

# FAILING FARMWORKERS: AN ADMINISTRATIVE PROCESS CRITIQUE OF THE H-2A TEMPORARY AGRICULTURAL VISA

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*America's farm economy has long been sustained by foreign migrant labor. One significant legal source of foreign agricultural labor is the H-2A visa program. The H-2A visa program allows U.S. employers to bring foreign workers into the United States to fill temporary or seasonal agricultural jobs when two conditions are satisfied: (1) there are not enough U.S. workers willing and able to perform the work, and (2) the employment of H-2A workers will not adversely affect the wages and working conditions of similarly employed U.S. workers. The H-2A program has been widely critiqued for failing to adequately protect migrant workers who face human trafficking and other labor abuses, displacing American workers who are otherwise willing and able to perform agricultural work, and denying U.S. agricultural employers prompt access to a foreign labor supply in the event of actual labor shortages. However, many critiques of the H-2A program focus on reforming the process to improve the outcomes for only one group of process participants. The following Note seeks to engage in a comprehensive analysis of the H-2A program, examining how the administration of the program in its current form simultaneously fails foreign workers, American workers, and U.S. agricultural employers. I argue that two changes are necessary to address the structural deficiencies of the H-2A program to align with its statutory objectives: first, eliminating the labor certification process, and second, issuing visas directly to workers rather than their employers. The designation of farmworkers as "essential" workers during the ongoing Covid-19 pandemic emphasizes the critical labor these workers provide and highlights the importance of ensuring that the H-2A program functions effectively for all process participants.*

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### INTRODUCTION

And the migrants streamed in on the highways and their hunger was in their eyes, and their need was in their eyes. They had no argument, no system, nothing but their numbers and their needs. When there was work for a man, ten men fought for it—fought with a low wage . . . And this was good, for wages went down and prices stayed up. The great owners were glad and they sent out more handbills to bring more people in. And wages went down and prices stayed up. And pretty soon now we'll have serfs again.<sup>1</sup>

Thirty-five miles from the Southwest Florida International Airport and an hour drive inland from the wealthy coastal resort town of Naples lies Immokalee, an unincorporated Florida community built in the beginning of the twentieth century for the agricultural production of tomatoes and oranges.<sup>2</sup> Today, Immokalee is home to one of the largest farmworker communities in the nation. The town's official population of about 20,000 nearly doubles every growing season from an influx of migrant workers, mostly male and hailing from Mexico and Central America.<sup>3</sup> Their presence is undeniable: most of the town's signs are in Spanish, the handful of restaurants are Mexican, and innumerable pay phones line the town's parking lots and street corners. Less visible is South Florida's status as "ground zero for modern slavery;"<sup>4</sup> Immokalee is its epicenter.

1. JOHN STEINBECK, *THE GRAPES OF WRATH* 322 (Penguin Books 2006) (1939).

2. KEVIN BALES & RON SOODALTER, *THE SLAVE NEXT DOOR: HUMAN TRAFFICKING AND SLAVERY IN AMERICA TODAY* 44 (Univ. of Cal. Press 2009).

3. John Bowe, *Nobodies*, *NEW YORKER* (Apr. 13, 2003), <https://www.newyorker.com/magazine/2003/04/21/nobodies>.

4. *Id.*

Ratification of the Thirteenth Amendment outlawed slavery in the United States more than 150 years ago, but in practice, it is far from eradicated. Modern slavery, also called “human trafficking” or “trafficking in persons,”<sup>5</sup> is an umbrella term used to cover sex trafficking, forced labor, debt bondage, involuntary servitude, and other practices that traffickers use to exploit victims for personal or commercial gain.<sup>6</sup> The State Department estimates that between 14,500 and 17,500 people are trafficked into the United States each year.<sup>7</sup> At the heart of modern slavery is the exploitation and enslavement of victims through a myriad of coercive and deceptive practices. Victims of modern slavery cannot refuse or leave their exploitative situations because of force, threats of violence, coercion, deception, and/or fraud. Where slaveholders in the 1800s took pride in slave ownership as a sign of social status, today’s human traffickers keep slaves hidden, making it more difficult to locate victims, punish offenders, and fully comprehend the precise number of people who are trafficked each year.<sup>8</sup>

In the United States, agriculture is one of the sectors where human trafficking, particularly forced labor, is the most prevalent.<sup>9</sup> Agricultural work is often isolated and transient, with irregular periods of employment based on changing harvest seasons. Agricultural work is also frequently performed by foreign nationals. Language barriers, weak community ties, economic insecurity, and, in many cases, the lack of permanent immigration status make migrant farmworkers particularly vulnerable to human trafficking. Immokalee offers a case study of the migrant farmworker experience in the United States—one

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5. I use the terms modern slavery and human trafficking interchangeably throughout the paper.

6. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, Nov. 15, 2000, 2237 U.N.T.S. 319, 319 [hereinafter *Trafficking in Persons Protocol*].

7. U.S. DEP’T OF JUSTICE, REPORT TO CONGRESS FROM ATTORNEY GENERAL JOHN ASHCROFT ON U.S. GOVERNMENT EFFORTS TO COMBAT TRAFFICKING IN PERSONS IN FISCAL YEAR 2003, 3 (2004); James Pasley, *20 Staggering Facts About Human Trafficking in the US*, BUSINESS INSIDER (Jul. 25, 2019, 10:48 AM), <https://www.businessinsider.com/human-trafficking-in-the-us-facts-statistics-2019-7> (estimating that between 18,000 and 20,000 victims are trafficked into the United States every year).

8. BALES & SOODALTER, *supra* note 2, at 6.

9. Tracie McMillan, *Beyond Brothels: Farms and Fisheries are Frontiers of Human Trafficking*, NPR (July 28, 2015, 2:18 PM), <https://www.npr.org/sections/thesalt/2015/07/28/426888946/beyond-brothels-farms-and-fisheries-are-frontier-of-human-trafficking> [<https://perma.cc/7AH3-22E6>].

characterized by low wages, long hours, substandard living conditions, and other labor abuses.

These conditions exist even for migrants who work in the U.S. legally on a temporary basis through the H-2A guestworker program. The H-2A program allows U.S. agricultural employers to hire workers from other countries to perform temporary and seasonal agricultural labor. In the past decade, the H-2A program has more than tripled, with the Department of Labor certifying 258,000 H-2A positions in 2019, up from 79,000 positions in 2010.<sup>10</sup> Despite the program's many rules and regulations,<sup>11</sup> government agencies, workers' rights groups, economic policy institutes, and other advocates have documented how the program fails foreign guestworkers, domestic workers, and agricultural employers. Overall, the H-2A program allows employers to subvert the usual laws of supply and demand that govern the domestic agricultural labor market by replacing American workers with foreign workers at a depressed wage rate without ensuring that visa recipients are adequately protected from exploitation. For employers who truly do need workers to combat labor shortages, the program's arduous application and approval process prevents employers from expeditiously hiring guestworkers. The ongoing Covid-19 pandemic has highlighted these failures, as it raises concerns about ensuring an uninterrupted supply of farm labor.<sup>12</sup> The subsequent designation of farmworkers as "essential workers," led to a significant, but temporary, rule change that allows H-2A workers already in the U.S. to switch employers without leaving the country.<sup>13</sup>

This Note evaluates the H-2A visa program in four parts. Part I explores the history of agricultural labor in the United States, including its origins in slavery, the reliance on an exploited transitory, specifically Mexican, workforce, and early iterations of the H-2A program. Part II describes the current H-2A visa process, focusing on

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10. MARCELO CASTILLO, SKYLER SIMNITT, GREGORY ASTILL & TRAVIS MINOR, EIB-226, ECON. RESEARCH SERV., U.S. DEP'T OF AGRIC., EXAMINING THE GROWTH IN SEASONAL AGRICULTURAL H-2A LABOR (2021).

11. See generally 20 C.F.R. pt. 655B (2021); 29 C.F.R. pt. 501 (2021).

12. Miriam Jordan, *Farmworkers, Mostly Undocumented, Become 'Essential' During Pandemic*, N.Y. TIMES (Apr. 2, 2020), <https://www.nytimes.com/2020/04/02/us/coronavirus-undocumented-immigrant-farmworkers-agriculture.html> [https://perma.cc/J5VV-TJCN]; Patricia Mazzei, *Florida's Coronavirus Spike Is Ravaging Migrant Farmworkers*, N.Y. TIMES (June 18, 2020), <https://www.nytimes.com/2020/06/18/us/florida-coronavirus-immokalee-farmworkers.html> [https://perma.cc/KKC3-8CU3].

