

# FARM LABOR INSTABILITY IN THE UNITED STATES: POTENTIAL SUCCESSES AND SHORTCOMINGS OF THE FARM WORKFORCE MODERNIZATION ACT OF 2021

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## I. INTRODUCTION

“You want to know what 350,000 pounds of wasted food looks like? Let me show you.” That is how Shay Myers opened his viral TikTok that amassed nearly 3.5 million views in April 2021.<sup>1</sup> Myers, a produce farmer in Parma, Idaho, had 35 acres of harvest-ready asparagus when he encountered a problem: no farm labor.<sup>2</sup> Normally, Myers relied on temporary non-citizen farmworkers under a visa program called H-2A.<sup>3</sup> But H-2A complications and COVID-19 impacts had delayed the asparagus harvest workers at the border.<sup>4</sup> Unable to recruit citizen or non-citizen agricultural labor, Myers had no choice but to waste about \$180,000 of asparagus.<sup>5</sup>

Farm labor instability is not unique to Shay Myers but rather a growing

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1. Shay Myers (@shayfarmkid), *350,000 Pounds of Wasted Food*, TIKTOK (Apr. 19, 2021), <https://www.tiktok.com/@shayfarmkid/video/6953043280904932613> [<https://perma.cc/5Y2M-4WWE>].

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

problem throughout the United States. In 2021, a nationwide survey of 400 producers found that 66% had “some” or “a lot of difficulty” hiring adequate labor, up from 30% in the prior year.<sup>6</sup> Similarly, the 2021 Farm Journal Labor Survey found a majority of farm employers (87%) and ag retailers (91%) are having increased difficulty in filling positions from prior years.<sup>7</sup> Nationwide, the average age of farmers is simultaneously increasing while interest in agricultural labor among young people is declining.<sup>8</sup> Contributing factors include: high real estate and land prices; steep investment costs of machinery and agrotechnology; commodity pricing volatility; unpredictable weather; unequal work-life balance; and the industry’s physical demands.<sup>9</sup> As a result, securing a sustainable agricultural workforce is increasingly difficult year over year.

Historically, non-citizens have filled the agricultural labor gap, and today they comprise approximately 68% of the United States’ farm workforce.<sup>10</sup> But as global literacy and education rates increase, the agricultural industry must compete with higher paying jobs for non-citizen workers.<sup>11</sup> Changing immigration policies and inefficiencies in guest worker programs have also created instability.<sup>12</sup> Additionally, COVID-19 caused many non-citizens to return to their home countries, and fewer undocumented individuals attempted to enter the United States.<sup>13</sup>

Countries experiencing farm labor instability (like the United States) have two primary options to avoid effects on food availability.<sup>14</sup> First, reduce labor demands through technological advancements, better management practices, or food imports.<sup>15</sup> Second, identify new labor sources and grant farmers sustainable access

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6. Jenny Shaffstall, *Five Facts About the Ag Labor Shortage*, FARM J. (July 27, 2021), <https://www.agweb.com/news/business/taxes-and-finance/five-facts-about-ag-labor-shortage> [<https://perma.cc/2EN7-ZHWD>].

7. *Id.*

8. (*Infographic*) *The U.S. Farm Labor Shortage*, AGAMERICA LENDING (June 28, 2022), <https://agamerica.com/blog/the-impact-of-the-farm-labor-shortage/> [<https://perma.cc/J855-T5ER>].

9. *Id.*

10. *Who are Farmworkers?*, FARMWORKERS JUST. (Aug. 23, 2022, 1:44 PM), <https://www.farmworkerjustice.org/about-farmworker-justice/who-we-serve/> [<https://perma.cc/TRW9-7FMG>].

11. (*Infographic*) *The U.S. Farm Labor Shortage*, *supra* note 8.

12. *Id.*

13. Diane Charleton & Marcelo Castillo, *Potential Impacts of a Pandemic on the US Farm Labor Market*, 43(1) APPLIED ECON. PERSPS. & POL’Y 39, 45 (2021).

14. J. EDWARD TAYLOR & DIANE CHARLETON, THE FARM LABOR PROBLEM 13 (2017).

15. *Id.*

to them.<sup>16</sup> Congress has attempted to accomplish the latter through immigration policy reform, including the recent Farm Workforce Modernization Act of 2021 (FWMA).<sup>17</sup> While the bill passed the House, it has stalled in the Senate.<sup>18</sup> If passed, the FWMA would provide farmworkers with a path to legal status and lawful permanent residency, improve the H-2A temporary agricultural guestworker program, and require employment authorization verification across the agricultural sector.<sup>19</sup>

This paper will focus on the FWMA's successes and shortcomings. The bill makes important progress in addressing farm labor instability, and I would support its passage. However, to more effectively address farm labor instability, Congress should make three adjustments to the FWMA. Congress should: (1) reduce the work requirement for farmworkers seeking lawful permanent residency; (2) maintain the adverse effect wage rate but mandate a study on its impacts and alternatives; and (3) keep E-Verify optional, at least until the agricultural sector reduces its dependence on undocumented labor.

In part II of this paper, I will provide a brief history of non-citizen agricultural labor in the United States. In part III, I will analyze how the current FWMA may fail to address labor instability. Finally, in part IV, I will provide recommendations to address these shortcomings.

