

# NOT SO TEMPORARY: HOW A RECENT AMENDMENT ADDRESSES HISTORICAL CONCERNS OF THE UNITED STATES H-2A TEMPORARY WORKER PROGRAM

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## ABSTRACT

*Throughout history, the United States has relied on temporary worker programs to meet consumer demands of the agricultural industry during times of war and labor shortage. These temporary workers come to the United States in hopes of earning money to support themselves and the families left behind in their home country. Yet upon arrival, they are often met with inhumane housing*

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*conditions, unsafe transportation, and receive lower wages than promised. The purpose of this note is to draw attention to the injustices temporary workers face and propose solutions that promote a safe and healthy environment for temporary workers to continue assisting the United States. agricultural industry in providing food and necessary product to the American people.*

## I. INTRODUCTION

Beginning in World War I, the United States started a program in which individuals from foreign countries were granted the ability to temporarily live and work in the United States to assist during labor shortages.<sup>1</sup> Prior to entering the United States, these individuals first must obtain a visa.<sup>2</sup> A visa entitles the foreign citizen to travel to the United States and apply for entry.<sup>3</sup> Next, an immigration official at the point of entry determines whether the visa holder is eligible for admission.<sup>4</sup> In order to be granted a H-2A visa, the temporary worker must be sponsored by an employer who has already filed a petition with United States Citizenship and Immigrant Services (USCIS).<sup>5</sup> In most cases, this means temporary workers must already be employed prior to arrival. To participate in the program, employers filing a petition must demonstrate a shortage of United States workers, acceptable working conditions, and wages that meet minimum requirements.<sup>6</sup> In addition to the employer requirements, the work to be performed must consist of agricultural labor or services, lasts at least 35 hours a week, and be seasonal or temporary in nature.<sup>7</sup> Nevertheless, issues begin to arise when the temporary worker programs and participating employers fail to protect temporary workers from exploitation and inhumane working conditions.<sup>8</sup>

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1. Claire Klobucista & Diana Roy, *U.S. Temporary Foreign Worker Visa Programs*, COUNCIL OF FOREIGN RELS. (June 8, 2023, 11:58 AM), <https://www.cfr.org/backgrounder/us-temporary-foreign-worker-visa-programs> [<https://perma.cc/9XFX-ETYB>].

2. *Temporary Worker Visas*, U.S. DEP'T OF STATE BUREAU OF CONSULAR AFFS. (Aug. 20, 2023, 7:15 PM), <https://travel.state.gov/content/travel/en/us-visas/employment/temporary-worker-visas.html> [<https://perma.cc/6XW8-DMX9>].

3. *Id.*

4. *Id.*

5. *Id.*

6. ETAN NEWMAN ET AL., FARMWORKER JUST., NO WAY TO TREAT A GUEST: WHY THE H-2A AGRICULTURE VISA PROGRAM FAILS U.S. AND FOREIGN WORKERS 7, <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/4LVF-4CVK>].

7. *H-2A Temporary Certification for Agricultural Workers*, U.S. DEP'T OF LAB. (Aug. 20, 2023, 7:18 PM), <https://flag.dol.gov/programs/H-2A> [<https://perma.cc/87FS-HSPY>].

8. NEWMAN, *supra* note 6, at 7.

This Note will provide an overview of the history of agricultural temporary worker programs in the United States through exploration of the Bracero and H-2A Programs. Additionally, it will detail the widespread violations experienced by temporary workers in the agricultural industry today and study how a new rule amending the H-2A program addresses these violations. In conclusion, this Note will detail the repercussions if the recent changes fail to deter continued H-2A program violations and recommend solutions to address issues in areas where the new rule falls short.

## II. HISTORY OF U.S. TEMPORARY WORKER PROGRAMS

### *A. The Bracero Program*

The first United States temporary worker program, the Bracero program, was developed as a response to labor shortages created by World War I.<sup>9</sup> Labor shortages slow economic growth due to rising prices, which in turn, force consumers to expend rather than save.<sup>10</sup> By importing workers from foreign countries, these costs can be avoided.<sup>11</sup>

The Bracero program required sponsoring farmers to obtain certification verifying there were not enough United States workers to fill available jobs.<sup>12</sup> The wages paid to the temporary workers had to be similar to the salary paid to United States citizens for the same position.<sup>13</sup> If approved, temporary workers were given six-month work permits that could be renewed upon the meeting of certain conditions.<sup>14</sup> The first Bracero program lasted from 1917 to 1921 and ended with varied results.<sup>15</sup> Despite the established pay requirement, sponsoring farmers frequently failed to pay workers adequately.<sup>16</sup> This resulted in temporary workers becoming cheaper to pay than United States citizens.<sup>17</sup> In contrast, the Mexican government wanted more stability for its citizens who frequently returned from the

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9. Philip Martin, *Mexican Braceros and US Farm Workers*, WILSON CTR. (July 10, 2020), <https://www.wilsoncenter.org/article/mexican-braceros-and-us-farm-workers> [<https://perma.cc/QX37-LGCY>].

10. Douglas S. Massey & Zai Liang, *The Long-Term Consequences of a Temporary Worker Program: The US Bracero Experience*, 8 POPULATION RSCH. & POL'Y REV. 199, 201 (1989).

11. *Id.* at 202.

12. Martin, *supra* note 9.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *See id.*

program with little savings and often attempted to reenter the United States illegally in a continued search for work.<sup>18</sup>

In 1942, as a result of labor shortages caused by the beginning of World War II, the United States generated a short-term solution by bringing back the Bracero Program.<sup>19</sup> This time, the program was met with more apprehension.<sup>20</sup> United States workers were still recovering from the Great Depression and felt sponsoring farmers favored temporary workers over American citizens because of lower wages.<sup>21</sup>

The second Bracero Program was very similar to the first. It arranged for the importation of Mexican workers for up to six months and sent temporary workers to special camps upon their arrival in the United States where wages, working conditions, transportation, and employment were arranged by the United States government.<sup>22</sup> A signed contract, detailing the temporary workers assignment, was completed by a United States Department of Labor (DOL) representative and the worker.<sup>23</sup> Despite these included provisions, temporary workers have long attested to the fact that they never really knew the compensation and housing conditions they were legally entitled to, regardless of what was stated in the contract.<sup>24</sup>

While the Bracero Program was meant to be a short-term solution, it was continuously extended through amendments until 1964.<sup>25</sup> With no end in sight, the United States government was ill-equipped to continue enforcing compliance with the signed contracts during the 22-year-long continuation of the program.<sup>26</sup> In addition to receiving compensation, temporary workers were entitled to free transportation during their time in the United States.<sup>27</sup> However, due to the United States' government's failure to enforce the contract, both reasonable pay and reliable transportation were not frequently provided by sponsoring farmers.<sup>28</sup> The

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18. *Id.*

19. Massey & Liang, *supra* note 10, at 203.

20. Martin, *supra* note 9.

21. *Id.*

22. Massey & Liang, *supra* note 10, at 203.

23. RONALD L. MIZE & ALICIA C.S. SWORDS, CONSUMING MEXICAN LABOR: FROM THE BRACERO PROGRAM TO NAFTA 10 (2011).

24. *Id.* at 11.

