

AGRICULTURE, IMMIGRATION, AND E-VERIFY: WHY E-VERIFY WILL NOT SOLVE AMERICA’S IMMIGRATION CRISIS

Lucas Asbury[†]

I. Introduction.....	471
II. Immigration in the Modern Era	474
III. The Immigration and Nationality Act and Immigration Reform and Control Act of 1986	474
IV. The Postville Raid	476
V. E-Verify	478
VI. Does E-Verify Work?	479
VII. Jurisdictions that Mandate E-Verify	480
VIII. Does E-Verify Work?	483
IX. Confounding Variables	484
X. Alternative Solutions	485
XI. The U Visa	485
XII. The “W” Visa.....	488
XIII. Conclusion.....	490

I. INTRODUCTION

While immigration and agriculture are separate areas of legal study, they are inexorably linked. One study stated, “[A]griculture’s link to undocumented labor is deeply rooted in the fundamentals of farm enterprise in the U.S.”¹ This should not be surprising given labor is the third highest expense that farmers face.² Labor is so important it accounts for 17% of all expenses farmers incur across the board.³

[†] J.D., Drake University Law School, 2020; M.A. Public Policy and Administration, Emphasis in Human Rights Advocacy, 2016, Adler University; B.S. Political Science, International Relations, and Spanish, 2014, University of Iowa. The author would like to thank the Editorial Board of the *Drake Journal of Agricultural Law* for their work in editing this Note. The author would also like to thank Professor Suzan M. Pritchett; her guidance and advice throughout the Note writing process was instrumental.

1. PATRICK O’BRIEN ET AL., AM. FARM BUREAU FED’N, GAUGING THE FARM SECTOR’S SENSITIVITY TO IMMIGRATION REFORM VIA CHANGES IN LABOR COSTS AND AVAILABILITY 5 (Feb. 2014), <https://perma.cc/8767-U32C>.

2. *Id.*

3. *Id.*

In sectors where migrant labor is especially important for harvesting, such as fruits and vegetables, labor costs can account for an even larger portion of farmers' expenses, oftentimes constituting up to 50% of their total expenses.⁴ Evidence further indicates the overwhelming majority of domestic workers simply do not or will not accept jobs in the agriculture industry.⁵

Agriculture and migrant labor are no strangers to each other. As early as the seventeenth century, European immigrants were brought to the Americas against their will as indentured servants to work as farm laborers.⁶ As that labor force proved to be inadequate to meet demand, thousands of slaves were brought from Africa to the New World in order to fill the need for agricultural labor.⁷ When the Thirteenth Amendment to the Constitution rightly exorcised our country of slavery and indentured servitude, the need for agricultural labor continued unabated.⁸ The need was filled through a combination of Mexican workers after the Mexican-American War, African-American workers forced to remain through Jim Crow, and Asian immigrants crossing the Pacific Ocean.⁹ After the Civil Rights Movement came to fruition in the latter half of the 1960s, African-Americans began working in other sectors of the economy.¹⁰ As a direct result of this shift, the agricultural labor force came to be largely comprised of immigrant laborers, often undocumented, from Central America.¹¹

Currently, immigrant labor is absolutely essential to agriculture. The American Farm Bureau Federation estimates agriculture needs anywhere from 1.5 to 2 million workers.¹² This number is complicated however, as it is estimated 50% to 75% of farm laborers in the United States are not authorized to legally work in

4. *Id.*

5. *Id.* ("A 2010 national survey conducted by the National Council of Agricultural Employers of H-2A employers showed that 68% of the 36,000 domestic workers state agencies referred to H-2A employers did not accept jobs offered to them. Only 5% of referred workers worked through the contract period.").

6. YOUTH & YOUNG ADULT NETWORK, TIMELINE OF AGRICULTURAL LABOR IN THE U.S., <https://perma.cc/XXS3-9GW3> (archived Aug. 25, 2019).

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Economic Impact of Immigration*, AM. FARM BUREAU FED'N, <https://perma.cc/639P-29K4> (archived Aug. 26, 2019).

this country.¹³ While it would be reductionist to say immigrant labor is essential for every aspect of agriculture, it is absolutely true the immigrant labor force is crucial for the industry as a whole and especially critical for the production of certain agricultural products which require human handling, such as berries and other easily bruised produce.¹⁴

Of course, there are those critical of the role immigrants play in the agricultural industry. These critics primarily argue the role of immigrant labor in agriculture is not one of necessity, but rather one of convenience.¹⁵ They argue the large immigrant labor force is effectively stealing jobs from American laborers because, as undocumented laborers work outside government's authority, they are not bound by government regulations. This argument is largely based on the fact the unemployment rate among American agricultural workers is higher than the unemployment rate in virtually any other sector.¹⁶ However, this argument neglects one important fact: American agricultural workers simply do not want to do the work. In 2010, the National Council of Agricultural Employers conducted a national survey which showed 68% of 35,000 domestic workers referred to agricultural employers by state agencies did not accept the job offered to them.¹⁷ Of the remaining 32% that did accept the job, 27% of them did not complete their contract.¹⁸ It is apparent American workers are choosing not to work as laborers in the agricultural industry. As one agribusiness expert said, "We are either going to have our food produced by foreign workers here in the United States, or the farming process will move to foreign countries."¹⁹ Simply put, the agricultural industry in the United States would not survive without immigrant labor.

Given agriculture and immigration are so dependent on each other, they must be discussed jointly. Practically, this note seeks to understand both sides of the employment dynamic (employer and employee) and explain the current "loopholes" which allow employers of undocumented workers to continue employing undocumented workers despite its illegality. Second, this note will analyze a proposed employment verification system that would seek to close those

13. *Id.*; ERIC A. RUARK & ANIQA MOINUDDIN, ILLEGAL IMMIGRATION AND AGRIBUSINESS 17 (Apr. 2011), <https://perma.cc/B2PW-A4QD>; YOUTH & YOUNG ADULT NETWORK, *supra* note 6.