13. Temporary Changes to Requirements Affecting H-2A Nonimmigrants due to the Covid-19 National Emergency: Extension of Certain Flexibilities, 85 Fed. Reg. 82,291, 82,295 (Dec. 18, 2020).

the many agency rules that govern the program. Part III assesses the success of the H-2A visa process in light of the program's statutory objectives, applying Roger Cramton's widely accepted and well-defined administrative process evaluation criteria of accuracy, efficiency, and acceptability. Finally, Part IV presents two recommendations to improve the H-2A program and better protect both domestic and foreign workers: eliminating the labor certification requirement and issuing visas directly to workers rather than their employers. Through a comprehensive review of the program's history and a structured analysis of the program as an administrative process, this paper seeks to show that the H-2A program fails on multiple fronts because: (1) it does not accurately test the domestic agricultural labor supply, thereby substituting foreign workers for U.S. workers; (2) it does not efficiently provide employers with the needed flexibility to hire guestworkers in the event of an actual labor shortage; and (3) it does not acceptably protect foreign workers from human trafficking and other labor abuses. Without reform, the H-2A visa program will increase reliance on foreign migrant labor to the detriment of domestic employees and continue the United States' legacy of exploiting agricultural workers.

## I.

### HISTORY AND DEVELOPMENT OF THE H-2A VISA

Understanding the failures of the modern-day H-2A visa requires acknowledging the longstanding American tradition of using immigrant and noncitizen workers to perform agricultural labor at below-market rates.<sup>14</sup> The current version of the H-2A program is deeply rooted in slavery and the historical exploitation of a migrant, and primarily Mexican, workforce. Rather than offering a premium wage or benefits to entice workers to perform difficult, dangerous, and sporadic farm work, growers historically relied on non-economic coercion that constrained workers to accept the work regardless of the conditions.<sup>15</sup> Cultural narratives frame guestworkers as dependable and hardworking, but law and social custom continue to exclude these workers from the American polity.<sup>16</sup> Despite multiple changes to agri-

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14. Alice J. Baker, *Agricultural Guestworker Programs in the United States*, 10 *TEX. HISP. J.L. & POL'Y* 79, 82 (2004).

15. Michael Holley, *Disadvantaged by Design: How the Law Inhibits Agricultural Guest Workers from Enforcing Their Rights*, 18 *HOFSTRA LAB. & EMP. L.J.* 575, 581 (2001).

16. MAE M. NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA* 129 (Princeton Univ. Press 2014).

cultural guestworker programs since the early 1900s, including the addition of more substantial legal protections, the problems present in earlier versions of the program persist today. U.S. agricultural guestworker programs historically treated imported foreign labor as a commodity—cheap and disposable. Today’s H-2A visa embodies this devaluation of agricultural work.

### A. *Slavery and Agricultural Labor Prior to World War II*

Slavery was America’s solution to the problem of colonial labor shortages, which interfered critically with the extraction of raw materials and the production of cash crops.<sup>17</sup> In antebellum America, slaves performed most of America’s farm work.<sup>18</sup> American slavery was not only legal and sanctioned by the state but enshrined in the Constitution, which regarded slaves as property.<sup>19</sup> “Slavery, simply put, was American agriculture’s original sin.”<sup>20</sup> Although the Thirteenth Amendment formally ended slavery in 1865,<sup>21</sup> institutions like debt peonage<sup>22</sup> and sharecropping<sup>23</sup> replaced the legal institution of slavery

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17. Unlike the Spanish colonization of the Americas, which relied on the enslavement of natives, American colonists were unable to enslave the native population and instead relied on imported labor in the form of African slaves. *Id.* at 132; ISABEL WILKERSON, *CASTE: THE ORIGINS OF OUR DISCONTENTS* 43 (2020).

18. Holley, *supra* note 15, at 581.

19. WILKERSON, *supra* note 17, at 44. *See e.g.*, U.S. CONST. art. I, § 2, cl. 3 (Three Fifths Compromise), modified by U.S. CONST. amend. XVII; U.S. CONST. art. I, § 9, cl. 1 (Slave Trade Clause); U.S. CONST. art. IV, § 2, cl. 3 (Fugitive Slave Clause), superseded by U.S. CONST. amend. XIII; *See also* *Dred Scott v. Sandford*, 60 U.S. 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV (holding that slaves were property under the Fifth Amendment, and any law that would deprive a slave owner of that property was unconstitutional).