25. Massey & Liang, *supra* note 10, at 203.

26. *See id.*

27. *Id.*

28. MIZE & SWORDS, *supra* note 23, at 11, 13–14.

provided transportation was often unsafe, resulting in numerous accidents and fatalities of temporary workers.<sup>29</sup>

In order to get to and from work, temporary workers were continually subject to the schedules of trucks that did not meet safety standards required by the H-2A program and were driven by unqualified operators, who were often overworked and ignored safety measures.<sup>30</sup> In one incident, a converted flatbed truck had been equipped, against safety code, with a canopy to transport temporary workers.<sup>31</sup> Ultimately, 31 temporary workers were killed when the converted truck collided with a train.<sup>32</sup>

By the 1960s, labor sectors and activists openly condemned the program for the violation of workers' rights, which led to a Congressional inquiry into the exploitation of temporary workers.<sup>33</sup> The findings of harsh treatment of temporary workers was one of many reasons the program was brought to an end.<sup>34</sup> However, the United States emphasized the primary reason for termination resulted from competition in the agricultural industry between temporary workers and United States farm workers.<sup>35</sup> While the end of the Bracero Program marked the end of the first official temporary worker program in the United States, it would not be the last due to the United States agricultural industry's ever-increasing reliance on foreign workers to successfully meet consumer demand.

### *B. The H-2A Temporary Agricultural Program*

The H-2 nonimmigrant visa program was established by the Immigration and Nationality Act of 1952.<sup>36</sup> The early H-2 visa program faced the same criticism the Bracero Program faced; therefore, the program was revised in an effort to improve the program.<sup>37</sup> More than 30 years later, the Immigration Reform Control Act (IRAC) of 1986 amended the Immigration and Nationality Act to create the H-2A

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29. *Id.* at 13–14.

30. *Id.* at 15.

31. *Id.*

32. *Id.*

33. Patricia Garcia, *Documenting and Classifying Labor: The Effect of Legal Discourse on the Treatment of H-2A Workers*, 14 ARCHIVAL SCI. 345, 348 (2014).

34. See generally MIZE & SWORDS, *supra* note 23, at 14.

35. Martin, *supra* note 9.

36. 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/2BU2-3LSE>].

37. Garcia, *supra* note 33, at 349.

program for agricultural workers and H-2B program for seasonal non-agricultural employment.<sup>38</sup>

The H-2A temporary agriculture program allows agricultural employers who are experiencing labor shortages in the United States to bring foreign workers into the country to perform agricultural labor for a temporary time.<sup>39</sup> In order to qualify for a H-2A visa, employers must demonstrate there are not sufficient, willing, and qualified United States workers available.<sup>40</sup> Additionally, they must also show the employment of H-2A workers will not affect the wages and working conditions of similarly employed United States workers.<sup>41</sup>

The goal of IRAC was the same as the Immigration and Nationality Act: to meet United States labor needs without increasing the country's permanent population and provide temporary workers better protections while working in the United States.<sup>42</sup> These goals are overseen by the DOL, the Department of Homeland Security (DHS), and the Department of State (DOS).<sup>43</sup> The requirements in place are similar to the Bracero program but have evolved to provide more humane treatment for eligible workers.<sup>44</sup> Employers must complete and submit a work order with their State Workforce Agency outlining the terms and conditions of the temporary workers' employment.<sup>45</sup> They must then submit a labor certification application with the DOL.<sup>46</sup> The labor certification application is in place to protect temporary workers by requiring employers to pay the federal or state minimum wage and ensuring the workers are subjected to reasonable work hours, housing costs, transportation, and insurance.<sup>47</sup>

Even with heightened requirements, a total of 13,081 H-2A applications were received in 2019 and only 211 were denied.<sup>48</sup> Despite safety measures in place, a 2008 study found indigenous farmworkers "were facing unsafe working

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38. Nepal, *supra* note 36.

39. *H-2A Temporary Agricultural Program*, U.S. DEP'T OF LAB. (Aug. 28, 2023, 2:23 PM), <https://www.dol.gov/agencies/eta/foreign-labor/programs/h-2a> [<https://perma.cc/V5BU-4K2C>].

40. *Id.*

41. *Id.*

42. Nepal, *supra* note 36.

43. *Id.*

44. See Massey & Liang, *supra* note 10, at 203.

45. Nepal, *supra* note 36.

46. CENTRO DE LOS DERECHOS DEL MIGRANTE, INC., RIPE FOR REFORM: ABUSES OF AGRICULTURAL WORKERS IN THE H-2A VISA PROGRAM 22, <https://cdmigrante.org/wp-content/uploads/2020/04/Ripe-for-Reform.pdf> [<https://perma.cc/2PG5-SQYS>].

47. *Id.* at 11–12.

48. *Id.* at 15.

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conditions, based in part on the unavailability of safety information and equipment and language barriers; and workers experienced discrimination on the job, due primarily to their language and cultural differences.”<sup>49</sup> A more recent study by Centro de los Derechos del Migrante, Inc. (Center for Migrants’ Rights) found “94% of workers experienced three or more serious legal violations, and almost half (46%) experienced five or more[,]” while working on an H-2A visa in the United States.<sup>50</sup> Despite legislative action that has already taken place, these widespread violations continue to occur.<sup>51</sup>

### III. MODERN DAY VIOLATIONS OF THE H-2A PROGRAM

The current H-2A program has no limit on the number of visas the government issues annually.<sup>52</sup> In the past 10 years, the program has expanded exponentially, yet protections afforded to temporary workers have not expanded in response to program growth.<sup>53</sup> This lack of protection has resulted in the inhumane treatment of workers while employed by businesses within the United States agricultural industry.<sup>54</sup>

The Center for Migrant’s Rights interviewed 100 Mexican workers who have worked as H-2A workers in the United States within the past four years and found the program had a high volume of systemic violations of workers’ legal rights.<sup>55</sup> The interview process discovered mistreatment often begins before temporary workers even arrive in the United States due to debt caused by recruitment fees and travel costs related to an opportunity to work in the United States.<sup>56</sup> Once the temporary workers arrive, they are met with conditions different from those they were promised.<sup>57</sup> In total, around 94% of workers surveyed experienced three or more serious legal violations during their time in the H-2A program.<sup>58</sup>

The program does allow joint employers to sponsor H-2A workers; however, traditionally only one employer has responsibility and liability over the worker

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49. Stephanie Farquhar et al., *Promoting the Occupational Health of Indigenous Farmworkers*, 10 J. OF IMMIGRANT & MINORITY HEALTH 269, 280 (2008).

50. CENTRO DE LOS DERECHOS DEL MIGRANTE, INC., *supra* note 46, at 18.

51. *See* Nepal, *supra* note 36.

52. CENTRO DE LOS DERECHOS DEL MIGRANTE, INC., *supra* note 46, at 15.

53. *Id.*

54. *See id.* at 18.

55. *See id.* at 4.

56. *See id.* at 19.

57. *Id.* at 4.