## II. BACKGROUND SECTION: A HISTORY OF NON-CITIZEN AGRICULTURAL LABOR IN THE UNITED STATES

The agriculture industry in the United States has always depended on—and often abused—non-citizen workers. This began with the enslavement of Africans during European colonization of the Americas.<sup>20</sup> In 1619, British privateers brought the first 20 enslaved Africans to Jamestown, Virginia.<sup>21</sup> Historians estimate that during the seventeenth and eighteenth centuries, slave traders brought between 6 and 7 million people to the Americas.<sup>22</sup> While enslaved Africans played a role in almost every industry, they primarily worked in agriculture, especially in

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16. *Id.*

17. *The Farm Workforce Modernization Act: A Bipartisan Bill that Would Provide a Path to Immigration Status for Agricultural Workers and Revise the H-2A Program*, FARMWORKER JUST. 1 (July 2021), <https://www.farmworkerjustice.org/wp-content/uploads/2021/03/FJ-FWMA-Factsheet-7.8.21.pdf> [<https://perma.cc/DY5D-6YDU>].

18. *Id.*

19. *Id.*

20. *Slavery in America*, HISTORY (Aug. 23, 2022, 1:22 PM), <https://www.history.com/topics/black-history/slavery> [<https://perma.cc/FCX2-YYYY>].

21. *Id.*

22. *Id.*

the South.<sup>23</sup> After the abolition of slavery in 1865—and despite the persistence of Jim Crow laws and sharecropping—African Americans began moving into other industries.<sup>24</sup>

In the mid-1800s, Asian immigrants began to comprise a larger portion of the agricultural workforce, facing shifting immigration policies, racism, and xenophobia. Chinese, Japanese, Filipino, and other Asian immigrants entered the United States during and after the California Gold Rush to work in mining, railroad construction, and agriculture.<sup>25</sup> By 1886, 7 out of every 8 farmworkers were Chinese, Japanese or Filipino.<sup>26</sup> However, as the Asian population grew in the United States, so did racist and xenophobic sentiments.<sup>27</sup> This led to the passage of regulations that prohibited the immigration of Asian women; such as the Chinese Exclusion Act of 1882, which barred immigration from China; as well as the Immigration Act of 1917 and the National Origins Act of 1924, both of which banned immigration from virtually all of Asia.<sup>28</sup> Asian farmworkers faced attacks by racist mobs, such as those of the Watsonville Riots of 1930, when groups of up to 500 white people attacked Filipino farmworkers and their property in California.<sup>29</sup> Later, during World War II, the United States government forced approximately 120,000 Japanese immigrants, many of them farmworkers, into internment camps.<sup>30</sup>

Non-citizen farmworkers from Mexico and the Caribbean also faced changing social, legal, and political climates during the 1900s. During World War I, declining immigration led to an agricultural labor shortage.<sup>31</sup> In response, growers

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23. *Id.*

24. *Immigration and Farm Worker Policy in the U.S.*, NAT'L FARM WORKER MINISTRY 2 (2018), <https://nfwf.org/wp-content/uploads/2018/07/ImmigrationFWTimeline-for-download-FINAL.pdf> [<https://perma.cc/JPL9-T467>].

25. *The Rise of Asian Americans*, PEW RSCH. CTR. (Apr. 4, 2013), <https://www.pewresearch.org/social-trends/2012/06/19/the-rise-of-asian-americans/> [<https://perma.cc/E5KU-B99H>].

26. *Immigration and Farm Worker Policy in the U.S.*, *supra* note 24, at 1.

27. Tam Le, *Deeply Rooted: How Asian American Farmers Shaped U.S. Agriculture*, THE SPRUCE EATS (June 10, 2021), <https://www.thespruceeats.com/history-of-asian-americans-in-us-agriculture-5120814> [<https://perma.cc/26YP-KKJ3>].

28. *The Rise of Asian Americans*, *supra* note 25.

29. *White Mobs Attack Filipino Farmworkers in Watsonville, California*, EQUAL JUST. INITIATIVE (Aug. 23, 2022, 1:29 PM), <https://calendar.eji.org/racial-injustice/jan/19> [<https://perma.cc/26YP-KKJ3>].

30. *The Rise of Asian Americans*, *supra* note 25.

31. *Immigration and Farm Worker Policy in the U.S.*, *supra* note 24, at 1.

successfully lobbied for the first temporary agricultural guest worker program.<sup>32</sup> Between 1917 and 1921, the federal government admitted 70,000 Mexican farmworkers into the United States.<sup>33</sup> But after the Dust Bowl and the Great Depression forced thousands of white farmers to sell their farms and become migrant workers, the United States initiated the Mexican Repatriation.<sup>34</sup> Between 1929 and 1939, the government deported or pressured to leave more than 500,000 Mexican Americans, including farmworkers.<sup>35</sup> After World War II caused another farm labor shortage, the United States started the Bracero program.<sup>36</sup> Millions of Mexican immigrants entered the United States under short-term agricultural labor contracts.<sup>37</sup> Similar programs also brought in farmworkers from the Bahamas, Jamaica, Barbados, and other Caribbean islands.<sup>38</sup>

Throughout the twentieth century, farmworkers of all racial and ethnic backgrounds suffered abuse from employers, largely in part because laws failed to protect them. In the 1930s, Congress passed two laws deliberately excluding farmworkers from labor protections.<sup>39</sup> First, the 1935 National Labor Relations Act provided the right to organize without retaliation but did not include farmworkers and domestic workers.<sup>40</sup> Second, the 1938 Fair Labor Standards Act created overtime rules and established the minimum wage for industrial workers but did not cover seasonal workers.<sup>41</sup> Later, in 1952, Congress passed the Immigration and Nationality Act, establishing an H-2 “nonimmigrant visa category.”<sup>42</sup> The H-2 program allowed United States employers to recruit temporary workers directly from any country after approval by the Attorney General.<sup>43</sup> Because employers essentially controlled employees’ visas and could threaten deportation, “poor working and living conditions and abuses like wage theft” proliferated.<sup>44</sup>

Abuse in the agricultural sector drove the farmworker movement of the

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32. *Id.*

33. *Id.*

34. *Id.* at 1-2.