20. Jim Chen, *Of Agriculture’s First Disobedience and Its Fruit*, 48 VAND. L. REV. 1261, 1277 (1995).

21. U.S. CONST. amend. XIII.

22. Peonage is a system of involuntary servitude, under which a debtor (“peon”) is compelled to work for his creditor in order to satisfy a debt. Peonage differs from voluntary labor in repayment of a debt because a party under peonage cannot release himself from his obligation to work. *See Clyatt v. United States*, 197 U.S. 207, 215 (1905) (“A clear distinction exists between peonage and the voluntary performance of labor or rendering of services in payment of a debt.”); *see also* 42 U.S.C. § 1994 (2021) (abolishing peonage).

23. Sharecropping established a more decentralized system of agricultural production than that which existed during slavery, dividing large plantations into small plots of land. Plots were leased by landowners to individual families, typically newly freed slaves, who received a share of the crop as compensation at the end of the season, rather than traditional wages. By 1868, sharecropping became the primary economic arrangement that replaced slavery in the Postbellum South. EDWARD ROYCE, *THE ORIGINS OF SOUTHERN SHARECROPPING* 181–83 (Temple Univ. Press 1993) (explaining the development of sharecropping: “Freedpeople remained dependent on planters, be-

and prolonged the subordination of black labor.<sup>24</sup> Following the Civil War, former Confederate states enacted contract labor laws in an effort to control newly freed slaves and retain a reliable agricultural workforce.<sup>25</sup> South Carolina, for example, expressly prohibited black people from performing any labor other than farm or domestic work.<sup>26</sup> States such as Alabama, Florida, and Georgia enacted laws that forced black sharecroppers and tenant farmers to carry out their contracts under threat of criminal punishment.<sup>27</sup> The Supreme Court declared these laws unconstitutional under the Thirteenth Amendment as early as 1911.<sup>28</sup> Nevertheless, these statutes endured as part of state law

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cause the latter's virtual monopoly on land, and planters remained dependent on their former slaves, because the latter's virtual monopoly of labor").

24. Juan F. Pera, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act*, 72 OH. ST. L.J. 95, 101 (2011) ("Just as the antebellum southern plantation system depended on the forced labor of black slaves . . . postbellum southern agriculture depended on exploitation and subordination of black labor."). Debt peonage and sharecropping both perpetuated a cycle of debt and poverty that prevented black farmers from freely withdrawing their labor and seeking better wages and working conditions elsewhere. The Civil War crippled the South's economy, and the abolition of slavery meant that southern landowners faced the need to pay their workers for the first time. Sharecropping allowed southern landowners to avoid paying their farm workers by instead giving them a share of the crop. Landlords or nearby merchants would lease equipment to workers and provide other items (like seed, fertilizer, and food) on credit until the harvest. Extremely high interest rates, unpredictable harvests, and corrupt landowners kept workers severely indebted so that the debt would carry over from year to year; workers who were unable to pay their debt found themselves in a constant cycle of working without pay. Workers who attempted to leave their workplace or escape their debts were arrested, found guilty of abandoning their debts, fined with court fees, returned to their employer, and compelled to work off their debt as punishment for their crime.

25. THE HUMAN COST OF FOOD: FARMWORKERS' LIVES, LABOR, AND ADVOCACY 113 (Charles D. Thompson, Jr. & Melinda F. Wiggins eds., 2002).

26. Acts of the General Assembly of the State of South Carolina Passed at the Sessions of 1864-65, No. 4733, § LXXII, 299 (1865) (Artisan and Shopkeepers Provision); WILKERSON, *supra* note 17, at 133.

27. These statutes made it a criminal offense to obtain advances from an employer with an intent to defraud; refusal to begin or complete work was *prima facie* evidence of intent to defraud. In other words, a person who failed to honor a work contract (for which that person was given an advance) could be arrested for fraud even if he had no intent to commit fraud. Marc Linder, *Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 65 TEX. L. REV. 1335, 1348 (1987). *See e.g.*, Act of Mar. 9, 1911, No. 98, 1911 Ala. Acts 93-94 (repealed 1977); Act of June 7, 1919, ch. 7917, 1919 Fla. Laws 286 (repealed 1951); Act of Aug. 15, 1903, No. 345, §§ 1-2, 1903 Ga. Laws 90-91 (repealed 1968).