58. *Id.*

depending on the location at which the injury or violation occurs.<sup>59</sup> Much of the failure of the program can be attributed to this power imbalance between the sponsoring employers and workers in the H-2A program because H-2A visas are tied to a single employer who typically holds all of the bargaining power.<sup>60</sup> An example of this is the recent 2021 prosecution of more than 24 defendants for human trafficking and visa fraud surrounding thousands of victims holding H-2A agricultural visas.<sup>61</sup> The employers-turned-traffickers sold and traded H-2A workers they brought into the country and forced temporary workers to dig for onions with their bare hands for illegal wages.<sup>62</sup> The wages received were far below the statutorily required rate for participants in the H-2A program.<sup>63</sup> Workers experienced death threats, inhumane housing conditions, and rape.<sup>64</sup> Two individuals ultimately died of heat exhaustion due to the inhumane working conditions.<sup>65</sup> The United States Department of Justice (DOJ) described the temporary workers' treatment as "modern-day slavery."<sup>66</sup>

In addition to being responsible for transportation and pay, sponsoring employers are also responsible for providing adequate housing for temporary workers under the H-2A program.<sup>67</sup> The current program allows employers to meet the requirement through several methods, which include providing a copy of a housing inspection report or certification by the applicable local, state, or federal

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59. 8 U.S.C. § 1188(d)(2).

60. CENTRO DE LOS DERECHOS DEL MIGRANTE, INC., *supra* note 46, at 4.

61. Lautaro Grinspan, 'This Has Been Happening for a Long Time': *Modern-day Slavery Uncovered in South Georgia*, THE ATLANTA J.-CONST. (Dec. 3, 2021), <https://www.ajc.com/news/this-has-been-happening-for-a-long-time-modern-day-slavery-uncovered-in-ga/SHBHTDDTTBG3BCPSVCB3GQ66BQ/> [https://perma.cc/A6SE-L44M].

62. *Second Class Workers: Assessing H2 Visa Programs Impact on Workers: Hearing Before the Subcomm. on Workforce Prots. of the H. Educ. & Lab. Comm.*, 117th Cong. 2 (2022) [hereinafter *Second Class Workers*] (statement of Farmworker Justice), <https://www.farmworkerjustice.org/wp-content/uploads/2022/07/Farmworker-Justice-Statement-7.20.22-H-2-Hearing.pdf> [https://perma.cc/8ADG-M6UL].

63. *Id.* at 13.

64. *See id.* at 2-3.

65. *See id.* at 3.

66. Press Release, U.S. Att'y's Off. S. Dist. of Ga., Human Smuggling, Forced Labor Among Allegations in South Georgia Federal Indictment (Nov. 22, 2021), <https://www.justice.gov/usao-sdga/pr/human-smuggling-forced-labor-among-allegations-south-georgia-federal-indictment> [https://perma.cc/44EQ-KETD].

67. *Fact Sheet #26: Section H-2A of the Immigration and Nationality Act (INA)*, U.S. DEP'T OF LAB. WAGE & HOUR DIV. (Feb. 2010), <https://www.dol.gov/agencies/whd/fact-sheets/26-H2A#> [https://perma.cc/22B7-GP4S].



agency or by providing a signed and dated written statement confirming that the accommodation complies with the applicable standards.<sup>68</sup>

This gap in protections has led to numerous human rights violations in which workers have been found to share a bed, sleep on the floor, and live in close quarters with numerous people.<sup>69</sup> An example of this took place in Iowa when inspections failed to take place due to lack of employed investigators.<sup>70</sup> Once the only part-time inspector was able to complete an investigation, the reports of H-2A program living conditions revealed black mold, raw sewage, pest infestations, broken windows, and defective plumbing and electrical wiring.<sup>71</sup> Additionally, workers have had to deal with pest infestations and fire hazards due to inaccessible sanitary facilities or inadequate cooking equipment.<sup>72</sup>

Unfortunately, cases like these are not unique due to the nature of these workers being entirely at the mercy of their sponsoring employer.<sup>73</sup> The restrictions of the H-2A program do not allow temporary workers to change employers, and in turn, give the sponsoring employer complete control over the individuals during their employment in the United States.<sup>74</sup>

There is not a single employer or state responsible for these systemic issues—the exploitation of temporary workers occurs across the entire country. In Missouri, H-2A workers hired to pick watermelons were housed in a former county

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68. *2010 H-2A Program FAQs*, U.S. DEP'T OF LAB. OFF. OF FOREIGN LAB. CERTIFICATION (June 16, 2017), [https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/Foreign\\_Labor\\_Certification\\_Website\\_2016\\_\(Meal\)\\_Update2.pdf](https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/Foreign_Labor_Certification_Website_2016_(Meal)_Update2.pdf) [https://perma.cc/D5T9-TQMJ].

69. *Temporary Agricultural Employment of H-2A Nonimmigrants in the United States*, 87 Fed. Reg. 61660, 61710 (Nov. 14, 2022).

70. See Robert Holly & Claire Everett, *Blighted Housing: Inspections Fail to Stem Poor Conditions for Migrant Farmworkers*, INVESTIGATE MIDWEST (Apr. 13, 2016), <https://investigatamidwest.org/2016/04/13/blighted-housing-inspections-fail-to-stem-poor-conditions-for-migrant-farmworkers-2/> [https://perma.cc/85U2-A9QK].

71. *Id.*

72. *Temporary Agricultural Employment of H-2A Nonimmigrants in the United States*, 87 Fed. Reg. at 61710.

73. *Second Class Workers*, *supra* note 62, at 3.

74. *Id.*

jail.<sup>75</sup> They were provided with little food and water during work hours.<sup>76</sup> In Arizona, an employer used a bus with a steering column attached by duct tape to transport workers.<sup>77</sup> In Texas, a worker was promised an hourly rate of \$11.87; however, upon arrival he was informed the pay would be a flat rate of \$400 per week despite being required to work approximately 70 hours per week.<sup>78</sup> The report by the Center for Migrant's Rights calculated the reduced wage to be roughly \$5.19 per hour, which is \$6.68 less per hour than he was legally entitled to earn.<sup>79</sup> This resulted in the temporary worker being severely underpaid by at least \$11,000 total for the duration of the contract.<sup>80</sup>

Regardless of state regulations and employer compliance with the federally mandated temporary worker programs, violations continue to occur and disproportionately impact the people that are essential for the efficient operation of the United States agriculture industry today.<sup>81</sup>

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75. Press Release, U.S. Dep't Lab. Wage & Hour Div., U.S. Department of Labor Obtains Preliminary Injunction to Prevent Agriculture Employer from Violating Obligations of H-2A Visa Program (Aug. 9, 2018), <https://www.dol.gov/newsroom/releases/whd/whd20180809-2> [<https://perma.cc/H3MG-CATJ>].

76. Press Release, U.S. Dep't Lab. Wage & Hour Div., Florida Employer to Pay 165k in Back Wages, 75k in Penalties for Shorting H-2A Workers' Wages, Subjecting Them to Unsanitary Living Conditions (Mar. 4, 2022), <https://www.dol.gov/newsroom/releases/whd/whd20220304-0> [<https://perma.cc/82GS-838H>].

77. Press Release, U.S. Dep't of Lab. Wage & Hour Div., Federal Judge Orders Arizona Farm Labor Contractors to Pay Employees Back Wages, Comply with Safe Transportation Laws (June 4, 2019) [hereinafter Federal Judge Orders], <https://www.dol.gov/newsroom/releases/whd/whd20190604-2> [<https://perma.cc/D4UU-LKMA>].