35. *Id.* at 2.

36. *Id.*

37. *Id.*

38. *H-2 Guestworker Visa Program*, IMMIGR. HIST. (2019), <https://immigrationhistory.org/item/h-2-guestworker-visa-program/> [<https://perma.cc/9R57-VFVS>].

39. *Immigration and Farm Worker Policy in the U.S.*, *supra* note 24, at 2.

40. *Id.*

41. *Id.*

42. *H-2 Guestworker Visa Program*, *supra* note 38.

43. *Id.*

44. *Id.*

1960s and 1970s. Leaders included Filipino activist Larry Itliong and Chicano activists Dolores Huerta and Cesar Chavez.<sup>45</sup> Together, they and other activists founded United Farm Workers, a farm labor union.<sup>46</sup> United Farm Workers led nationwide strikes and campaigns that achieved contracts improving working conditions.<sup>47</sup> These improvements included rest periods and access to toilets, clean drinking water, hand washing facilities, pesticide-protective clothing, and more.<sup>48</sup>

In the 1980s, farm labor reform expanded from union efforts to legislative efforts.<sup>49</sup> The Migrant and Seasonal Agricultural Worker Protection Act of 1983 required employers to disclose expectations and comply with pay stubs and other documentation.<sup>50</sup> Notably, it did not guarantee collective bargaining or freedom of association rights.<sup>51</sup> In 1986, Congress passed the Immigration Reform and Control Act,<sup>52</sup> amending the Immigration and Nationality Act and separating the H-2 program into H-2A for agricultural workers and H-2B for seasonal non-agricultural employment.<sup>53</sup> While the Immigration Reform and Control Act intended to improve conditions for farmworkers and increase employer oversight, “[t]he situation in the fields change[d] little.”<sup>54</sup>

H-2A program basics have also remained relatively unchanged since 1986. Under the H-2A program, employers can sponsor farmworkers for one year or less if no citizen workers are available.<sup>55</sup> Employers can apply to extend workers’ visas in up to one year increments for up to three years.<sup>56</sup> After three years, H-2A visa holders must leave and remain outside the country for three months before

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45. *Our Vision*, UNITED FARM WORKERS (Aug. 23, 2022, 1:39 PM), <https://ufw.org/about-us/our-vision/> [<https://perma.cc/4XH5-TE3F>].

46. *Id.*

47. Inga Kim, *UFW Successes Through the Years*, UNITED FARM WORKERS (Apr. 3, 2017), <https://ufw.org/ufw-successes-years/> [<https://perma.cc/LS2L-VB4S>].

48. *Id.*

49. *See U.S. Labor Law for Farmworkers*, FARMWORKER JUST. (Aug. 23, 2022, 1:40 PM), [https://www.farmworkerjustice.org/advocacy\\_program/us-labor-law-for-farmworkers/](https://www.farmworkerjustice.org/advocacy_program/us-labor-law-for-farmworkers/) [<https://perma.cc/T5CU-VMQU>].

50. *Id.*

51. *Id.*

52. *Immigration and Farm Worker Policy in the U.S.*, *supra* note 24, at 2.

53. *H-2 Guestworker Visa Program*, *supra* note 38.

54. *See Immigration and Farm Worker Policy in the U.S.*, *supra* note 24, at 2.

55. Sadikshya Nepal, *Primer: Evolution of the H-2A Visa Program*, BIPARTISAN POL’Y CTR. (Sept. 15, 2021), <https://bipartisanpolicy.org/explainer/primer-h2a-visa/> [<https://perma.cc/SUL4-6P8U>].

56. *Id.*

reapplying.<sup>57</sup> Employers cannot sponsor workers permanently, and employees cannot adjust H-2A visas to lawful permanent residency.<sup>58</sup> To bring H-2A visa holders to the United States, employers must complete a labor certification application, among other paperwork.<sup>59</sup> They must also pay for farmworkers' housing, transportation, and workers' compensation insurance.<sup>60</sup> To further disincentivize employers from choosing non-citizens over citizens, the H-2A program requires inflated wages under a policy called the "adverse effect wage rate."<sup>61</sup>

Today, the H-2A program continues to fail to meet the needs of farmworkers and employers. Farmers complain that "there are too many government agencies involved" and "the costs are exorbitant."<sup>62</sup> They also say that "scrutiny from the government, unions, legal aid, and outreach workers is excessive."<sup>63</sup> Other critics argue that the H-2A program incentivizes employers to choose non-citizen workers over citizens.<sup>64</sup> They point out that employers must pay Social Security and unemployment taxes on American workers' wages but not for guestworkers.<sup>65</sup>

Meanwhile, farmworker advocates report that "violations of the rights of [United States] workers and guest workers by H-2A program employers are rampant and systemic."<sup>66</sup> They also report that "[a]buses in the recruitment of foreign workers are endemic."<sup>67</sup> In addition, while the H-2A program has no visa cap, it fails to capture all non-citizen farmworkers.<sup>68</sup> Undocumented individuals make up between a third<sup>69</sup> and a half<sup>70</sup> of all farmworkers in the United States. These undocumented farmworkers take risks migrating to and working in the United States.