28. *Bailey v. Alabama*, 219 U.S. 219, 227-28, 241, 245 (1911) (explaining that the 13th Amendment's words prohibiting involuntary servitude have a "larger meaning than slavery").

until the early 1940s because of their “extra-legal coercive effect.”<sup>29</sup> In effect, the South maintained a system of subordinated black labor that continued to prop up its agricultural economy for decades after the official end of slavery.

Beginning in the twentieth century, migrant Mexican labor grew to comprise a predominant portion of the agricultural workforce in the United States. If slave labor was markedly racialized and unfree, Mexican labor at least appeared to be free, waged labor.<sup>30</sup> However, many of the problems that preceded slavery, namely labor shortages in the production of crops, similarly spurred the importation of Mexican labor. Slavery was essential to a productive agricultural economy. The end of slavery and the gradual erosion of institutions like sharecropping and debt peonage that succeeded slavery left farm owners unable (or at least unwilling) to pay competitive wages that would attract workers. Foreign migrant labor, in particular Mexican labor, provided a solution, and the American legal system continued to exclude these workers from full social and political integration. As agriculture shifted from small family-owned farms to large farms owned by business entities, the agricultural labor market assumed a distinctly migratory character. The migratory nature of the workforce inhibited both labor organization and the development of settled communities—two factors critical to incorporating these workers into the American polity and to ensuring access to education, higher wages, and political participation.<sup>31</sup> Although the Immigration and Nationality Act (INA) of 1917 banned contract labor, it included an exception for the temporary employment of agricultural laborers, prompted by growers’ concerns

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29. *Pollock v. Williams*, 322 U.S. 4, 15 (1944) (declaring a Florida debt peonage law unconstitutional). In *Pollock*, the Florida law at issue stated that contract workers who received money from an employer and then did not honor their contract were guilty of fraud. If a defendant, arrested under the law, refused to honor the work contract, that refusal constituted prima facie evidence of fraudulent intent. The Supreme Court found that this presumption provision had a coercive effect, encouraging defendants to plead guilty when charged under this law, despite the Court previously holding that such a presumption was unconstitutional and prohibited under the federal Anti-Peonage statute. The Court noted that “the possibility of obtaining relief” in this case was not bright. Justice Jackson explained “Pollock had to come all the way to this Court and was required, and quite regularly, to post a supersedeas bond of \$500, a hundred times the amount of his debt. He was an illiterate Negro laborer in the toils of the law for the want of \$5. Such considerations bear importantly on the decision of a prisoner even if aided by counsel, as Pollock was not, whether to plead guilty and hope for leniency or to fight. It is plain that, had his plight after conviction not aroused outside help, Pollock himself would have been unheard in any appellate court.” *Id.*

30. NGAI, *supra* note 16, at 132–33 (explaining that in the 1920s, the destruction of “semifeudal relationships” in agriculture prompted a shift to wage labor).

31. *Id.* at 129–31.



about labor shortages during World War I.<sup>32</sup> During this period, approximately 73,000 Mexican and Latin American workers legally entered the U.S. to perform agricultural work.<sup>33</sup> The granted visas denied workers the privileges or possibility of citizenship (as they carried the expectation that recipients would return to their home countries after the war), restricted migrants to work in the agricultural sector, and allowed growers to subvert the usual laws of supply and demand by restricting workers' ability to transfer their labor.<sup>34</sup> Consistent with the colonial approach to concerns about labor shortages, the 1917 INA perpetuated the system of "imported colonialism" that originated with slavery.<sup>35</sup> It led to the growth of a transnational labor force that associated "foreignness" with agricultural work, rendered labor a commodity, and relegated noncitizen workers to a subordinate position in the American legal system.

America's embrace of migrant agricultural labor took a drastic turn following the end of World War I. The continued rise of both legal and illegal immigration through the 1920s saw an average of approximately 162,000 Mexican citizens enter the U.S. annually.<sup>36</sup> While agricultural work was readily available in the 1920s, even to those who lacked the legal authority to perform that work,<sup>37</sup> the Great Depression sparked a backlash against this trend in two ways. First, the Great Depression generally changed attitudes towards foreign workers, whom Americans viewed as competition for limited jobs. In

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32. Immigration and Nationality Act of 1917, Pub. L. No. 64-301, ch. 29, 39 Stat. 874 (codified as amended at 8 U.S.C. § 1181 (2021)); Baker, *supra* note 14, at 82–83.