14. *Economic Impact of Immigration*, *supra* note 12.

15. *See, e.g.*, RUARK & MOINUDDIN, *supra* note 13, at 6.

16. *Id.* at 4.

17. NAT'L COUNCIL OF AGRIC. EMP'RS, WHY DOMESTIC AGRICULTURE NEEDS NEW, WORKABLE FARM LABOR ALTERNATIVES NOW, <https://perma.cc/8BLL-NRH3> (archived Sept. 4, 2019).

18. *Id.*

19. RUARK & MOINUDDIN, *supra* note 13, at 3.

loopholes. Finally, this note will propose an alternative solution modeled after existing programs.

II. IMMIGRATION IN THE MODERN ERA

Immigration, much like the law surrounding it, is a complex and multi-faceted issue that is, all too often, over-simplified into sound-bites and rhetoric. The issue is not as simple as “immigration: yes or no?” but instead must revolve around questions such as when, how, who, how many, and from where? While the President talks of bans, walls, and deportations, immigrants, both documented and undocumented, continue to arrive in the United States. While thousands of immigrants legally cross America’s borders, thousands more stream across those same borders each year without documentation or authorization to work.²⁰ Therefore, any discussion of immigration reform must consider not only those who enter legally, but also how to deal with the thousands of individuals who illegally cross into the United States each year.

Opinions are divided on how to deal with immigration issues, especially with regard to those who are in the country illegally. Generally speaking, one side chooses to emphasize the rule of law, stating as a nation of laws, we must protect our borders. Conversely, the other side generally emphasizes humanitarian considerations in making an argument for amnesty and/or a pathway to citizenship for those who are not authorized to work in the United States. However, where both sides find common ground is in their shared dissatisfaction with the status quo.²¹ Thus, while opinions about immigration are divided, most advocates agree on at least one key point: the current system is incredibly broken and must be fixed.

III. THE IMMIGRATION AND NATIONALITY ACT AND IMMIGRATION REFORM AND CONTROL ACT OF 1986

In 1952, Congress passed the McCarran-Walter bill, also known as the Immigration and Nationality Act (INA).²² Prior to the passage of the INA, immigration law consisted of a variety of different statutes with no central organization scheme.²³ The INA centralized all immigration law into one source.²⁴

20. See *Yearbook of Immigration Statistics 2017*, DEP’T HOMELAND SEC., <https://perma.cc/2AX7-ZAEE> (archived Aug. 25, 2019).

21. See, e.g., RUARK & MOINUDDIN, *supra* note 13; YOUTH & YOUNG ADULT NETWORK, *supra* note 6.

22. *Immigration and Nationality Act*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://perma.cc/S9LD-F6PS> (archived Aug. 25, 2019).

23. *Id.*

24. *Id.*

While it has undergone a myriad of amendments since its initial passage in the 1950s, the INA remains the central foundation of immigration law.²⁵ Today, the INA is cited to as if it were a codification of law, although each part of it can also be found in the United States Code.²⁶

It was not until 1986 that Congress made it a federal crime for employers to knowingly recruit or hire undocumented workers.²⁷ The Immigration Reform and Control Act of 1986 (IRCA) is “premised on the conclusion that employment is the magnet that attracts aliens here illegally.”²⁸ When Congress passed the IRCA, the INA was amended to read, in relevant part,

It is unlawful for a person or other entity to hire, or to recruit or refer for a fee, for employment in the United States— “(A) an alien knowing the alien is an unauthorized alien (as defined in subsection (h)(3)) with respect to such employment, or “(B) an individual without complying with the requirements of subsection (b).²⁹

Additionally, this prohibition on the hiring of undocumented workers was extended to include knowingly hiring a contractor or subcontractor who hired undocumented workers.³⁰ The INA was later amended to add a special category for agricultural workers, stating, “if the person or entity is an agricultural association, agricultural employer, or farm labor contractor . . . [it is unlawful] to hire, or to recruit or refer for a fee, for employment in the United States an individual without complying with the requirements of subsection (b).”³¹ Additionally, subsection (b)(6) of the statute states “a person or entity is considered to have complied with a requirement of this subsection notwithstanding a technical or procedural failure to meet such requirement if there was a good faith attempt to comply with the requirement.”³² Notwithstanding these exceptions, and given the plain and explicit language of the bill, Congress clearly sought to criminalize the

25. *Id.*; see generally Immigration and Nationality Act, 8 U.S.C. §§ 1101-1537 (2018).

26. *Immigration and Nationality Act*, *supra* note 22.

27. Preliminary Advice Pending Implementation of the Immigration Reform and Control Act of 1986, 52 Fed. Reg. 1675, 1675 (Jan. 15, 1987) (“The new law also serves notice to employers for the first time that they cannot continue to hire illegal aliens.”).

28. Robert F. Koets, Annotation, *Validity, Construction, and Application of § 274A of Immigration and Nationality Act (8 U.S.C.A. § 1324a), Involving Unlawful Employment of Aliens*, 130 A.L.R. Fed. 381, at *3 (1996).

29. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359, 3445 (codified at 8 U.S.C. § 1252 (2018)).

30. *Id.*

31. 8 U.S.C. § 1324a(a)(1)(B)(ii) (2018).

32. 8 U.S.C. § 1324a(b)(6)(A) (2018).

hiring of undocumented workers, holding employers accountable for generating revenue from undocumented workers.³³ If, Congress obviously intended employing undocumented workers to be a crime, why are more employers not prosecuted for violating the law?