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57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. Gosia Wozniacka, *The H-2A Guest Worker Program Has Ballooned in Size, but Both Farmers and Workers Want it Fixed*, CIVIL EATS (July 16, 2019), <https://civileats.com/2019/07/16/the-h-2a-guest-worker-program-has-ballooned-in-size-but-both-farmers-and-workers-want-it-fixed/> [<https://perma.cc/SFR8-NG4N>].

63. *Id.*

64. ETAN NEWMAN, FARMWORKER JUST., NO WAY TO TREAT A GUEST 7, FARMWORKER JUST. (2012), <https://www.farmworkerjustice.org/wp-content/uploads/2012/05/7.2.a.6-No-Way-To-Treat-A-Guest-H-2A-Report.pdf> [<https://perma.cc/89YB-HUC9>].

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 17.

69. *Who are Farmworkers?*, *supra* note 10.

70. Charleton & Castillo, *supra* note 13, at 45.

Particularly following 9/11, the United States-Mexico border has become increasingly militarized, and crossings have become more expensive and dangerous for farmworkers.<sup>71</sup> In addition, a large undocumented population “deprives all farmworkers of bargaining power and political influence.”<sup>72</sup> The H-2A program fails both farmworkers and their employers, destabilizing the agricultural workforce.

Congress has unsuccessfully attempted multiple times to reform the H-2A program to improve farm labor stability. In 2006, Congress introduced—but did not pass—the Agricultural Job Opportunities, Benefits, and Security Act.<sup>73</sup> This bill would have provided farmworkers with a path to documentation and citizenship.<sup>74</sup> The Border Security, Economic Opportunity, and Immigration Modernization Act of 2013—passing the Senate but not the House—would have created a path to documentation and legal permanent resident status.<sup>75</sup> It also would have created permanent guest worker visas that could transfer from employer to employer.<sup>76</sup> The Agricultural Guestworker Act of 2013—introduced but not passed—would have expanded the definition of “agricultural labor and services.”<sup>77</sup> It also would have replaced the H-2A program with a new H-2C program.<sup>78</sup> These changes would have increased the number of non-citizens who could receive guest-worker visas for farm labor.<sup>79</sup> More recently, in both 2019 and 2021, Congress introduced the FWMA.<sup>80</sup> It aimed to improve the efficiency and quality of the H-2A program for both farmworkers and employers.<sup>81</sup> It also created a path to documentation, residency, and citizenship for farmworkers.<sup>82</sup> In both years, the bill

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71. *Immigration and Farm Worker Policy in the U.S.*, *supra* note 24, at 2.

72. NEWMAN, *supra* note 64, at 8.

73. Nepal, *supra* note 55.

74. *Id.*

75. Michelle Peirano, *Farm Owners, Workers Hope Immigration Reform Can Fix ‘Flawed’ H-2A Visas*, CRONKITE NEWS (May 7, 2013), <https://cronkitenewsonline.com/2013/05/farmers-farmworkers-look-to-immigration-reform-to-fix-flawed-h-2a-visas/> [<https://perma.cc/23SL-PACB>].

76. *Id.*

77. CONG. BUDGET OFF., H.R. 1773, AGRIC. GUESTWORKER ACT 3 (July 25, 2014), [https://www.cbo.gov/sites/default/files/113th-congress-2013-2014/costestimate/hr17732\\_0.pdf](https://www.cbo.gov/sites/default/files/113th-congress-2013-2014/costestimate/hr17732_0.pdf) [<https://perma.cc/P7AB-26AR>].

78. *Id.*

79. *Id.*

80. *The Farm Workforce Modernization Act*, *supra* note 17, at 1.

81. *Id.*

82. *Id.*



passed the House but stalled in the Senate.<sup>83</sup>

Farmworker abuse, shifting immigration laws, and inefficient guestworker programs define the history of non-citizen farm labor in the United States. At the same time, farmworkers and their advocates have continuously demonstrated resilience and won important labor reforms. Today, existing laws continue to fail to meet the needs of farmworkers and their employers. To build a sustainable agricultural workforce, Congress must pass farm labor reform.

### III. ANALYSIS SECTION: THE FARM WORKFORCE MODERNIZATION ACT OF 2021

The FWMA would implement three major changes.<sup>84</sup> First, it would create a pathway to legal status and lawful permanent residency for farmworkers.<sup>85</sup> Second, it would reform the H-2A program.<sup>86</sup> These H-2A changes would improve the efficiency of the visa application and renewal process, establish new protections for farmworkers, and replace the current calculations for wages.<sup>87</sup> Third, the FWMA would require “E-Verify” across the agricultural sector.<sup>88</sup>

#### *A. Pathway to Documentation and Citizenship*

The FWMA would introduce a path to legal status and lawful permanent residency for undocumented and longtime farmworkers.<sup>89</sup> First, it would create a new temporary visa program for currently unauthorized farmworkers called the Certified Agricultural Worker (CAW) program.<sup>90</sup> The CAW program would have an 18-month open application period with no visa cap.<sup>91</sup> Applicants would need to prove that they have spent at least 180 days in the last two years employed in agriculture.<sup>92</sup> Applicants with between 100 and 180 days of work history could apply

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83. Barbara Sprunt & Claudia Grisales, *House Passes 2 Bills Aimed at Overhauling the Immigration System*, NPR (March 18, 2021, 7:49 PM), <https://www.npr.org/2021/03/18/977887411/house-passes-2-bills-aimed-at-overhauling-the-immigration-system> [<https://perma.cc/HN7S-KMSU>].