33. Baker, *supra* note 14, at 82.

34. *Id.* at 82–83. The legal approach to Mexican migrant labor in the early 1900s bears striking similarities to the treatment of slaves and, later, newly freed black agricultural laborers in the post-Civil War South: slaves were not, and had no hope of becoming, citizens prior to the adoption of the Fourteenth Amendment; the Black Codes, enacted by many former Confederate states, restricted black citizens to two occupations, agricultural and domestic work; and institutions like debt peonage and sharecropping, circumvented economic laws of supply and demand to ensure a cheap and reliable labor force. See *supra* text accompanying notes 17–29.

35. NGAI, *supra* note 16, at 129.

36. Baker, *supra* note 14, at 83; Ngai, *supra* note 16, at 131 (consisting of approximately 62,000 legal and 100,000 illegal immigrants).

37. During this time, immigration enforcement on farms was lax, and the newly created Border Patrol pursued an informal policy that accounted for the harvest needs of the region's agricultural production by waiting until the end of the growing season to raid farms so they would not disrupt the harvest. Baker, *supra* note 14, at 83; NGAI, *supra* note 16, at 152. See also *Border Patrol History*, U.S. CUSTOMS AND BORDER PROTECTION (July 21, 2021), <https://www.cbp.gov/border-security/along-us-borders/history> ("On May 28, 1924, Congress passed the Labor Appropriation Act of 1924, officially establishing the U.S. Border Patrol for the purpose of securing the borders between inspection stations.").

response, the U.S. government's mass repatriation program during the 1930s led to the deportation or "voluntary return" of over 400,000<sup>38</sup> workers to Mexico.<sup>39</sup> Second, New Deal legislation effectively "institutionalized the second-class status of agricultural laborers" by explicitly denying farmworkers important substantive rights granted to other workers.<sup>40</sup> The exclusion of farmworkers from critical New Deal labor laws endorsed the racism of the Jim Crow South and ensured that growers would continue to have access to a cheap, vulnerable workforce.<sup>41</sup> However, the reversal in Mexican migration patterns proved to be only temporary, and the looming threat of labor shortages precipitated by World War II led to an enormous expansion of imported contract labor in the United States through the bracero program.

### B. *The Bracero Program*

The bracero program began as a bilateral agreement between the United States and Mexico during World War II; it permitted Mexican workers to come to the U.S. to perform seasonal agricultural labor and then return to Mexico.<sup>42</sup> Although initially intended as a temporary wartime measure to alleviate the shortage of domestic workers, the bracero program was formally adopted into federal law in 1951,<sup>43</sup> ex-

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38. NGAI, *supra* note 16, at 135.

39. See Jennifer J. Lee, *U.S. Workers Need Not Apply: Challenging Low Wage Guest Worker Programs*, 28 STAN. L. & POL'Y REV. 1, 24 (2017) (describing the role that political interest groups, such as the American Federation of Labor and the American Eugenics Society, played in curtailing Mexican immigration by emphasizing American unemployment and xenophobic rhetoric).

40. Holley, *supra* note 15, at 582 (quoting DANIEL ROTHENBERG, WITH THESE HANDS: THE HIDDEN WORLD OF MIGRANT FARMWORKERS TODAY 28 (Univ. of Cal. Press 2000) (1998)). The National Labor Relations Act deprived farmworkers of the right to collective bargaining. National Labor Relations Act, Pub. Law No. 74-198, ch. 372, 49 Stat. 449, § 2 (1935) (defining "employee" to exclude from the law's protection "any individual employed as an agricultural laborer"). Similarly, the Fair Labor Standards Act excluded farmworkers from the right to minimum and overtime wages. Fair Labor Standards Act of 1938, ch. 676, 52 Stat. 1060, §§ 13(a)(6), 13(c) (1938) (codified as amended at 29 U.S.C. § 201 (2021)) (excluding any employees employed in agriculture from the minimum wage, maximum hour, and child labor provisions).

41. Laurence E. Norton II & Marc Linder, *Part I: Unemployment Compensation and Eligibility: Down & Out in Weslaco, Texas and Washington, D.C.: Race-Based Discrimination Against Farmworkers Under Federal Unemployment Insurance*, 29 U. MICH. J.L. REFORM 177, 197 (1996).