78. CENTRO DE LOS DERECHOS DEL MIGRANTE, INC., *supra* note 46, at 22.

79. *Id.*

80. *Id.*

81. See Andrew Moriarty, *Immigrant Farmworkers and America's Food Production: 5 Things to Know*, FWD.US (Sept. 14, 2022), <https://www.fwd.us/news/immigrant-farmworkers-and-americas-food-production-5-things-to-know/> [<https://perma.cc/S5K4-U8BH>].

#### IV. NEW H-2A AMENDMENT EXPANDS PROTECTIONS FOR TEMPORARY WORKERS

##### *A. Overview of Amendment*

On July 26, 2019, the DOL requested public comments on proposals to modernize the H-2A process.<sup>82</sup> In total, 83,532 comments were received from the public, private, and not-for-profit sectors.<sup>83</sup> Following careful consideration of the comments received, the DOL amended the H-2A program on October 12, 2022.<sup>84</sup> The primary goals were to strengthen protection for temporary workers, modernize the H-2A application, and ease regulatory burdens on employers.<sup>85</sup>

Overall, the amendment to the rule, named Temporary Agricultural Employment of H-2A Nonimmigrants in the United States, includes several notable changes, such as improving safety and health protections for workers housed in rental or public accommodations, clarifying the housing certification process, establishing explicit authority to attorneys and agents for employer misconduct, making electronic filing mandatory, and modernizing the methodology and procedures for determining the prevailing wage.<sup>86</sup>

##### *1. Strengthening Protections*

The amendment clarifies the definition and consequent liability of an “employer” versus that of “joint employers” in regard to the H-2A application.<sup>87</sup> The language specifies joint employers are, at all times, responsible for the H-2A workers sponsored under the application.<sup>88</sup> This simply means employers who file as joint employers are treated as such for purposes of compliance and enforcement.<sup>89</sup> Following the amendment, if something goes wrong with H-2A

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82. Temporary Agricultural Employment of H-2A Nonimmigrants in the United States, 87 Fed. Reg. 61660, 61662 (Oct. 12, 2022).

83. *Id.* at 61664.

84. *See id.* at 61791 (containing the text of the amendments to the program, which were published on October 12, 2022).

85. *Id.* at 61660.

86. Press Release, U.S. DEP’T OF LAB. U.S. Wage & Hour Div., Department of Labor Announces Final Rule to Improve H-2A Visa Program (Oct. 6, 2022), <https://www.dol.gov/newsroom/releases/whd/whd20221006> [<https://perma.cc/32E6-65WF>].

87. Temporary Agricultural Employment of H-2A Nonimmigrants in the United States, 87 Fed. Reg. at 61662.

88. 20 C.F.R. § 655.103(b) (2023).

89. Temporary Agricultural Employment of H-2A Nonimmigrants in the United States, 87 Fed. Reg. at 61662.

program compliance, the application will be able to hold all employers liable for any discretion.<sup>90</sup>

The final rule dictated by Congress also requires employers who move H-2A workers from one employer to another to retain program responsibility and liability with respect to the workers it moves.<sup>91</sup> An example of this would be if two small growers shared temporary workers every other week and one small grower failed to pay the workers for a given time, the other grower would be responsible to provide workers with adequate pay or they may be subject to discipline. If the DOL determines an employer has committed a violation, either one or all of the employers named in the employment certification can be found responsible for remedying the violation, even if the violation did not occur under their direct supervision.<sup>92</sup> This provision was included to encourage employer compliance by providing temporary workers with the federally mandated pay and adequate living conditions.<sup>93</sup>

In addition to sufficient pay, employers are required to provide housing to temporary workers sponsored under the H-2A program.<sup>94</sup> Employers can meet the housing obligations by providing their own housing that meets the federal health and safety standards or by renting private or public accommodations that meet the applicable standards.<sup>95</sup> In the past, employers were able to meet housing standards by numerous methods and, as a result, the differing standards created a challenge in uniformly protecting the health and safety of temporary workers.<sup>96</sup>

To provide uniformity, the DOL identified specific Occupational Safety and Health Administration (OSHA) standards within 20 C.F.R. 655.122(d)(1)(ii) to apply to rental or public accommodations provided for the H-2A program.<sup>97</sup> Some specifics of the provision require 50 square feet of floor space for each occupant, beds for each individual, requirement of sanitation in food preparation areas, and access to water.<sup>98</sup> If the local standards do not address one or more issues addressed

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90. *Id.* at 61663, 61732.

91. *See* 8 U.S.C. § 1188(d)(2) (2012).

92. Temporary Agricultural Employment of H-2A Nonimmigrants in the United States, 87 Fed. Reg. at 61675.

93. *Id.*

94. *See* 8 U.S.C. § 1188(c)(4); 20 C.F.R. § 655.122(d)(1) (2023).

95. *See* 8 U.S.C. § 1188(c)(4).

96. *See* Temporary Agricultural Employment of H-2A Nonimmigrants in the United States, 87 Fed. Reg. at 61709.

97. 20 C.F.R. § 655.122(d)(1)(i).

98. *Id.* § 655.122(d)(1)(ii).

by the OSHA health and safety standards, then state standards will apply.<sup>99</sup> However, if both the local and state standards fail to address one or more of the issues addressed by OSHA standards, the OSHA standards will apply.<sup>100</sup>

The previous H-2A program also required employers to cover the costs of meals and transportation.<sup>101</sup> Historically, the costs of transportation began at the temporary workers home address and accumulated until the worker made it to the United States employer's designated housing or work location.<sup>102</sup> This standard requires employers to pay for all transportation costs until the employee arrives in the United States to begin work.<sup>103</sup> This rule was unchanged and leaves employers with a continued obligation to reimburse workers for travel costs to and from their place of residence in their home country.<sup>104</sup>

The amendment also includes language altering the safety standards of employer transportation by requiring "the same transportation safety standards, driver licensure, and vehicle insurance as required under 29 U.S.C. 1841."<sup>105</sup> These amendments expand and strengthen protections offered under the past H-2A program by increasing wage security, stabilizing transportation requirements, and increasing enforcement of housing standards.<sup>106</sup>

## *2. Modernizing the Process & Expanding Employer Access*

In the past, the H-2A program required employers to pay temporary workers the highest wage based upon the adverse effect wage rate (AEWR), the prevailing wage, the agreed-upon collective bargaining wage, or the federal or state minimum wage.<sup>107</sup> The AEWR, determined by the Department of Agriculture's Farm Labor Survey, defines the "average hourly wage rate for field and livestock workers."<sup>108</sup> Before the amendment, there was no clear explanation of the process used,

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99. Temporary Agricultural Employment of H-2A Nonimmigrants in the United States, 87 Fed. Reg. at 61711.

100. *Id.*

101. *Id.* at 61716.

102. *Id.* at 61719.

103. 20 C.F.R. § 655.122(h)(1).

104. Temporary Agricultural Employment of H-2A Nonimmigrants in the United States, 87 Fed. Reg. at 61719.

105. *Id.* at 61718–19.

106. *Id.* at 61718.