84. *The Farm Workforce Modernization Act*, *supra* note 17, at 1.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

for an H-2A visa instead.<sup>93</sup> In addition, applicants would need to meet existing work visa requirements, pass a criminal background check, and pay an application fee.<sup>94</sup> While awaiting approval, applicants would receive interim work authorization.<sup>95</sup> “Employers would not face penalties for past or ongoing hires of individuals applying for CAW or H-2A status.”<sup>96</sup>

If approved, farmworkers with CAW status could work in the United States for five and a half years and travel in and out of the country during this time.<sup>97</sup> While CAW recipients could work in any industry, if they wanted to renew their CAW status or work towards lawful permanent residency, they would need to work in agriculture at least 100 days per year.<sup>98</sup> Farmworkers’ spouses and children could enroll as CAW dependents with the same protections (work authorization and the ability to travel in and out of the country).<sup>99</sup> Under FWMA, individuals could renew their CAW status indefinitely.<sup>100</sup>

For documented farmworkers (including future CAW recipients), FWMA would create an option to work towards lawful permanent residency.<sup>101</sup> Farmworkers who have worked in agriculture for ten years or more prior to FWMA’s enactment would need to work for at least 100 days per year for four more years.<sup>102</sup> Those who have worked in agriculture for less than ten years would need to work for 100 days per year for eight more years.<sup>103</sup> In addition, both groups would need to pay an application fee and a \$1,000 fine, as well as any outstanding federal taxes.<sup>104</sup> Under current immigration law, an individual with five years of lawful permanent residency in the United States can apply for citizenship.<sup>105</sup>

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93. Danilo Zak, *Bill Summary: Farm Workforce Modernization Act*, NAT’L IMMIGR. F. (Nov. 19, 2019), <https://immigrationforum.org/article/bill-summary-farm-workforce-modernization-act/> [https://perma.cc/MZ28-B79Q].

94. See *Farm Workforce Modernization Act*, *supra* note 17, at 1-2.

95. Zak, *supra* note 93.

96. *Id.*

97. *Farm Workforce Modernization Act*, *supra* note 17, at 2.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *I am a Lawful Permanent Resident of 5 Years*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Nov. 18, 2020), <https://www.uscis.gov/citizenship/learn-about-citizenship/citizenship-and-naturalization/i-am-a-lawful-permanent-resident-of-5-years> [https://perma.cc/R9P6-35S7].

The FWMA's paths to legal status and lawful permanent residency have the potential to improve the mental and physical wellbeing of millions of farmworkers. According to the American Psychiatric Association, undocumented individuals face elevated mental health risk factors.<sup>106</sup> They may have faced trauma or stressors before, during, or after immigrating, including racism, discrimination, or stigma.<sup>107</sup> Undocumented immigrants experience higher rates of social isolation and separation from their family members.<sup>108</sup> They also have higher rates of fear of deportation and distrust in the United States legal system.<sup>109</sup> This leads to lower use of social services, healthcare, and legal assistance.<sup>110</sup> In the context of agricultural labor, this may also lead to unsafe working or living conditions. The FWMA would provide farmworkers with a safer, healthier, and more permanent home in the United States for themselves and their families.<sup>111</sup>

However, the FWMA's proposal has its flaws. First, farmworkers might face difficulties documenting their work history to meet the requirement for lawful permanent residency.<sup>112</sup> "Sometimes there's no formal contract between workers and the grower, that's common throughout farm work," Edgar Franks told *The Counter*.<sup>113</sup> Franks is the political director at Familias Unidas por La Justicia, a farmworker union based in Washington.<sup>114</sup> Franks also added that "many farmers hire via handshake agreement, making accurate records of work history scant. . . . '[t]here could be extended periods of time where workers were only getting paid in cash or under the table.'" <sup>115</sup> Second, the FWMA's work requirement does not reflect the physical toll of farm labor. "People like me who have been here for [almost] twenty years—their bodies are tired," Luis Jimenez told *The Counter*.<sup>116</sup> Jimenez is a farmworker in upstate New York and president of Alianza Agrícola,

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106. *Stress and Trauma Toolkit*, AM. PSYCHIATRIC ASS'N (Aug. 23, 2022, 1:47 PM), <https://www.psychiatry.org/psychiatrists/cultural-competency/education/stress-and-trauma/undocumented-immigrants> [<https://perma.cc/Z9EP-BXW5>].

107. *See id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *See generally The Farm Workforce Modernization Act*, *supra* note 17.

112. Jessica Fu, *The House Approved a Pathway to Citizenship for Farm Workers. Why Do Some Farm Workers Oppose It?*, THE COUNTER (Mar. 23, 2021, 1:44 PM), <https://thecounter.org/farm-workforce-modernization-act-citizenship/> [<https://perma.cc/W5HS-FPXH>].

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

an advocacy organization.<sup>117</sup> Third, farmworker families may struggle to pay the \$1,000 fine for lawful permanent residency.<sup>118</sup> In short, the FWMA creates large barriers for farmworkers seeking legal status or lawful permanent residency.

### *B. H-2A Reforms*

The FWMA's H-2A reforms would improve the efficiency of the petition and renewal process, establish new protections for farmworkers, and introduce a new calculation for wages.