The answer is not a complicated one. Like with any criminal matter, the IRCA requires the criminal action (i.e., the contracting of an undocumented worker) be accompanied by the requisite culpable mental state.³⁴ Thus, to establish an IRCA violation, the employer must not only violate the law, but must do so knowingly.³⁵ Proving this can be troublesome for prosecutors; oftentimes the only witnesses to the criminal employment are co-conspirators, or immigrant employees who either have nothing to gain by talking to the authorities or are too scared of deportation to do so.³⁶ In an effort to assist employers in “knowing” if their prospective employees are authorized to work in the United States, the IRCA also created the I-9 system.³⁷ However, since the creation of the I-9 system thirty-three years ago, the number of undocumented immigrants continues to be a problem.³⁸ For that reason, there have been a number of other authorization verification systems proposed, including the E-Verify System, which is discussed in detail later in this note. However, there are many instances where immigrant workers are prosecuted for working while their employers are not prosecuted or only face minimal repercussions.³⁹ There is no better example of this than the immigration raid of Agriprocessors, Inc. in Postville, Iowa.

IV. THE POSTVILLE RAID

On May 12, 2008, helicopters circled over small town Postville, Iowa.⁴⁰ Underneath the watchful eye of the helicopters, swarms of immigration agents,

33. See Immigration Reform and Control Act of 1986 § 274A.

34. *Id.* at § 1324a.

35. *Id.*; 8 U.S.C. § 1324a (2018).

36. Violeta R. Chapin, *¡Silencio! Undocumented Immigrant Witnesses and the Right to Silence*, 17 MICH. J. RACE & L. 119, 121-22 (2011).

37. Immigration Reform and Control Act of 1986 § 1324a.

38. Jie Zong et al., *Frequently Requested Statistics on Immigrants and Immigration in the United States*, MIGRATION POL’Y INST. (Mar. 14, 2019), <https://perma.cc/EC7P-MZHR>.

39. See, e.g., *What Did It Achieve?': Documentary Examines Largest Immigration Raid In U.S. History*, WBUR (July 30, 2018), <https://perma.cc/HLR5-Y5W4>.

40. Spencer S. Hsu, *Immigration Raid Jars a Small Town*, WASH. POST (May 18, 2008), <https://perma.cc/GX6F-ET5U>; *What Did It Achieve?': Documentary Examines Largest Immigration Raid In U.S. History*, *supra* note 39.

approximately 1,000 in total, descended on the local meat packing plant.⁴¹ It was the single largest workplace immigration raid in the history of the United States.⁴² In a town with a population of about two thousand, 389 workers were arrested for suspicion of working without proper documentation.⁴³ It was Monday.

On Tuesday, the day following the raid, half of the 600 students enrolled in the local school were absent.⁴⁴ Of those initially detained, 287 people—nearly 10% of the population of the town of Postville—never came home and were eventually deported.⁴⁵ The fallout was immense. The Superintendent of Postville Schools described it “like a natural disaster—only this one is manmade.”⁴⁶

Perhaps not surprisingly, there was an almost immediate outcry.⁴⁷ Advocates swarmed Postville, as immigration agents had just a short time before. But the biggest controversy was not the size of the raid, nor the undocumented workers themselves. The biggest controversy was what happened to the owners and managers of the meat packing plant that employed the hundreds of undocumented workers.⁴⁸ It is a crime to knowingly employ an individual who is not authorized to work in the United States.⁴⁹ According to Immigration and Customs Enforcement (ICE), 76% of the nearly one-thousand workers who were employed at the plant in the months leading up to the raid were charged with working without authorization or related crimes.⁵⁰ On the other end of the equation, no members of the management nor the family owning the plant were even charged with employing undocumented workers.⁵¹ Although one member of the family who owned the business went to jail, he was convicted on tax fraud, rather than

41. Hsu, *supra* note 40; ‘What Did It Achieve?’: *Documentary Examines Largest Immigration Raid In U.S. History*, *supra* note 39.

42. Courtney Crowder & MacKenzie Elmer, *A decade after a massive raid nabbed 400 undocumented workers, this tiny town fights to reclaim its identity*, DES MOINES REG. (May 17, 2018), <https://perma.cc/RJL2-NPF6>; ‘What Did It Achieve?’: *Documentary Examines Largest Immigration Raid In U.S. History*, *supra* note 39.

43. Hsu, *supra* note 40.

44. *Id.*

45. *Id.*; ‘What Did It Achieve?’: *Documentary Examines Largest Immigration Raid In U.S. History*, *supra* note 39.

46. Hsu, *supra* note 40.

47. ‘What Did It Achieve?’: *Documentary Examines Largest Immigration Raid In U.S. History*, *supra* note 39.

48. *Id.*

49. 8 U.S.C § 1324a (2018).

50. Hsu, *supra* note 40.

51. ‘What Did It Achieve?’: *Documentary Examines Largest Immigration Raid In U.S. History*, *supra* note 39.

immigration violations.⁵² Furthermore, his sentence was recently commuted.⁵³ Although outraged, the community was not surprised; one community member noted, “They don’t go after employers. They don’t put CEOs in jail . . . In the end, it is the greater population that will suffer and the workforce that will be held accountable.”⁵⁴ Another pointed out targeting workers only addresses half the issue saying, “You take away a hundred people. A couple hundred more will come tomorrow.”⁵⁵ In words that have become strangely prophetic in the following decade, Congressman Bruce Braley observed, “Until we enforce our immigration laws equally against both employers and employees who break the law, we will continue to have a problem.”⁵⁶ This is in large part due to the fact that it remains difficult to prove employers know their employees are undocumented for various reasons. There are several proposed solutions, among them are recent proposals to make the E-Verify system mandatory for all employers across the nation.

V. E-VERIFY

E-Verify is an internet-based verification system which allows employers to confirm the employee is authorized to work by submitting an employee’s I-9 Employment Eligibility Verification form to be compared to data on that worker from the United States Department of Homeland Security and social security records.⁵⁷ The popularity of E-Verify and employment verification has dramatically increased in recent months due to current events. On July 18, 2018, in a small, rural community in Iowa, twenty-year-old Mollie Tibbitts disappeared.⁵⁸ Over a month later, Cristhian Bahena Rivera was arrested after confessing to her murder.⁵⁹ It quickly became apparent he did not have proper documentation, yet had been employed at a local dairy farm for the previous four years, under a different name.⁶⁰ Soon after, it was revealed the farm employing him did not use the E-Verify system, instead opting to use a different unnamed

52. *Id.*

53. Associated Press, *Trump commutes sentence of kosher meatpacking executive Sholom Rubashkin*, NBC NEWS (Dec. 21, 2017), <https://perma.cc/FSN7-3622>.