107. Roy Maurer, *DOL Updates H-2A Visa Program for Farmworkers*, SHRM (Nov. 7, 2022), <https://www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/dol-updates-h-2a-visa-program-for-farmworkers.aspx> [https://perma.cc/R6SJ-ENC9].

108. *Id.*

including how to determine authority for establishing prevailing wages.<sup>109</sup> “The prevailing wage is defined as the average wage paid to similarly employed workers in a specific occupation in the same area of employment.”<sup>110</sup> The new law addresses this issue by amending § 653.501(c)(2)(i) and making the definition for “prevailing wage” the same for both the agricultural recruitment system and the H-2A program under § 655.103(b).<sup>111</sup>

This change of definition for the agricultural recruitment system now means the prevailing wage is established by the Office of Foreign Labor Certification (OFLC) Administrator “for a crop activity or agricultural activity and . . . geographic area based on a survey conducted by a State that meets the requirements in § 655.120(c).”<sup>112</sup> In sum, the new rule simply expands who can conduct prevailing wage surveys.<sup>113</sup>

All surveyors must now make a reasonable good faith effort to contact all employers who employ workers in the area being surveyed or to conduct a randomized sampling of such employers.<sup>114</sup> The DOL highlights this surveying technique as a requirement rather than a recommendation.<sup>115</sup> The new amendment expands on the number of survey providers to encourage an increase in survey data to generate a fair and accurate prevailing wage.<sup>116</sup> The overall requirement that employers pay temporary workers the highest rate of the AEW, the prevailing wage, the agreed-upon collective bargaining wage, or the federal or state minimum wage has been retained.<sup>117</sup>

The DOL made these changes in response to concerns that the current AEW methodology for lower level agriculture workers may have had an adverse effect on the wages of management agricultural positions in the past.<sup>118</sup> Kristi Boswell, the former senior advisor at the USDA, noted that “the vast majority of

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109. See 20 C.F.R. § 655.210(g) (2023).

110. Maurer, *supra* note 107.

111. 20 C.F.R. § 653.501(c)(2)(i).

112. *Id.* § 655.103(b).

113. See Maurer, *supra* note 107.

114. Temporary Agriculture Employment of H-2A Nonimmigrants in the United States, 87 Fed. Reg. 61660, 61694-95 (Oct. 12, 2022).

115. 20 C.F.R. § 655.120(C)(1)(IV).

116. See Maurer, *supra* note 107.

117. *Id.*

118. *Id.*; Adverse Effect Wage Rate Methodology for the Temporary Employment of H-2A Nonimmigrants in Non-Range Occupations in the United States, 86 Fed. Reg. 68174, 68177 (Dec. 01, 2021).

workers are getting paid the AEW. ”<sup>119</sup> In some states, however, prevailing wages are higher than the AEW are being used, so prevailing wages are becoming increasingly important.<sup>120</sup> Following the DOL approval of a prevailing wage rate, the approved wage will remain valid for one year after it is posted on the OFLC website.<sup>121</sup> The new rule establishes a prevailing wage that will expire either one year after the OFLC post or on the date an adjusted prevailing wage is issued, whichever occurs earliest.<sup>122</sup>

Additionally, the new rule distinguishes the minimum requirements for wages and working conditions by separating them into two different sentences.<sup>123</sup> At a minimum, employers must (1) offer the applicable prevailing wage or federal or state minimum wage, whichever is higher, and (2) working conditions are not less than conditions among similarly employed workers<sup>124</sup>

In another attempt to modernize the process for employers, the new rule makes changes to § 655.130(c)(1) by requiring employers to submit electronic submissions for H-2A applications for temporary employment certifications.<sup>125</sup> The change requires all applications to be signed with an electronic signature and submitted electronically to the National Processing Center (NPC).<sup>126</sup> The only exceptions allowed are employers authorized to file by mail because of a lack of internet access or a reasonable accommodation.<sup>127</sup> Ultimately, this amendment will improve program efficiency, reduce errors, streamline the process, improve communication between agencies, and aid response times.<sup>128</sup>

Some dissenters were concerned this amendment would duplicate the application and cause a delay between the employer’s submission and the State Workforce Agency’s (SWA) access to the job order.<sup>129</sup> The DOL has ensured this will not be an issue as the SWA already has electronic access to the application system and the transmission from the NPC to the SWA is automatic and

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119. Maurer, *supra* note 107.

120. *See id.*

121. Temporary Agriculture Employment of H-2A Nonimmigrants in the United States, 87 Fed. Reg. 61660, 61701 (Oct. 12, 2022).

122. *Id.*

123. *See* 20 C.F.R. § 653.501(c) (2023).

124. *Id.* at § 653.501(c)(2)(i)–(ii).

125. *Id.* at § 655.130(c)(1).

126. *Id.* at § 655.130(d).

127. *Id.* at § 655.130(c)(2).

128. Temporary Agricultural Employment of H-2A Nonimmigrants in the United States, 87 Fed. Reg. 61660, 61705 (Oct. 12, 2022).

129. *Id.*

instantaneous.<sup>130</sup> Following the new amendment, the DOL requires SWA to state the reason(s) the job order fails to meet the requirements and the modifications needed to accept the order.<sup>131</sup> These amendments modernize the current H-2A application process in a way that both protects temporary workers while increasing the accessibility and response time for employers.

In addition to enhancing temporary worker protection, § 655.135(f) allows small growers who alone cannot guarantee full-time work to join other small growers in the same area to sponsor temporary workers by guaranteeing full-time employment.<sup>132</sup> This specific section provides increased protection to temporary workers while also providing more flexibility to sponsoring employers who are hoping to use the program to meet production standards.

### *B. Critiques of the New Rule*

#### *1. Opposition From All Sides*

The new rule has received numerous critiques from private citizens, farmworkers, and workers' rights advocacy organizations.<sup>133</sup> The current opposition mirrors the same concerns that have historically been voiced against the original H-2A program.<sup>134</sup> Most farmworkers who opposed the proposed changes did so over concerns that the amendments to the current H-2A program could disproportionately harm small farms.<sup>135</sup> Specifically, the American Farm Bureau Federation has spoken out against the changes regarding the prevailing wage surveys.<sup>136</sup> The organization believes the changes will lead to the H-2A program becoming too costly for smaller employers to rely on.<sup>137</sup> The program has been costly for small farmers in the past due to the financial capital needed for housing

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130. *Id.* at 61706.

131. *Id.* at § 655.141(b)(1).

132. *See id.* at § 655.135(f).

133. Temporary Agricultural Employment of H-2A Nonimmigrants in the United States, 87 Fed. Reg. at 61664.

134. *Latest Slavery Indictments Expose Exploitive Nature of H-2A "Guestworker" Program*, COAL. OF IMMOKALEE WORKERS (Oct. 5, 2021), <https://ciw-online.org/blog/2021/10/latest-slavery-indictments-expose-exploitive-nature-of-h-2a-guestworker-program/> [<https://perma.cc/4VX7-NZME>].

135. Temporary Agricultural Employment of H-2A Nonimmigrants in the United States, 87 Fed. Reg. at 61665.

136. *See Maurer, supra* note 107.