The FWMA would improve the efficiency of the employer petition process by creating an online platform where employers could file petitions with multiple relevant agencies in one place.<sup>119</sup> The petition process "would require more evidence of H-2A guideline compliance, but employers could use one petition for multiple positions and multiple start dates."<sup>120</sup> This would better account for the in-season variation of labor needs.<sup>121</sup>

The FWMA would improve the efficiency of the renewal process by introducing H-2A visas that last longer than a year through three initiatives. First, it would create a new three-year H-2A visa with an initial cap of 20,000 per year.<sup>122</sup> Second, it would provide 40,000 "green cards" (granting lawful permanent residency) to H-2A workers with a preference for those with more than ten years of work experience.<sup>123</sup> These green cards would fall into the "EB-3" visa category for "skilled workers," "professionals," or other "unskilled workers."<sup>124</sup> Third, it would establish a pilot program for three-year "portable" agricultural work visas. Under this pilot, 10,000 H-2A visa holders could move from one farm job to another during 60-day grace periods.<sup>125</sup> These three initiatives would allow non-citizen farmworkers to work in the United States for longer time periods, improving agricultural labor stability.

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117. *Id.*

118. *Farm Workforce Modernization*, *supra* note 17, at 2.

119. Zak, *supra* note 93.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. See *Employment-Based Immigration: Third Preference EB-3*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Dec. 2, 2020), <https://www.uscis.gov/working-in-the-united-states/permanent-workers/employment-based-immigration-third-preference-eb-3> [<https://perma.cc/DPD7-P9NJ>].

125. Zak, *supra* note 93.

The FWMA would establish new protections for farmworkers by making current regulations legally required.<sup>126</sup> These regulations would include workers' compensation coverage, employer-provided free housing, transportation cost reimbursements, and guaranteed paid labor for at least 75% of the workdays in farmworkers' contracts.<sup>127</sup> New protections would include required heat illness prevention plans and greater oversight of H-2A labor contractors.<sup>128</sup> In addition, the Migrant and Seasonal Agricultural Worker Protection Act would cover farmworkers, granting them the right to sue to enforce their job terms.<sup>129</sup> The FWMA would also establish recruitment standards that prevent "foreign labor recruiters . . . from defrauding and misinforming potential workers."<sup>130</sup> Specifically, the FWMA would require the Department of Labor to register and track recruiters, and it would exempt potential workers from any fees accrued during the recruiting process.<sup>131</sup> Overall, the FWMA would result in improved legal protections for farmworkers.

One of the FWMA's most controversial changes is its proposed adjustment to H-2A wage calculations. Currently, employers pay H-2A visa holders according to the adverse effect wage rate schedule.<sup>132</sup> Under this schedule, employers must pay farmworkers whichever is higher: "the federal or state minimum wage rate, the prevailing wage rate, or the adverse effect wage rate."<sup>133</sup> The Department of Labor sets the adverse effect wage rate for each state.<sup>134</sup> Between 2010 and 2020, the adverse effect wage rate rose an average of 4% per year, and it rose 4.3% in 2021.<sup>135</sup> In 2022, the adverse effect wage rate was between \$11 and \$18 per hour, depending on the state.<sup>136</sup> The FWMA would freeze the adverse effect wage rate for one year and then limit per year growth to 3.25% for the next 10 years.<sup>137</sup> In addition, after the first year, wages would become job-specific rather than applying

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126. *Farm Workforce Modernization*, *supra* note 17, at 2.

127. *Id.*

128. *Id.*

129. *Id.*

130. Zak, *supra* note 93.

131. *Id.*

132. Nepal, *supra* note 55.

133. *Id.*

134. *Id.*

135. Phillip L. Martin & Zachariah Rutledge, *Proposed Changes to the H-2A Program Would Affect Labor Costs in the United States and California*, 75(3) CAL. AGRIC. 135, 140 (2021).

136. See *Adverse Effect Wage Rates*, U.S. DEP'T OF LAB. (Aug. 23, 2022, 1:49 PM), <https://www.dol.gov/agencies/eta/foreign-labor/wages/adverse-effect-wage-rates> [<https://perma.cc/8LYZ-7CU9>].

137. *The Farm Workforce Modernization Act*, *supra* note 17, at 4.

to all field and livestock workers.<sup>138</sup> Consequently, some wages would increase, and others would decrease.<sup>139</sup> After 10 years, the FWMA would require the Department of Agriculture and the Department of Labor to conduct an adverse effect wage rate study.<sup>140</sup> This study would assess “the impact and need for the adverse effect wage rate,” and “set the wage rate for 2031 and beyond.”<sup>141</sup>

A study analyzing the potential impact of the FWMA found that the adverse effect wage rate changes would transfer billions from farmworkers to employers.<sup>142</sup> H-2A employers would save \$169 million a year and \$1.7 billion over 10 years.<sup>143</sup> Wage reductions for H-2A visa holders and citizen farmworkers (whose wages must match those of H-2A visa holders) would drive these savings.<sup>144</sup> While these cost savings represent billions transferred to producers, both citizen and non-citizen farmworkers would see their wage growth stagnate. Consequently, they may face reduced living standards.

A recent lawsuit illustrates the potential damage of the FWMA wage changes. In November of 2020, the Department of Labor issued a rule freezing the adverse effect wage rate for farmworkers at the 2019 level.<sup>145</sup> The United Farm Workers sued, and a federal judge temporarily blocked the rule.<sup>146</sup> The judge found that “the department did not provide reasonable justification for the wage freeze or sufficiently analyze if wage idling would impact [United States] agricultural workers.”<sup>147</sup> In the final ruling in April of 2022, the court found that the wage freeze “fail[ed] to protect United States workers against adverse effects to their wages and working conditions.”<sup>148</sup> In doing so, the rule violated the Immigration and Nationality Act.<sup>149</sup> While the 2020 rule differs from the FWMA’s proposal, the lawsuit’s outcome suggests that wage rate changes could adversely affect farmworkers and therefore agricultural workforce stability.