54. Hsu, *supra* note 40.

55. *Id.*

56. *Id.*

57. *5 Things You Should Know About E-Verify*, PBS NEWS HOUR: POL. (June 17, 2013), <https://perma.cc/HMZ2-7UQV>; Allison Johnston & Ann Morse, *E-Verify*, NAT’L CONF. ST. LEGISLATORS, <https://perma.cc/Q2RS-7CQY> (archived Aug. 25, 2019).

58. Ryan Foley, *Immigrant charged in Tibbitts’ death used ‘John Budd’ alias to secure job at Yarrabee Farms*, DES MOINES REG. (Sept. 5, 2018), <https://perma.cc/D6ES-KC5V>.

59. *Id.*

60. *Id.*

system.⁶¹ While it would border on absurd to argue the reprehensible actions of one individual are exemplary of a whole community, the situation does highlight the tightrope employers and employees are forced to walk. As Erica Johnson, director of the American Friends Service Committee's immigration program in Iowa, pointed out, "We have an immigration system that doesn't account for the labor needs or economic realities of Iowa businesses and farms."⁶²

There have been efforts to make E-Verify "a permanent and mandatory verification system for all employers, including federal, state and local government."⁶³ Senator Chuck Grassley (R-IA) and Senator Lamar Smith (R-TX) called on Congress to mandate such a system for all employers, suggesting "any [immigration] reform legislation should contain a permanent authorization of the current voluntary verification program."⁶⁴ Notably, a recent House of Representatives bill, House Resolution 2885, implicitly acknowledges the importance of immigration to agriculture by exempting agricultural workers returning to work for previous employers regardless of whether their employment was originally verified or not.⁶⁵

VI. DOES E-VERIFY WORK?

Despite its recent popularity, the E-Verify system is not without its flaws and critics. Its most serious flaw is the most obvious question: Does it work? Critics, including the American Civil Liberties Union and the CATO Institute, insist that it does not.⁶⁶ They point out while the system is generally correct, it would still return false negatives for potentially tens of thousands of legal workers.⁶⁷ A 2010 report by the Government Accountability Office found that over 150,000 people could be wrongfully denied work simply due to administrative errors if E-Verify were implemented nationally.⁶⁸ Furthermore, critics point out mandatory E-Verify participation would do little to prevent those who fraudulently use another's

61. *Id.*

62. *Id.*

63. Johnston & Morse, *supra* note 57.

64. Jennifer Carsen, *The feds want you to use E-Verify – but should you?*, HR DIVE (July 2, 2018), <https://perma.cc/3SWA-CSW2>.

65. Johnston & Morse, *supra* note 57.

66. David Bier, *E-Verify Has Delayed or Cost Half a Million Jobs for Legal Workers*, CATO INST. (May 16, 2017), <https://perma.cc/R7RN-GZ7G> [hereinafter Bier, *E-Verify*]; *Prove Yourself to Work: The 10 Big Problems With E-Verify*, ACLU, <https://perma.cc/34WK-B65M> (archived Aug. 25, 2019).

67. Bier, *E-Verify*, *supra* note 66.

68. U.S. GOV'T ACCOUNTABILITY OFFICE, EMPLOYMENT VERIFICATION 19 (Dec. 2010), <https://perma.cc/7ZB5-WJWQ>.

identification to gain employment.⁶⁹ They cite to a 2009 study finding 54% of undocumented workers were approved to work, often times through identity fraud.⁷⁰ As one critic noted, “E-Verify is the Swiss cheese of government identity systems . . . It is fatally flawed and incapable of completing its basic mission of identifying illegal immigrants and preventing them from getting a job.”⁷¹ Implementing a program that does not achieve its purpose is simply illogical.

Currently, use of the E-Verify system is voluntary in most states.⁷² However, it is mandatory for all federal contractors.⁷³ As of 2012, twenty states required its use for some public or private employers: Alabama, Arizona, Colorado, Florida, Georgia, Idaho, Indiana, Louisiana, Michigan, Mississippi, Missouri, Nebraska, North Carolina, Oklahoma, Pennsylvania, South Carolina, Tennessee, Utah, Virginia, and West Virginia.⁷⁴ While the number of states that mandate E-Verify remains unchanged, the voluntary use of E-Verify has increased dramatically.⁷⁵

VII. JURISDICTIONS THAT MANDATE E-VERIFY

Twenty states are requiring the use of E-Verify in some form or another, with varying degrees of success. Alabama passed House Bill 56 (HB 56) in 2011.⁷⁶ HB 56 amended Alabama law to require all employers, both private and public, to use E-Verify to ensure all new employees are authorized to work in the United States.⁷⁷ Failure to comply with the law can result in suspension or revocation of a business license as well as other penalties.⁷⁸

Arizona became one of the first states to require the use of E-Verify when it passed House Bill 2779 (HB 2779) in 2007.⁷⁹ It broadly requires all employers to use a “pilot program” to verify all workers are authorized to work in the United

69. See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 68, at 1; Alan Gomez, *Federal E-Verify system in spotlight after Mollie Tibbetts' death. Here's how it works*, USA TODAY (Aug. 24, 2018), <https://perma.cc/VS9U-M4HJ>.

70. Gomez, *supra* note 69.

71. *Id.*

72. *5 Things You Should Know About E-Verify*, *supra* note 57; Johnston & Morse, *supra* note 57.

73. *5 Things You Should Know About E-Verify*, *supra* note 57; Johnston & Morse, *supra* note 57.