137. *Id.*



and visa application processing where changes from the new rule have only increased costs, making it nearly impossible for small farm participation.<sup>138</sup>

In addition, employers argue the changes encourage them to deny jobs to United States farm workers in order to hire foreign workers for less pay.<sup>139</sup> While this argument has been commonly used throughout the history of the H-2A program and is a cause for real concern, both the new and old H-2A programs already addressed this concern by requiring sponsoring employers to prove United States workers were not available to fill the positions prior to getting their applications approved to hire temporary workers.<sup>140</sup>

Alternatively, workers' rights advocacy organizations contend the proposed changes are not enough to address the prevalent inhumane treatment within the immigration system.<sup>141</sup> The proposed changes do not address the lucrative recruitment fees and the impact on agricultural sectors with year-round labor needs.<sup>142</sup> Failure to address these concerns leads to a more general concern about food security as the agricultural industry is highly dependent on temporary workers in order to maintain production and transportation needs.<sup>143</sup>

Additionally, remaining ambiguous terms within the rule pose a danger to temporary workers. An example of this is the use of the term "anticipates" when identifying start dates.<sup>144</sup> By allowing employers to use anticipatory language on their Application for Temporary Employment Certification, the new law risks the possibility that temporary workers arrive at a location that is unprepared to start work when, in fact, they do not receive pay until actual work begins.<sup>145</sup> A way to solve this issue is through providing pay to the temporary workers on the day they arrive at their work locations, regardless of whether the employer is ready to begin work.

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138. *Id.*

139. Temporary Agricultural Employment of H-2A Nonimmigrants in the United States, 87 Fed. Reg. at 61660.

140. See *H-2A Temporary Agricultural Program*, *supra* note 39.

141. *Second Class Workers*, *supra* note 62, at 3; see Temporary Agricultural Employment of H-2A Nonimmigrants in the United States, 87 Fed. Reg. at 61665.

142. Temporary Agricultural Employment of H-2A Nonimmigrants in the United States, 87 Fed. Reg. at 61665.

143. See *US Agriculture Relies Heavily on Immigrant Workers and They're Getting Older*, FOODINDUSTRY.COM (June 2021) [hereinafter *US Agriculture*], <https://www.foodindustry.com/articles/us-agriculture-relies-heavily-on-immigrant-workers-and-theyre-getting-older/> [https://perma.cc/38LP-3F9N].

144. See Temporary Agricultural Employment of H-2A Nonimmigrants in the United States, 87 Fed. Reg. at 61677.

145. *Id.* at 61678.

Employers in opposition of this argument believe they should be given a 14 to 30-day flexibility period due to the inconsistent nature of agricultural work.<sup>146</sup> The flexible window for workers to start work would allow employers to factor in unpredictable circumstances.<sup>147</sup> The DOL has rejected these arguments.<sup>148</sup> The DOL contends the term “anticipated” was only included to ensure organizations understand an approximate time frame for the beginning and end of the temporary work program.<sup>149</sup>

Employers were hopeful the new rule would make the program more flexible and cost-effective.<sup>150</sup> However, they were disappointed when the amendments failed to address their concerns.<sup>151</sup> Employers could have benefitted from a flexible filing window, an opportunity to file one application for multiple dates of entry, or the ability to request post-certification amendments; unfortunately, the amendments did not provide any of these measures.<sup>152</sup>

Despite critics of the new rule and the remaining ambiguity, the DOL’s amended provisions for the H-2A program are taking steps to acknowledge and address past program violations by offering temporary workers more protections, modernizing the program, and increasing employer access.<sup>153</sup>

## 2. Failure to Address Housing and Transportation Standards

The main concern regarding the new rule is whether or not it truly advocates for better treatment of temporary workers.<sup>154</sup> By amending the past health and safety regulations for housing of temporary workers, the new rule does accomplish the purpose of improving living conditions.<sup>155</sup> If employer-supplied housing is subject to regular inspections and enforcement for violations, the new H-2A amendment addresses the negligent housing conditions that have previously been accepted. Even so, there are many concerns, such as housing standards and transportation safety, the new rule fails to tackle.

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146. *Id.*

147. Maurer, *supra* note 107.

148. *See* Temporary Agricultural Employment of H-2A Nonimmigrants in the United States, 87 Fed. Reg. at 61660.

149. *Id.* at 61728.

150. Maurer, *supra* note 107.

151. *See id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *See* Temporary Agricultural Employment of H-2A Nonimmigrants in the United States, 87 Fed. Reg. 61660, 61660 (Oct. 12, 2022).

Employers are still not required to provide windows for ventilation or access to dining halls and food handling facilities despite living quarters without kitchen facilities.<sup>156</sup> The DOL contends windows are not necessary for proper ventilation when a mechanical system is in place and current kitchen facility standards would be too difficult for employers to meet.<sup>157</sup> However, the failure to provide these simple necessities is a disservice to the individuals who have come to America to assist with the agricultural industry's work demand.<sup>158</sup>

While the new amendments did adopt changes to the safety regulations regarding transportation of temporary workers by employers, the DOL failed to adopt any provisions to directly address driver fatigue, certification, vehicle operational status, and other critical safety issues.<sup>159</sup> The DOL argued that much of the transportation of temporary workers is short in both duration and distance, despite past fatalities occurring due to driver fatigue and unsafe vehicle conditions during transport of workers.<sup>160</sup>

The amendment not only fails to protect temporary workers from unsafe conditions, but also fails to protect employers from liability surrounding transportation. The DOL mentions that employers with workers' compensation insurance will not cover transportation for non-work-related purposes, such as the grocery store or laundry.<sup>161</sup> Transportation of temporary workers remains a significant issue within human rights advocacy groups, and the most recent amendment has left both temporary workers and sponsoring employers unprotected. Overall, the new rule has provided improved protections for participants in the H-2A program, but it has failed to adequately address housing standards and transportation safety.

## V. PERSISTING PROBLEMS WITH THE H-2A PROGRAM

### A. U.S. Dependence on Foreign Labor

The American Farm Bureau Federation estimates the United States agricultural sector needs between 1.5 to 2 million hired workers each year to meet schedules of production.<sup>162</sup> In California, 56% of farmers have reported being

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156. *Id.* at 61713.

157. *Id.*

158. *Id.* at 61714.

159. *See id.* at 61718.

160. *See id.*; *see also* Federal Judge Orders, *supra* note 77.

161. Temporary Agricultural Employment of H-2A Nonimmigrants in the United States, 87 Fed. Reg. at 61719.

162. *US Agriculture*, *supra* note 143.

unable to find United States citizens to fill these necessary positions over the last five years.<sup>163</sup> Instead, it is estimated immigrant farmworkers currently make up 73% of agricultural workers in the United States, yet there are still not enough workers to support the agricultural industry's growing demand.<sup>164</sup> By maintaining H-2A program restrictions that limit workers to agricultural labor positions, the United States is failing to maximize the full potential of the program.

The labor shortage in the agricultural industry has only increased following the COVID-19 pandemic, with the vice president of the Pennsylvania Farmers' Union sharing his dairy farm's continuous struggle to find labor.<sup>165</sup> He explained "if it was difficult to find good help before when there's a dearth of labor, then it's even more difficult (now.) It feels like we're perennially short-handed."<sup>166</sup> Farmers' inability to find and fund adequate labor has forced the United States to depend on imported goods to compensate for the increase in demand.<sup>167</sup> In addition to reliance on other countries, the Natural Resources Defense Council reported in 2012 that nearly 20% of produce never leaves farms due to a lack of labor to transport the produce for sale.<sup>168</sup> This untouched produce could be used to meet consumer demand; however, the lack of United States workers to meet labor needs has left farmers and consumers vulnerable to unnecessary food waste.