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138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. See Martin & Rutledge, *supra* note 135, at 140.

143. See *id.*

144. *Id.*

145. Madalyn Wright, *Trump-Era Ag Wage Freeze Gutted by Federal Judge*, COURTHOUSE NEWS SERV. (Apr. 5, 2022), <https://www.courthousenews.com/trump-era-ag-wage-freeze-gutted-by-federal-judge/> [<https://perma.cc/G8MV-Z98K>].

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

*C. E-Verify*

The FWMA's third major component is the E-Verify requirement. E-Verify is a web-based system that employers can use to confirm employees' work authorization.<sup>150</sup> The tool matches employee's data (provided via the Employment Eligibility Verification or Form I-9) to government records.<sup>151</sup> After an employer submits employee data into the E-Verify software, they receive confirmation that their employee has authorization to work, or they receive a tentative non-confirmation.<sup>152</sup> After receiving a tentative non-confirmation, the employee has eight to 10 days to contest the determination before it becomes final.<sup>153</sup> After a final non-confirmation, the employer must fire the employee.<sup>154</sup> E-Verify is currently available in all 50 states and 750,000 of the nation's 18 million employers use it.<sup>155</sup> The FWMA would make E-Verify mandatory for agricultural employers, starting between six and 15 months after the end of the CAW application period.<sup>156</sup>

Requiring E-Verify across the agricultural sector has the potential to destabilize the farm workforce, which relies heavily on undocumented labor. A recent study presented at the 2021 International Association of Agricultural Economists investigated the impact of mandatory E-Verify on the United States farm workforce.<sup>157</sup> The researchers found that implementation of E-Verify would curtail unauthorized agricultural employment by 20% at the county level.<sup>158</sup> They also found that the inflow of H-2A visa-holders would not cover this shortage.<sup>159</sup> While this study does not account for the CAW program, we do not know yet if the CAW program would successfully absorb all undocumented farmworkers. Requiring E-Verify without waiting to assess the impact of the CAW program could worsen agricultural labor shortages.<sup>160</sup>

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150. See *About E-Verify*, U.S. DEP'T OF HOMELAND SEC. (Aug. 23, 2022, 1:50 PM), <https://www.e-verify.gov> [<https://perma.cc/4CV9-DPYE>].

151. *Id.*

152. *Fact Sheet: E-Verify*, NAT'L IMMIGR. F. (Aug. 14, 2018), <https://immigration-forum.org/article/fact-sheet-e-verify/> [<https://perma.cc/4MRZ-49UM>].

153. *Id.*

154. *Id.*

155. *Id.*

156. Zak, *supra* note 93.

157. Sunghun Lim and SongYi Paik, *The Impact of E-Verify Immigration Policy on the U.S. Agricultural Labor Shortage*, INT'L ASS'N OF AGRIC. ECON. (Mar. 28, 2021), <https://ageconsearch.umn.edu/record/315125> [<https://perma.cc/F5U5-TB9R>].

158. *Id.*

159. *Id.*

160. *Id.*

A National Immigration Forum fact sheet on the potential impact of mandatory E-Verify across all sectors echoes this concern. It states that “unless mandatory E-Verify is accompanied by guest worker and visa reform provisions sufficient to meet employer demand, industries that have a shortage of legal workers will face serious worker shortages.”<sup>161</sup> Employers would essentially be faced with a choice between breaking the law, operating with dramatic labor shortages, or outsourcing to other countries that have sufficient workers.<sup>162</sup> The fact sheet stated that “moving to mandatory E-Verify would also impose significant costs on employers, who would need to devote time and resources to worker verification.”<sup>163</sup> This would disproportionately impact smaller employers.<sup>164</sup>

The impact of erroneous non-confirmations also presents a potential problem. While the accuracy of E-Verify has improved since its creation, in 2017, 0.15% of E-Verify searches resulted in erroneous tentative non-confirmations (this data does not include uncontested tentative non-confirmations.)<sup>165</sup> While the margin of error appears minor, thousands of farmworkers could lose their livelihoods.<sup>166</sup> In addition, non-citizen farmworkers may face language or other barriers to filing and winning appeals.<sup>167</sup>

#### IV. CONCLUSION SECTION: RECOMMENDATIONS AND COUNTERARGUMENTS

The FWMA would revolutionize the agricultural system in the United States and make important strides in addressing labor shortages and instability. However, I propose the following three adjustments to better meet the needs of farmworkers and employers and stabilize the workforce. Congress should: (1) reduce the number of years of work required to attain lawful permanent residency; (2) remove the adverse effect wage rate changes and require the wage rate study in the first year following the FWMA’s passage; and (3) keep E-Verify optional across the agricultural sector, at least until it is less dependent on undocumented labor.

My first recommendation is to reduce the number of years non-citizen farmworkers must work to attain lawful permanent residency. The current version of the FWMA requires farmworkers to work between four or eight years, depending

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161. *Fact Sheet: E-Verify*, *supra* note 152.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*



on their prior work history.<sup>168</sup> Barriers to meeting this work requirement include the physical toll of farm work, the mental toll of uncertain legal status, and the difficulties of documenting work history. To address these barriers, I propose mirroring the work requirements for farmworkers included in the U.S. Citizenship Act of 2021. The House and Senate introduced the U.S. Citizenship Act in 2021, but it has not passed.<sup>169</sup> Under the Act, individuals who performed agricultural labor or services for at least 2,300 hours or 400 workdays during the five years prior to their application date could receive lawful permanent residency.<sup>170</sup> Under my recommendation, undocumented farmworkers could apply for CAW status or an H-2A visa, as outlined by the FWMA. But once any CAW or H-2A visa holder demonstrated 2,300 hours or 400 workdays of agricultural labor in the prior five years, they could apply for legal permanent residency.