74. Johnston & Morse, *supra* note 57.

75. Preston Huennekens, *E-Verify Continues to Grow*, CTR. FOR IMMIGR. STUD. (Mar. 20, 2018), <https://perma.cc/742A-TMEC>.

76. H.B. 56, 204th Leg., Reg. Sess. (Ala. 2011).

77. ALA. CODE § 31-13-9 (2018).

78. *Id.*

79. H.B. 2779, 48th Leg., 1st Reg. Sess. (Ariz. 2007).

States.⁸⁰ This was amended in 2008 to clarify the pilot program must be the E-Verify system.⁸¹ Similar to Alabama, Arizona law allows for the revocation or suspension of a business license as a penalty for non-compliance.⁸²

Similarly, Mississippi requires all public and private employers to participate in the E-Verify program.⁸³ The penalties in Mississippi are similar to Alabama and Arizona as well, with the main sanctions being license suspension or loss of a contract.⁸⁴ South Carolina also requires the use of E-Verify for all public and private employers.⁸⁵ The only penalty for non-compliance is the loss of a business license and a reinstatement fee.⁸⁶

Three states employ a slightly different tactic than the states previously mentioned. Missouri requires the use of E-Verify by all public employers, government contractors who hold a contract in excess of \$5,000, and businesses with state-administered or state-subsidized tax abatement, tax credits or loans.⁸⁷ Pennsylvania is similar, requiring all “public works” contractors with contracts of \$25,000 or greater to participate in the E-Verify program.⁸⁸ Finally, Virginia requires all government contractors with fifty employees or more, and a contract of at least \$50,000, to use E-Verify.⁸⁹ Of these three, Virginia is unique in that it also requires all state agencies to use E-Verify.⁹⁰

Since 2006, Colorado has required all prospective state and local government contractors to either participate in the E-Verify program or an alternative state program which examines work documents.⁹¹ The state further prohibits state and local government agencies from contracting with those who knowingly employ undocumented workers.⁹² Two years later, in 2008, Colorado expanded these provisions to apply to existing state contractors as well.⁹³

80. *Id.*

81. H.B. 2745, 48th Leg., 2d Reg. Sess. (Ariz. 2008).

82. *Id.*

83. S.B. 2988, 2008 Leg., Reg. Sess. (Miss. 2008).

84. *Id.*

85. H.B. 4400, Gen. Assemb., 117th Sess. (S.C. 2008).

86. *Id.*; *Immigration Compliance*, S.C. DEP’T LABOR, LICENSING & REG., <https://perma.cc/PHJ7-J5SL> (archived Feb. 14, 2020).

87. H.B. 1549, 94th Gen. Assemb., 2d Reg. Sess. (Mo. 2008).

88. S.B. 637, 195th Gen. Assemb., Reg. Sess. (Pa. 2011).

89. H.B. 1859, Gen. Assemb., 2011 Sess. (Va. 2011).

90. H.B. 737, Gen. Assemb., 2010 Sess. (Va. 2010).

91. S.B. 193, 66th Gen. Assemb., 2d Reg. Sess. (Colo. 2008).

92. H.B. 1343, 65th Gen. Assemb., 2d Reg. Sess. (Colo. 2006).

93. Colo. S.B. 193.

Georgia, similar to Colorado, began to require the use of E-Verify by all state employers and contractors in 2006.⁹⁴ However, in 2011, Georgia passed House Bill 87 (HB 87) which required all businesses, public or private, with more than ten employees to use E-Verify.⁹⁵ This shift brought Georgia more in line with the more stringent laws of Arizona and Alabama than Colorado.⁹⁶ Indiana, Nebraska, and Oklahoma are all alike, as they require both state and local governments and contractors to participate in the E-Verify program.⁹⁷ Private employers in Indiana and Nebraska are also given a tax credit if they participate in the program.⁹⁸ North Carolina requires all state employers, government contractors, and local employers with more than twenty-five workers to use E-Verify.⁹⁹ However, seasonal workers are exempt from the E-Verify requirement.¹⁰⁰

Louisiana requires all state and local contractors to use E-Verify.¹⁰¹ Other public and private employers are given the option of either participating in the E-Verify program or checking and retaining copies of an employee's work authorization documents.¹⁰² Interestingly, Louisiana law exempts an employer from liability if they use the E-Verify program and it is later discovered the worker was not authorized to work in the United States.¹⁰³

Under federal law, E-Verify is obviously not mandatory for all employers. However, recent proposals seek to change that.¹⁰⁴ The Legal Workforce Act (LWA) was introduced to the United States House of Representatives in 2017.¹⁰⁵ The LWA would require the Department of Homeland Security to establish an employment eligibility verification system patterned after E-Verify.¹⁰⁶ The Act

94. S.B. 529, 148th Gen. Assemb., Reg. Sess. (Ga. 2006).

95. H.B. 87, 151st Gen. Assemb., Reg. Sess. (Ga. 2011).

96. *See id.*; H.B. 2745, 48th Leg., 2d Reg. Sess. (Ariz. 2008); Colo. S.B. 193; H.B. 2779, 48th Leg., 1st Reg. Sess. (Ariz. 2007).

97. S.B. 590, 117th Gen. Assemb., 1st Reg. Sess. (Ind. 2011); Legis. B. 403, 101st Leg., 1st Reg. Sess. (Neb. 2009); H.B. 1804, 51st Leg., 1st Sess. (Okla. 2007).

98. Ind. S.B. 590; Neb. Legis. B. 403.

99. H.B. 318, Gen. Assemb., 2015 Sess. (N.C. 2015); H.B. 36, Gen. Assemb., 2011 Sess. (N.C. 2011).

100. N.C.H.B. 318; N.C.H.B. 36.

101. LA. STAT. ANN. § 23:995 (2019); H.B. 342, 2011 Leg., Reg. Sess. (La. 2011).

102. H.B. 646, 2011 Leg., Reg. Sess. (La. 2011).

103. § 23:995; La. H.B. 342.

