farm to Table: Immigrant Workers Get the Job Done”
May 31, 2023**

Alianza Nacional de Campesinas, Inc, (“Alianza”), is a farmworker womens’ umbrella organization with 15 member organizations nationwide, representing workers and their families in 20 states. The mission of Alianza is to unify the struggle and promote leadership of farmworker women in a national movement to create major visibility and advocate for changes that defend their human and civil rights. Our work is centered in four critical policy areas - ending gender-based violence, protecting and ensuring worker rights, promoting humane immigration reform, and advocating for environmental and pesticide justice.

Alianza represents approximately 700,000 farmworker women and girls, or *campesinas*, some as young as 10 – who work in agricultural fields, orchards, nurseries, packing houses, and dairies across the United States. Despite the indispensable work of planting, picking, and packing fruits and vegetables we consume daily, these women toil in the shadows of society in isolated locations, which are out of sight and out of mind for most policy makers. Campesinas across the country have consistently helped feed our communities through their work and volunteer distribution efforts, especially during emergencies like the COVID-19 Pandemic and widespread weather disasters.

Still, campesinas do more than just risk their lives feeding our country; they also

have been organizing for decades on a local and national level to share knowledge and recommendations to policy makers and federal and state agencies to advocate for worker centered changes. Campesinas are also becoming increasingly involved in environmentally sustainable farming, with many already engaging as small or beginner farmers, bringing their ancestral farming methods and cultural practices into their work, their small-scale operations, and community gardens where they participate.¹ Despite these tremendous contributions to our economy and their recognition as “essential workers,” farmworker women are still among the most exploited, undervalued, and least protected workers in our country. Regardless of the region or industry, farmworker communities are united in their resilience to bring forth their collective stories as a tool for reform while they continue to experience the daily effects of flawed environmental, immigration, and labor and employment policies.

Farmworker Personal Remarks

Farmworker families are subjected to difficult working conditions and risks in order to do their jobs and feed our nation. Josefina, a farmworker from Oregon, shares her experience:

“Agriculture is one of the most dangerous but also essential employment sectors. As a community, we work in the agricultural field and run risks when working because of the pesticides. There are many different pesticides, with different names and uses, and with different risks. Many of our employers do not provide us with any kind of protective

¹ Alianza Nacional de Campesinas, along with partner organizations Líderes Campesinas, La Mujer Obrera, and Rural Coalition, Mujeres Divinas, and Mujeres Luchadoras Progresistas have been working since 2021 on what is called ‘The Mother Earth Project. (Proyecto Madre Tierra).’ In the project, farmworker women cultivate community gardens and home gardens where individuals grow food free of chemicals according to traditional, ancestral practices. A description of the process can be found here, <https://www.alianzanacionaldecampesinas.org/mother-earth-project-1>

equipment, including footwear, gloves, or appropriate clothing for the type of work we are doing.

As a farmworker, my job is not easy, I start my days at 5am, which is the time that the seeds, fruits trees, and plants are being sprayed. Some people's job is to do the spraying, but even if it's not, the pesticides reach our eyes and it burns. When I first started working, I would experience headaches, vomiting, allergic reactions, and irritation all over my body. I still get headaches and irritation on my skin from the pesticides. However, I don't have the option to stop working because I need the job to survive. I know I am putting my life at risk as well as my family's. I am against this use of pesticides because it is poisoning me, my family, and other people as well.

My husband has been a farmworker for the past 20 years and for much of this time, we didn't even know what a pesticide was. He would apply the pesticides to the plants without knowing how dangerous they were because no one told him what it was. This lack of information ended up hurting our family when he returned home from work one day after working with the pesticides and I washed his clothes with the rest of our family's laundry as usual. This load of laundry also had my son's clothes and when I put these clothes on him, he had an allergic reaction all over his body. When I saw that his body was covered in a rash, I took him to a doctor, who didn't provide any specific answers or ask questions about the pesticide exposure. As a parent, I felt like the doctor did not understand the risk of the pesticides or have the information to help me protect my family better.

As a family, we have dealt with several significant health issues, which we suspect are all related to pesticide exposure from years of farmworker. My husband has had cancer and high blood pressure, one of my kids has autism, and I myself have also had cancer.