Some may argue that 400 days of agricultural labor is insufficient to “earn” lawful permanent residency in the United States. However, a lower work requirement is more consistent with existing immigration law. Under the existing EB-3 employment-based visa program, visa holders do not have work requirements.<sup>171</sup> The EB-3 program covers skilled workers, professionals, or other unskilled workers.<sup>172</sup> A United States employer must sponsor EB-3 applicants for permanent jobs for which citizens are currently unavailable.<sup>173</sup> Once EB-3 applicants receive approval, they do not have to work for that employer (or any employer) to keep their lawful permanent residency.<sup>174</sup> EB-3 visas last for 10 years, and visa holders can apply for renewal.<sup>175</sup> While agricultural jobs are typically temporary or seasonal, they align with the EB-3 category.<sup>176</sup> After all, the FWMA proposes creating 40,000 EB-3 green cards for farmworkers.<sup>177</sup> My recommendation for FWMA, which establishes a work requirement of one to two years instead of four to eight years, better aligns with current employment-based immigration law. It also

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168. *Farm Workforce Modernization*, *supra* note 17, at 2.

169. See *The U.S. Citizenship Act of 2021: What’s Inside and Who Could be Eligible for Immigration Relief*, CTR. FOR MIGRATION STUD. (Mar. 11, 2021), <https://cmsny.org/citizenship-act-2021-explainer/> [<https://perma.cc/FC7G-JSYT>].

170. *Farm Workforce Modernization*, *supra* note 17, at 1.

171. *Employment-Based Immigration: Third Preference EB-3*, *supra* note 124.

172. *Id.*

173. *Id.*

174. *EB-3 Green Card FAQ*, VISA NATION (Aug. 28, 2022), <https://www.immi-usa.com/immigration/employment-green-card/eb3-green-card/eb-3-faq/> [<https://perma.cc/EQ8K-6ZFH>].

175. *Id.*

176. *Employment-Based Immigration: Third Preference EB-3*, *supra* note 124.

177. *Farm Workforce Modernization*, *supra* note 17, at 3.

recognizes that farmworkers, like other employment-based visa holders, contribute to the United States economy, working jobs that citizens cannot or will not fill.

My second recommendation is to remove the adverse effect wage rate changes from the FWMA and instead require the proposed wage rate study in the first year following the bill's passage. This change would allow Congress to consider the impact of the FWMA's wage proposal and alternatives and identify the best path forward.

Proponents of the FWMA's wage proposal say that it would keep producers in business, allowing them to compete with international producers who pay lower wages.<sup>178</sup> They also say producer cost savings would potentially increase the number of H-2A workers that producers sponsor.<sup>179</sup> However, preliminary data suggests that the FWMA's proposed changes would have an adverse effect on millions of farmworkers, both citizens and non-citizens.<sup>180</sup> This risk alone justifies a study on the FWMA's proposal and potential alternatives. Congress might identify the FWMA's current proposal as the best path forward, but it should assess costs, benefits, and alternatives before implementing a change affecting millions of farmworkers and producers.

My third recommendation is to keep E-Verify optional, at least until Congress can assess the impact of the CAW program. This change would protect the agricultural sector from the risk of a sudden labor shortage. Like the FWMA's wage changes, we do not know yet how the implementation of the CAW program will go. If CAW enrollment goes well and Congress establishes that most farmworkers have documentation, then employers could more easily implement mandatory E-Verify. But implementation of the E-Verify program might still prove unnecessarily burdensome for employers and employees.

Some may argue that optional E-Verify encourages reliance on the undocumented farmworker population, which will remain high until E-Verify is mandatory. However, farmworkers do not lack documentation because it is too easy to work without it; they lack documentation because it is too difficult to get work authorization. If we want to reduce our reliance on undocumented labor, we need to create more (and easier) paths to legal status. The CAW program and H-2A efficiency improvements make progress, as do all initiatives creating quicker paths to lawful permanent residency.

Overall, my primary concern with my recommendations is political

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178. Wozniacka, *supra* note 62.

179. Martin & Rutledge, *supra* note 135, at 135.

180. *See id.* at 140.

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feasibility. After all, the FWMA has already stalled in the Senate twice. But because my recommendations benefit both farmworkers and producers, they would only make the FWMA more attractive to lawmakers across the aisle. Creating a shorter and easier path to lawful permanent residency would reduce reliance on the inefficient H-2A visa program and allow producers to directly hire farmworkers with preexisting work authorization. At the same time, farmworkers would have confidence in a secure future in the United States with their families. Maintaining the current adverse effect wage rate calculation and mandating an impact study would allow Congress to identify the best path forward for both producers and farmworkers. And finally, making E-Verify optional would reduce the administrative burden for employers and employees.

That said, the best version of the FWMA is the one that passes. While I support the current version of the FWMA and would advocate for the recommendations outlined in this paper, I would also welcome any incremental farm labor reforms from Congress. The clock is ticking—every year without Congressional action is another year of farm labor shortages and instability. Another year of farmworkers working in hard and potentially dangerous conditions and without a path to documentation or citizenship. And another year where producers like Shay Myers must navigate frustratingly inefficient immigration programs only to let entire fields of food go to waste. Congress must pass farm labor reform. Doing so will stabilize the agricultural workforce and improve the lives of consumers, producers, and farmworkers.