104. Legal Workforce Act, H.R. 3711, 115th Cong. (2017).

105. *Id.*

106. *Id.*

would also require an employer to “attest, under penalty of perjury and on a form . . . that it has verified that the individual is not an unauthorized alien”¹⁰⁷

Critics of the LWA were readily forthcoming. For example, David Bier of the CATO Institute argued it “would impose one of the most extensive regulatory schemes in the history of the United States.”¹⁰⁸ He further said, “E-Verify’s harms are demonstrable and definite, while its supposed benefits are nonexistent.”¹⁰⁹ Bier gives a laundry list of valid criticisms of the LWA, ranging from it would not achieve its goal, to arguing it would hurt American workers and businesses, and pointing out there are still significant privacy concerns involved in creating and maintaining such an extensive and comprehensive database.¹¹⁰ However, the most important criticism is its functionality.

VIII. DOES E-VERIFY WORK?

Setting aside the host of other completely valid criticisms of the E-Verify program, there remains the question of whether or not E-Verify manages to fulfill its purpose of turning off the “employment magnet,” which was originally laid out in the IRCA in 1986.¹¹¹ As previously detailed, several states have mandated E-Verify to varying degrees. Each state serves as an individual testing ground where the effectiveness of the policy can be examined. The answer to whether E-Verify is effective, like the answer to so many legal questions, is “it depends.” The majority of literature on the effects of E-Verify studies the State with the strictest restrictions: Arizona.

In Arizona, proponents of the mandate claimed a victory, pointing out the mandated usage of E-Verify coincided with a drop in formal employment among foreign-born, non-citizen Hispanics.¹¹² In that sense, this could be viewed as a fulfillment of its purpose. However, there are at least two issues with the alleged success of the E-Verify program mandate. First, there are several confounding variables that could also explain the correlation. Among them are increased federal

107. *Id.*

108. DAVID BIER, STATEMENT FOR THE RECORD 1 (Oct. 2017), <https://perma.cc/HC9F-35FD>.

109. *Id.*

110. *See id.*

111. *See* Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359, 3361 (codified at 8 U.S.C. § 1324a (2018)).

112. SARAH BOHN & MAGNUS LOFSTROM, EMPLOYMENT EFFECTS OF STATE LEGISLATION AGAINST THE HIRING OF UNAUTHORIZED IMMIGRANT WORKERS 18 (May 2012), <https://perma.cc/BB4Q-TD69>.

enforcement efforts and the Great Recession.¹¹³ Second, the metric the studies actually measured—decreased formal employment of foreign-born, non-citizen Hispanics—might not be as great of an indicator of success as E-Verify advocates claim.

IX. CONFOUNDING VARIABLES

Several years before the E-Verify mandate became law, the federal government began the Arizona Border Control Initiative.¹¹⁴ This multi-million dollar border control initiative focused on strengthening ICE presence in order to “achieve operational control of the Arizona border and support of the Homeland Security priority mission of anti-terrorism, detection, arrest and deterrence of all cross-border illicit trafficking.”¹¹⁵ These increased federal efforts cannot be neglected when evaluating the effectiveness of the E-Verify mandate.

In addition to coinciding with increased federal enforcement efforts, the E-Verify mandate also coincided with one of the most notable events of this century so far: the Great Recession.¹¹⁶ Officially beginning in December of 2007 and lasting until June of 2009, the Great Recession devastated both the American and global economies.¹¹⁷ Houses lost 30% of their value, the real national gross domestic product fell by 4.3%, and, most importantly for this analysis, the national unemployment rate doubled.¹¹⁸

There is also little evidence the reduction in formal employment of foreign-born, non-citizen Hispanics actually means the employment magnet is being turned off. In Arizona, the reduction in formal employment resulted in an increase in informal employment as undocumented workers continued to be employed.¹¹⁹ Additionally, there was a sharp increase in self-employment among the same group.¹²⁰ Therefore, despite mandatory E-Verify use, Arizona continues to have a large number of undocumented workers employed and working in

113. *Id.* at 16-17.

114. DEP’T OF HOMELAND SEC., FACT SHEET: ARIZONA BORDER CONTROL INITIATIVE (Mar. 2004), <https://perma.cc/BBC2-NRZP>.

115. *Id.*

116. Bier, *E-Verify*, *supra* note 66; See Robert Rich, Fed. Reserve Bank of N.Y., *The Great Recession*, FED. RES. HIST. (Nov. 22, 2013), <https://perma.cc/2GHA-8VEZ>.

117. Rich, *supra* note 116.

118. *Id.*

119. BOHN & LOFSTROM, *supra* note 112, at 27.

120. *Id.* at 22.

Arizona.¹²¹ E-Verify did not “turn off the magnet,” it just forced the labor underground.¹²²

Setting aside the concerns relating to the efficacy of E-Verify, there are also real concerns the federal agencies are mining the data from enrolled employers and may inappropriately use that data against those employers in future audits or inspections.¹²³ These suspicions disincentivize employers from using the program, and some attorneys advising their corporate clients to not use the program unless required to do so because of the potential liability it would expose them to.¹²⁴

X. ALTERNATIVE SOLUTIONS

Since E-Verify is not a viable solution to the current problem, other avenues must be explored. The latter portion of this note seeks to examine alternative options. The first alternative is to expand the U visa program existing today to include employment-based crimes such as those originally proscribed in the IRCA in 1986.¹²⁵ While promising, such an alternative is ultimately not viable. A second alternative is the creation of a new nonimmigrant status visa, the “W” visa, which would be modeled after the U visa program but exists as its own separate program.

XI. THE U VISA

Whenever a crime is committed against members of the immigrant community unique and significant challenges will arise.¹²⁶ Immigrants often tend to distrust law enforcement, are unwilling to cooperate in investigations, and frequently do not report crimes committed against them out of fear that the police will retaliate against them—the victims—because of their immigration status.¹²⁷

121. *See id.* at 22, 27.