However, it is hard to protect ourselves because even if we try to stay further away, it's hard to know the multiple sources of pesticide application going on, and the breeze will carry it over to you. There is also a risk of exposure when you leave the workplace, like with my family. It can also affect babies before they are born. I also worry about the quality of the fruits and vegetables that are being produced with those pesticides and whether we are being further exposed to unhealthy toxins through our food. These are the reasons that I am an advocate as well as an essential worker. I want cleaner crops to be grown without pesticides, I want to be able to afford healthy food and lead a healthy life, and I want my family to be healthy and safe at work and at home."

Josefina's story is not rare among farmworker families. Her story is an example of the immense contributions that she and her family are making while lacking basic protections in the workplace, accessing information about their health risks, and dealing with the rising food costs despite their labor to produce those foods. Josefina's story also highlights the severe health risks and conditions that pesticide exposure creates. Studies have also linked pesticide exposure to infertility, miscarriages, birth defects, respiratory conditions, and different forms of cancer. Not counting exposure that takes place outside of the workplace, there are an estimated 3,000 yearly cases of physician-diagnosed pesticide poisoning among U.S. farmworkers, according to the EPA, however, many cases are not diagnosed or reported like in Josefina's experience.²

Economic Exploitation

Economic exploitation of campesinas is common as they continue to receive unlivable wages that are often below what is mandated by federal law. The reason is that

² Environmental Protection Agency; Pesticides; Agricultural Worker Protection Standard Revisions, 80 Fed. Reg. 67502 (Nov. 2, 2015)

farmworkers are exempt from the Fair Labor Standards Act and many states' minimum wage and overtime laws. In addition to underpaid long hours, wage theft is also common when workers' wages are not fully paid or accurately compensated for the produce that they harvest. Farmworker women also experience discrimination in *how* they are paid - some have their wages included in their husband's or the male family member's paycheck, robbing these women of financial autonomy while giving their husbands or male family members power over them. This is especially harmful when domestic violence occurs and farmworker women cannot access their own resources.

Farmworkers are also at risk of fraud when they are hired for jobs that don't exist or have the terms of their jobs changed after they agree to jobs, realizing after working for days or weeks that they will not be compensated as promised. Another type of fraud that is common among farmworkers, especially in the H-2A program, is illegal recruitment fees for non-existent jobs. This type of scheme leaves farmworkers vulnerable to trafficking because they become indebted by the recruitment fees and feel obligated to work off their debts.³ Many workers are not able to easily report these types of abuses or recover their losses because they are not told their employers or contractors real names, may be afraid of retaliation, or may not be able to identify resources in their language.

Farmworkers are also exempt from federal collective bargaining laws, preventing them from unionizing and improving their wages and benefits in the workplace.⁴ As of 2023, only 14 states grant farmworkers the right to collective bargain, but even so, they must navigate significant exemptions on when they can strike to pressure their employers.⁵

³ See <https://cdmigrante.org/wp-content/uploads/2020/04/Ripe-for-Reform.pdf>

⁴ Full text of the National Labor Relations Act can be found here, <https://govtrackus.s3.amazonaws.com/legislink/pdf/stat/49/STATUTE-49-Pg449.pdf>. Full text of the Fair Labor Standards Act, here <https://www.dol.gov/sites/dolgov/files/WHID/legacy/files/FairLaborStandAct.pdf>.

⁵ See <https://nationalaglawcenter.org/collective-bargaining-rights-for-farmworkers/>

Workplace Discrimination and Violence

Workplace violence, including sexual harassment and assault is systemically perpetrated by employers, supervisors, company owners, and co-workers. While exact numbers are unknown due to severe underreporting from fear of retaliation, a 2012 Human Rights Watch report surveyed dozens of farmworkers and nearly all of them said that they personally had experienced harassment or assault, or knew of others who had.⁶ Additionally, another 2010 survey of 150 farmworking women in the Central Valley of California found that 80% had experienced some form of sexual harassment, an extremely high and unacceptable number.⁷ Farmworker women also lack support services when they are subjected to sexual harassment and violence. Many are afraid to report the mistreatment and abuse out of fear of losing their jobs, fear of engaging with labor agencies, or from feelings of shame.