Even if farmers can find temporary workers to meet production needs, labor shortages in the agriculture industry do not end there. Currently, there is a shortage of 160,000 truckers, which has left farmers waiting for equipment, grocers needing deliveries to restock shelves, and consumers dealing with longer wait times for online orders.<sup>169</sup> These agricultural labor shortages have long-term impacts outside

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163. *Id.*

164. *Farm Labor*, U.S. DEP'T OF AGRIC. ECON. RSCH. SERV. (Aug. 7, 2023), <https://www.ers.usda.gov/topics/farm-economy/farm-labor/#:~:text=In%202014%2D16%2C%2027%20percent,percent%20held%20no%20work%20authorization> [https://perma.cc/6TYA-B7Y4] (including immigrants working in the country illegally and workers who have received visas through temporary worker programs).

165. Lauren Rosenblatt & Pitt. Post-Gazette, *Farm Labor Shortage Nothing New, Getting Worse, Farmers Say*, ASSOCIATED PRESS (July 3, 2021, 8:52 AM), <https://apnews.com/article/immigration-health-coronavirus-pandemic-business-50121aa858e9f7cb2c708d94602ef366> [https://perma.cc/A99Z-UNUN].

166. *Id.*

167. (*Infographic*) *The U.S. Farm Labor Shortage*, AGAM. LENDING (June 28, 2022), <https://agamerica.com/blog/the-impact-of-the-farm-labor-shortage/> [https://perma.cc/NJ4J-KSDV].

168. *Id.*

169. Su Bacon, *Ag Supply Chains Feel the Pressure from Labor Shortage*, FED. RSRV. BANK OF KAN. CITY (May 18, 2022), <https://www.kansascityfed.org/agriculture/ag-symposium-snapshots/labor-ag-supply-chain/> [https://perma.cc/N74A-CSPZ].

the industry as well.<sup>170</sup> Due to severe shortages of workers in the production and manufacturing of goods, supply chains have been experiencing acute bottlenecks, which give rise to volatile prices and delivery delays.<sup>171</sup> Economists have also identified a correlation between inflation and the workforce deficit.<sup>172</sup>

The H-2A temporary agricultural program cannot be overlooked as a possible solution for addressing the labor shortage. There have already been movements to remove the restrictions that prevent H-2A workers from filling these critical roles, including increasing the number of workers to meet market demands.<sup>173</sup> By allowing these temporary workers to fill positions in the supply chain and manufacturing levels of the agriculture sector, the United States would be one step closer to addressing the current labor shortage. In order to achieve this, the H-2A program would also need to create additional standards for technical positions by ensuring adequate training and certification for temporary workers. The new rule is proof the H-2A program can be amended to provide more efficiency for employers and more protections for workers. It would be beneficial for the DOL to consider making an additional amendment to expand the scope of applicable jobs for the current H-2A workers.

#### *B. Strain Due to Immigration Enforcement Policy*

The USDA estimates around half of the nation's farmworkers are unauthorized.<sup>174</sup> The dire need of these individuals as workers in the agricultural field was demonstrated by a study commissioned by the Center for North American Studies, which found that if federal labor and immigration policies reduced the number of foreign-born workers by 50%, more than 3,500 dairy farms would close, leading to a big drop in milk production and a spike in prices of about

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170. (Infographic) *The U.S. Farm Labor Shortage*, *supra* note 167.

171. DANIEL REES & PHURICHAIRUNGCHAROENKITKUL, BANK FOR INT'L SETTLEMENTS, BULL. NO. 48, BOTTLENECKS: CAUSES AND MACROECONOMIC IMPLICATIONS (Hyun Song Shin ed. 2021), <https://www.bis.org/publ/bisbull48.pdf> [<https://perma.cc/UU9B-BBBA>].

172. Rebecca Rainey, *Biden and Businesses Agree on One Thing: U.S. Needs Immigrant Workers*, POLITICO (Dec. 4, 2021, 7:01 AM), <https://www.politico.com/news/2021/12/04/immigration-system-labor-squeeze-523744> [<https://perma.cc/8BSN-RTHQ>].

173. Arturo Castellanos-Canales, *America's Labor Shortage: How Low Immigration Levels Accentuated the Problem and How Immigration Can Fix It*, NAT'L IMMIGR. F. (Feb. 28, 2022), <https://immigrationforum.org/article/americas-labor-shortage-how-low-immigration-levels-accentuated-the-problem-and-how-immigration-can-fix-it/> [<https://perma.cc/WQF2-K3MT>].

174. Mary Jo Dudley, *These U.S. Industries Can't Work Without Illegal Immigrants*, CBS NEWS: MONEYWATCH (Jan. 10, 2019, 3:55 PM), <https://www.cbsnews.com/news/illegal-immigrants-us-jobs-economy-farm-workers-taxes/> [<https://perma.cc/HL6V-2W7P>].

30%.<sup>175</sup> Total elimination of immigrant labor would increase milk prices by 90%.<sup>176</sup> Despite ongoing labor shortages, this essential group of workers is still being subjected to strict, harmful immigration enforcement practices while the employers who benefit from their labor suffer little-to-no consequences.<sup>177</sup>

In recent years, deferral immigration enforcement policies have relied heavily on state and local agencies to provide information about temporary workers who have stayed past the allotted time periods on their visas.<sup>178</sup> This reliance has resulted in an unprecedented number of H-2A workers being placed into detention centers and deportation proceedings.<sup>179</sup> Once placed in deportation proceedings, these workers become ineligible to return for further participation in the H-2A program.<sup>180</sup>

The over-policing currently being supported by enforcement policies is disproportionately impacting immigrants and their families.<sup>181</sup> In turn, these policies act as a deterrence for individuals to participate in the H-2A program.<sup>182</sup> The continued failure to provide a safe and fair enforcement strategy may be detrimental to the sustained success of the United States economy and participation in the global trade market.

## VI. FINAL RECOMMENDATIONS

While the new amendments to the H-2A program do address some areas of prior concern, there is still more that can be done. One of the issues still unaddressed in the amendment is progress towards more humane treatment of temporary workers, or immigrants, who overstay their visas while working in the United States. Seemingly, the current brutality and spending budget in immigration

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175. FLYNN ADCOCK ET AL., TEX. A&M AGRILIFE RSCH. CTR. FOR N. AM. STUD., THE ECONOMIC IMPACTS OF IMMIGRANT LABOR ON U.S. DAIRY FARMS 12 (2015), <https://www.nmpf.org/wp-content/uploads/immigration-survey-090915.pdf> [<https://perma.cc/CHT4-6QKD>].