122. *See id.* at 35.

123. Carsen, *supra* note 64.

124. *Id.*

125. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359, 3361 (codified at 8 U.S.C. § 1324a (2018)).

126. *See, e.g.,* SUDHA SHETTY & JANICE KAGUYUTAN, IMMIGRANT VICTIMS OF DOMESTIC VIOLENCE I (Feb. 2002), <https://perma.cc/HT48-WRH9>.

127. Paul Harris, *Undocumented workers' grim reality: speak out on abuse and risk deportation*, GUARDIAN (Mar. 28, 2013), <https://perma.cc/S265-Y43Z>; *Workers are on the move, often into uncertain and potentially exploitative labor*, INT'L LAB. RTS. F.: MIGRANT LAB., <https://perma.cc/3K36-ZN5H> (archived Aug. 25, 2019); *see also* Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464, 1468 (codified at 22 U.S.C. § 1701(17) (2018)).

To protect both victims of crimes, and the rule of law in the United States, Congress created the U visa program.¹²⁸

In October of 2000, as part of the Victims of Trafficking and Violence Protection Act, Congress authorized the creation of U Nonimmigrant status.¹²⁹ This status is granted through the awarding of a U visa.¹³⁰ These visas are reserved for “victims of certain crimes who have suffered mental or physical abuse and are helpful to law enforcement or government officials in the investigation or prosecution of criminal activity.”¹³¹ In creating this visa, Congress found that “[Immigrants] are often targeted to be victims of crimes committed against them in the United States.”¹³² Congress also found “victims of these crimes committed against them in the United States must be able to report these crimes to law enforcement and fully participate in the investigation of the crimes committed against them and the prosecution of the perpetrators of such crimes.”¹³³ For these reasons, Congress acted with explicit purpose in creating the U visa program, stating:

The purpose of this section is to create a new nonimmigrant visa classification that will strengthen the ability of law enforcement agencies to detect, investigate, and prosecute . . . [crimes] committed against aliens, while offering protection to victims of such offenses in keeping with the humanitarian interests of the United States. This visa will encourage law enforcement officials to better serve immigrant crime victims and to prosecute crimes committed against aliens.¹³⁴

Congress additionally stated:

Creating a new nonimmigrant visa classification will facilitate the reporting of crimes to law enforcement officials by trafficked, exploited, victimized, and abused aliens who are not in lawful immigration status. It also gives law enforcement officials a means to regularize the status of cooperating individuals during investigations or prosecutions. Providing temporary legal

128. See Victims of Trafficking and Violence Control Act of 2000 § 1533 (codified at 8 U.S.C. § 1101 (2018)).

129. *Victims of Criminal Activity: U Nonimmigrant Status*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://perma.cc/559F-EEXK> (archived Aug. 25, 2019).

130. *Id.*

131. *Id.*

132. Victims of Trafficking and Violence Control Act of 2000 § 1513 (codified at 8 U.S.C. § 1101 (2018)).

133. *Id.*

134. *Id.*; see also *Victims of Criminal Activity: U Nonimmigrant Status*, *supra* note 129.

status to aliens who have been severely victimized by criminal activity also comports with the humanitarian interests of the United States.¹³⁵

Importantly, this U visa is not permanent; it is only valid for a period of four years.¹³⁶ However, it does give authority to the Attorney General to “convert the status of such nonimmigrants to that of permanent residents when doing so is justified on humanitarian grounds, for family unity, or is otherwise in the public interest.”¹³⁷ This allows those immigrants, who have proven themselves to be lawful, productive members of society to remain in the United States so they might continue to better our country.

Currently, a U visa is only available to victims of qualifying criminal activities.¹³⁸ Qualifying criminal activities are defined by the INA.¹³⁹ Many of the crimes listed, such as assault, have varying definitions depending on the jurisdiction; each state and the federal government define the crimes differently and require different elements to be proven. For this reason, the list of qualifying criminal activities in the INA “is not a list of specific statutory violations, but instead a list of general categories of criminal activity.”¹⁴⁰ Therefore, in order for an applicant to have been a victim of a qualifying criminal activity, the activity need not conform exactly to any single definition of the crime, but must fall into the broad categories established by the INA.¹⁴¹ While many of these categories of crimes can happen anywhere, including the workplace and several resemble employment related abuses, none of them are sufficiently close to provide

135. Victims of Trafficking and Violence Control Act of 2000 § 1533 (codified at 8 U.S.C. § 1101 (2018)); *see also Victims of Criminal Activity: U Nonimmigrant Status*, *supra* note 129.

136. *Victims of Criminal Activity: U Nonimmigrant Status*, *supra* note 129.

137. Victims of Trafficking and Violence Control Act of 2000 § 1533 (codified at 8 U.S.C. § 1101 (2018)).

138. Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(U)(i)(I) (2018).

139. Immigration and Nationality Act 8 U.S.C. § 1101(a)(15)(U)(iii) (2018) (defining the qualifying criminal activities as “rape; torture; trafficking; incest; domestic violence; sexual assault; abusive sexual contact; prostitution; sexual exploitation; stalking; female genital mutilation; being held hostage; peonage; involuntary servitude; slave trade; kidnapping; abduction; unlawful criminal restraint; false imprisonment; blackmail; extortion; manslaughter; murder; felonious assault; witness tampering; obstruction of justice; perjury; fraud in foreign labor contracting (as defined in section 1351 of title 18); or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes”).

140. New Classification for Victims of Criminal Activity; Eligibility for “U” Nonimmigrant Status, 72 Fed. Reg. 53,014, 53,018 (Sept. 17, 2007).