Discrimination and mistreatment in the workplace create an environment where women are often paid less, given less desirable jobs or shifts, and not considered or hired as much as men. An example of this is the rampant sex based discrimination in the H-2A program, where women make up about 3% of the hired population in the program. Many women report they are told by U.S. employers' recruiters and contractors that they cannot apply or be hired because the positions are for men. If women are hired, then they are paid less than their male counterparts.⁸

⁶ See <https://www.hrw.org/report/2012/05/15/cultivating-fear/vulnerability-immigrant-farmworkers-us-sexual-violence-and>

⁷ See <https://www.theatlantic.com/business/archive/2018/01/agriculture-sexual-harassment/550109/>

⁸ See <https://cdmigrante.org/new-report-ripe-for-reform-abuse-of-agricultural-workers-in-the-h-2a-visa-program/>

Immigration

About 44% of farmworkers do not have immigrant status with some large agricultural states like California, having larger percentages of undocumented farmworkers when compared to others. The lack of status impacts farmworkers' lives in several aspects. In the workplace, there are threats of deportation that discourage farmworkers from reporting abuses and exploitation. This is also true for migrant farm workers with H-2A visas, who often fear visa termination or “blacklisting” (i.e. when employers subsequently choose to refuse to rehire workers as a punishment for exercising their rights in any way). Employers often retaliate by threatening to call immigration agencies, withholding wages, blacklisting, demoting, or terminating employment.

The lack of immigrant status also affects farmworker families from being able to access resources they need such as nutritional assistance programs and healthcare. Site-specific studies show high rates of food insecurity, as between 47 to 82% of farmworker households lack access to a regular supply of nutritious food. This problem is compounded by the fact that undocumented people, given their immigration status, are ineligible to access federal food assistance programs such as SNAP (the Supplemental Nutrition Assistance Program). The situation of farmworker food insecurity is made even worse as many experience language barriers or lack technical support to access state- and county-level assistance programs.⁹ Additionally, lack of health insurance and access to health care heavily affect farmworker women and their families. Only a small percentage of farmworkers have health insurance and most typically cannot afford medical care. Without federally mandated paid sick leave, farmworkers cannot stay home when they become ill,

⁹ See <https://blog.ucsusa.org/alice-reznickova/how-many-farmworkers-are-food-insecure/>

even during health crises like the COVID-19 pandemic. Lastly, immigrant status requirements for federal programs such as USDA loan programs designed to support minority farmers or beginner farmers are preventing farmworkers from engaging in the agriculture industry in positions that do not perpetuate inequities and poverty.

Housing and Living Conditions

Substandard living conditions are not unique for many farmworker families. Housing often lacks decent, safe, and sanitary conditions, including basic services such as potable water, electricity, paved roads, proper drainage, and waste management/sewage systems. Others live in crowded houses, apartments, motels, trailers, or makeshift shacks, some of which are provided by employers or growers, yet that are not regulated or monitored. Many farmworker families live in rural or isolated areas, which means that they do not have reliable internet service and sometimes school buses for children to attend school. These areas also often lack affordable fresh fruits and vegetables for the local residents, requiring long commutes to grocery stores or locations that accept assisted forms of payment like WIC or food stamps.

The isolated living conditions are often more severe for women in the H-2A agricultural visa program, who are often placed in substandard housing that is remote, requiring workers to be completely dependent on their employers for rides to grocery stores or access to any sort of services like a bank, clinic, legal services, and government offices.

Conclusion

Congress must act now to protect farmworkers. Farmworkers deserve to work free from exploitation and abuse. Declared essential during the pandemic, now is the time to make that designation count and ensure that workers live with dignity. They are the drivers of our

functioning agricultural system and are critical in making sure our communities are fed. Farmworkers need federal standards protecting them from harmful pesticide and heat exposure. They also should be compensated with living wages, included in federal employment and labor laws provided a timely pathway to citizenship and work authorization, and protected from gender and sex discrimination and violence.

Thank you for the opportunity to submit our statement. For more information or questions regarding farmworker women issues, please contact Mily Trevino-Sauceda or Amy Tamayo at mily@campesinasunite.org or amy.tamayo@campesinasunite.org.