176. *Id.*

177. See RANDOLPH D. ALLES, U.S. DEP'T OF HOMELAND SEC., COMPREHENSIVE STRATEGY FOR OVERSTAY ENFORCEMENT AND DETERRENCE 6 (2020), [https://www.dhs.gov/sites/default/files/publications/ice\\_-\\_comprehensive\\_strategy\\_for\\_overstay\\_enforcement\\_and\\_deterrence\\_1.pdf](https://www.dhs.gov/sites/default/files/publications/ice_-_comprehensive_strategy_for_overstay_enforcement_and_deterrence_1.pdf) [<https://perma.cc/GB8P-BXZ8>].

178. *Immigration Enforcement*, NAT'L IMMIGR. L. CTR. (Aug. 20, 2023, 8:01 PM), <https://www.nilc.org/issues/immigration-enforcement/> [<https://perma.cc/42RK-H7EG>].

179. *Id.*

180. See generally *id.*

181. *Id.*

182. See ALLES, *supra* note 177.

enforcement has recently received nationwide criticism.<sup>183</sup> While workers under the H-2A program are legally allowed in the United States, many find themselves staying past the allotted time on their visa in order to search for more work.<sup>184</sup>

The key to enforcement policies is simply to maximize compliance with the law. The current system has been unsuccessful in achieving this goal but could be aided by revising the substantive rules of immigration enforcement.<sup>185</sup>

One method of achieving this is by ending the reliance on deportation by creating reasonable alternative penalties for immigration violations.<sup>186</sup> Frequently, the penalty of deportation is largely disproportionate to the immigration offense and could be remedied by penalties such as fines, treatment programs, probationary periods, or community service.<sup>187</sup> This would also ease the burden on the immigration system to have to maintain the current rate of deportation proceedings across the nation. If deportation is the correct penalty for the immigration offense, the system could replace the preemptive detention requirements.<sup>188</sup> Deportation begins with handcuffs and subjects the offender to time within a cage, despite almost every other federal agency in the administrative state enforcing its agenda without requiring detention.<sup>189</sup>

Instead of inhumane treatment, the government could take measures, such as providing counsel, support, or incentives, to ensure appearance and compliance with court orders for individuals facing deportation.<sup>190</sup> Specifically, for H-2A participants who overstay their visa, the policy could be changed to send them to their home country for a specific time frame before they become eligible to participate again. This would achieve the purpose of requiring compliance with the

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183. See Chantal Da Silva, *ICE Agents Detain Woman Despite 'High Risk' Pregnancy and Deny Her Medication for Days, Immigration Lawyers Say*, NEWSWEEK (Jan. 21, 2019, 12:29 PM), <https://www.newsweek.com/ice-agents-arrest-high-risk-pregnant-woman-during-her-green-card-interview-1299295> [<https://perma.cc/QV7Q-STPY>]; Morgan Winsor, *ICE Arrests Father of 3 as He Was Getting Kids Ready for School*, ABC NEWS (Feb. 3, 2018, 4:35 PM), <https://abcnews.go.com/US/ice-arrests-father-kids-ready-school/story?id=52818039> [<https://perma.cc/N9QD-28QF>].

184. Peter L. Markowitz, *A New Paradigm for Humane and Effective Immigration Enforcement*, CTR. FOR AM. PROGRESS (Nov. 30, 2020), <https://www.americanprogress.org/article/new-paradigm-humane-effective-immigration-enforcement/> [<https://perma.cc/8DU4-QGA3>].

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

law and providing discipline without banning them from reentry into the United States and H-2A program entirely. While these steps may seem futile in addressing the major issues the United States immigration system faces, they serve as a reminder that small changes can make a considerable impact on an individual's chances for an improved life.

A second idea for future amendments of the H-2A program is the creation of multi-year certifications and multi-year visas to improve program flexibility for both employers and temporary workers.<sup>191</sup> Employers who have passed all of their inspections, met previous requirements, and have been active in the program for two or more years should be able to receive a multi-year certification. These certifications would remain as long as employers accurately update the wage rate, number of workers, and start and end dates for the temporary workers during each time period.<sup>192</sup>

Employers would need to be recertified every couple of years, but multi-year certification would allow for more flexibility and accessibility to the program.<sup>193</sup> The idea would also benefit approved workers by awarding them multi-year visas in which they could skip the United States consulate by showing a valid job offer and employer contact information at points of entry.<sup>194</sup> Border patrol could ensure the job is valid and the workers have permission to legally reenter the United States.<sup>195</sup>

Overall, the allowance of long-term certification would give employers more certainty in the amount of workers to expect each season and give temporary workers an opportunity to earn income while employed within the United States.<sup>196</sup> This would also minimize temporary workers having to work with recruiters who historically take advantage of temporary workers by requiring high fees and making empty promises.<sup>197</sup> The long-term certification would also require less paperwork for both employers and workers, which may provide financial assistance through cutting out overhead costs and minimizing the governmental backlog that can occur due to yearly certifications.

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191. Philip Martin, *A Look at H-2A Growth and Reform in 2021 and 2022*, WILSON CTR. (Jan. 3, 2022), <https://www.wilsoncenter.org/article/look-h-2a-growth-and-reform-2021-and-2022> [<https://perma.cc/3VPK-FY56>].

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*



These are only two ideas of many that could be included in the next amendments of the H-2A program to provide better protections and promote better quality of life for temporary workers while they are in the United States.

## VII. CONCLUSION

Since the beginning of the United States' temporary worker programs, participating workers have been frequently exposed to inhumane treatment and broken agreements when brought to the United States to work in the agricultural industry.<sup>198</sup> The formation of the H-2A program in 1952 was meant to remedy these issues; however, over 70 years have gone by while temporary workers continue to receive few protections.<sup>199</sup> Some of the largest violation concerns were addressed by the DOL's finalized rule that amended the H-2A program in order to strengthen protection for temporary workers, modernize the H-2A application, and expand employer access.<sup>200</sup>

These changes have offered temporary workers improved quality of life while in the United States by refining housing standards, regulating proper wage determinations, streamlining wait times by requiring electronic applications, and clarifying ambiguous terms and definitions.<sup>201</sup> The new amendments have made great progress in combating the historical H-2A program violations. However, there are many changes still necessary to ensure the H-2A program can remain safe and effective for both employers and temporary workers. By developing more humane enforcement procedures or amending the H-2A program to allow for multi-year certifications and multi-year visas, the H-2A program will improve by becoming more flexible and accessible.<sup>202</sup> It is vital to continue making changes to the H-2A program to improve the protections for temporary workers and accessibility for sponsoring employers.

The new changes to the H-2A program are a step in the right direction. With continued H-2A violations surfacing across nationwide news every day,<sup>203</sup> it is necessary to continue speaking out against these injustices to promote a safe and healthy environment for temporary workers who leave their home and families to

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198. See generally *Second Class Workers*, *supra* note 62.

199. *Nepal*, *supra* note 36.

200. 20 C.F.R. § 653 (2023); Temporary Agricultural Employment of H-2A Nonimmigrants in the United States, 87 Fed. Reg. 61660, 61660 (Oct. 12, 2022).

201. See generally Temporary Agricultural Employment of H-2A Nonimmigrants in the United States, 87 Fed. Reg. 61660.

202. See Markowitz, *supra* note 184; Martin, *supra* note 9.

203. See Da Silva, *supra* note 183; Winsor, *supra* note 183.

assist the United States agricultural industry in providing food to the American people.