141. *Id.*

protection against work specific crimes such as wage theft, dangerous work conditions, or discrimination in the workplace.¹⁴²

The largest issue with expanding the U visa program is the program is already at capacity.¹⁴³ The number of U visas which may be granted each year is limited to a mere 10,000.¹⁴⁴ The number of petitions has exceeded this capacity every year, except the program's first year.¹⁴⁵ When the capacity is reached and the maximum number of U visas have been awarded for that year, the remaining applicants are placed on a wait list.¹⁴⁶ Currently, the back log is twelve times the annual cap.¹⁴⁷ That means it would take twelve years to clear out the backlog, assuming there are no new applicants in that time.¹⁴⁸ Not only is the backlog growing with each passing year, but the rate at which it is growing is increasing as well.¹⁴⁹ Adding more applicants to the queue will do nothing more than further stymie the process.

XII. THE "W" VISA

As Congress noted when it created the U visa, immigrant communities are often among the most vulnerable to being the target of certain types of crime.¹⁵⁰ To that end, the W visa would be grounded in much of the same logic with the same intent as the U visa, but with a broader scope.¹⁵¹ Where the U visa is directed primarily at remedying violent crimes, the W visa would be directed at addressing and protecting those who are victims of employment related crimes. Second, as the U visa is incredibly backlogged, the W visa would not be held to the same statutory

142. See *Agaton v. Hosp. & Catering Servs.*, No. 11-1716, 2013 U.S. Dist. LEXIS 46966, at *12, (W.D. La. Mar. 28, 2013).

143. Sara Ramey, *Eliminating the U visa cap will help catch criminals*, HILL (Feb. 14, 2018), <https://perma.cc/J4C6-899K>.

144. *Victims of Criminal Activity: U Nonimmigrant Status*, *supra* note 129.

145. U.S. CITIZEN & IMMGR. SERVS., NUMBER OF FORM I-918, PETITION FOR U NONIMMIGRANT STATUS, BY FISCAL YEAR, QUARTER, AND CASE STATUS 2009-2018, <https://perma.cc/5NHE-Z65J> (archived Aug. 25, 2019).

146. *Victims of Criminal Activity: U Nonimmigrant Status*, *supra* note 129.

147. U.S. CITIZEN & IMMGR. SERVS., *supra* note 145.

148. *Id.*

149. *Id.*

150. Harris, *supra* note 127; *Workers are on the move, often into uncertain and potentially exploitative labor.*, *supra* note 127; see also *Victims of Trafficking and Violence Protection Act of 2000*, Pub. L. No. 106-386, 114 Stat. 1464, 1533 (codified at 8 U.S.C. § 1101 (2018)).

151. The next visa Congress creates will be called the W visa. Discussion of the W visa in this note does not refer to an existing visa program, but are the author's suggestions for how the next visa program could be improved.

cap as the U visa. Instead discretion would be given to the Attorney General at the beginning of each year to adjust the capacity as required by justice.

Undocumented immigrants are especially vulnerable to employment related abuses.¹⁵² While it is a crime to knowingly employ an undocumented worker in the United States,¹⁵³ employers often do so anyway due to a low risk of prosecution and the potential financial gain to be had by skirting employment regulations.¹⁵⁴ This is not a victimless crime; the victims of these crimes are both the people of the United States whose laws are so blatantly violated and the individual men and women who silently suffer abuses in the workplace.¹⁵⁵

The W visa functions as a solution to protect both employees and law-abiding employers. Primarily, it seeks to protect the rule of law in the United States.¹⁵⁶ By granting temporary, nonimmigrant status to immigrant victims of employment related crimes, the W visa assures prosecutors will have sufficient witnesses to aid in the investigation and prosecution of crimes.¹⁵⁷ Additionally, it would protect immigrants who are already victims of employment abuses from suffering further harms.¹⁵⁸ Among the primary reasons for the employment of undocumented workers include: they can be paid substantially less than the minimum wage, are more willing to work in dangerous conditions in violation of state or federal regulations, and are less likely than domestic workers to report violations committed against them.¹⁵⁹

This solution is not a cure-all to address every facet of the immigration dilemma. Like E-Verify, it would not protect against the fraudulent use of another's identity by an immigrant worker.¹⁶⁰ However, it would finally give prosecutors a much-needed platform to prosecute those who seek to benefit by underpaying undocumented laborers. Additionally, unlike E-Verify's problem

152. Harris, *supra* note 127; *Workers are on the move, often into uncertain and potentially exploitative labor.*, *supra* note 127.

153. 8 U.S.C. § 1324a(a)(1)(A) (2018).

154. Harris, *supra* note 127.

155. *Id.*; *Workers are on the move, often into uncertain and potentially exploitative labor.*, *supra* note 127.

156. Paul McDaniel, *The W Visa: Why the Economy Benefits from A Robust New Worker Program*, IMMIGR. IMPACT (May 15, 2013), <https://perma.cc/BRS5-CCVG>.

157. *See* Harris, *supra* note 127.

158. *See id.*

159. *See id.*; *Workers on the move, often into uncertain and potentially exploitative labor.*, *supra* note 127.

160. Gomez, *supra* note 69; *see* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 68, at 3.

with returning false positives, the W visa would not deprive any citizen or authorized immigrant of their right to be gainfully employed.

XIII. CONCLUSION

The immigration system is broken. While there is no doubt the system must be changed, there is a great deal of debate over how the issue should be remedied. Whatever the solution is, it will have dramatic effects on the agricultural industry across the nation, due to the vital role migrant and immigrant workers play in the agricultural process. Many of these workers are undocumented and flout the law by continuing to work. Perhaps more culpable are those who employ them; those who more directly and knowingly profit from the labor of the immigrant workforce. It was Congress' intent to criminalize and prosecute those who illegally employ immigrants. However, this has not come to pass. There are several solutions to this issue, among them is the E-Verify system. Yet, the E-Verify system has proven to be ineffective and inadequate. The U visa program is also problematic due to its overloaded nature. America needs another option. The W visa program would offer nonimmigrant status to those who would cooperate with law enforcement officers in the investigation and prosecution of employment related abuses. This is the best option to emphasize both the rule of law in the United States and address the humanitarian concerns inherent when dealing with vulnerable populations.