42. Baker, *supra* note 14, at 84.

43. See Act of July 12, 1951, Pub. L. No. 78, ch. 223, 65 Stat. 119. From 1947, when special wartime legislation expired, until the adoption of Public Law 78 in 1951, the bracero program continued to operate, but the government abdicated its supervisory role and contracts were made directly between U.S. employers and Mexican

panded to five times its original size, and continued until 1964, well after the end of the war.<sup>44</sup> At the height of the bracero program from 1956 to 1959, over 432,000 Mexican workers entered the U.S. annually.<sup>45</sup> The program explicitly restricted U.S. growers from employing Mexican workers unless they satisfied three conditions: (1) there were no sufficient willing, able, and qualified domestic workers available, (2) the employment of Mexican workers would not adversely affect the wages and working conditions of domestic agricultural workers, and (3) employers made reasonable efforts to recruit domestic workers.<sup>46</sup> Despite these restrictions, the bracero program displaced domestic farmworkers, depressed working conditions, and enabled the abuse of Mexican workers.<sup>47</sup>

On its face, the bracero program included relatively robust legal protections.<sup>48</sup> Workers were entitled to a wage set at the prevailing domestic rate and guaranteed work (or at minimum, payment) for at least seventy-five percent of the contract period.<sup>49</sup> Growers were required to provide transportation that met specific safety standards and housing that met certain sanitation, space, and cleanliness standards.<sup>50</sup> The Mexican government could blacklist certain communities or localities from eligibility for discriminating against braceros.<sup>51</sup> The United States government, not individual employers, guaranteed the braceros' contracts and protection.<sup>52</sup>

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workers. Gerald P. López, *Undocumented Mexican Migration: In Search of a Just Immigration Law and Policy*, 28 UCLA L. REV. 615, 665 (1981).

44. Lee, *supra* note 39, at 24. During the “wartime agreement” period of the bracero program (from 1942 until 1947), the United States imported approximately 215,000 Mexican nationals *in total* for work in agriculture. From 1948 to 1964 the United States imported, on average, 200,000 braceros *each year*. NGAI, *supra* note 16, at 138–39.

45. These numbers greatly exceeded those admitted during World War I, World War II, and the post-war period. H. Michael Semler, *Aliens in the Orchard: The Admission of Foreign Contract Laborers for Temporary Work in U.S. Agriculture*, 1 YALE L. & POL'Y REV. 187, 194 (1983). For example, during all of World War II approximately 200,000 workers entered the United States under the wartime bilateral agreement. James F. Creagan, *Public Law 78: A Tangle of Domestic and International Relations*, 7 J. INTER-AM. STUDIES 541, 542 (1965).

46. Act of July 12, 1951, Pub. L. No. 78, ch. 223, 65 Stat. 119.

47. Semler, *supra* note 45, at 195.

48. Creagan, *supra* note 45, at 545–46.

49. Baker, *supra* note 14, at 85.

50. Creagan, *supra* note 45, at 545–46.

51. *Id.*

52. See BUREAU OF EMPLOYMENT SECURITY, FARM LABOR SERVICE, U.S. DEP'T OF LABOR, BES NO. F-146, INFORMATION CONCERNING ENTRY OF MEXICAN AGRICULTURAL WORKERS INTO THE UNITED STATES 15–16 (1959).

In practice, a lack of oversight, unscrupulous recruiting practices, and restrictive contracts created a vulnerable bracero workforce unable to assert their rights in the face of exploitative treatment. Although each individual work contract specified the pay rate, there was no guarantee workers would be paid that amount,<sup>53</sup> and workers often could not read and did not understand what they signed.<sup>54</sup> The Department of Labor had difficulty determining the actual prevailing wage rate for farmworkers and ended up simply adopting the growers' representations, leading to depressed agricultural wages and the displacement of domestic workers.<sup>55</sup> Program oversight was decentralized—various federal agencies and state authorities monitored compliance with different aspects of the program.<sup>56</sup> Although workers lodged thousands of formal complaints per year, the government rarely terminated employer contracts because monitoring authorities were understaffed and agencies lacked sufficient resources.<sup>57</sup> Before even arriving in the United States, Mexican workers encountered fees at all points in the recruitment process, often leaving workers hundreds of pesos in debt.<sup>58</sup> Critically, if workers complained about negative treatment, they risked retaliation from their employer—under their contracts, workers could not switch to another job and thus faced deportation for publicly voicing their grievances.<sup>59</sup> In debt from recruitment fees and illegal paycheck deductions, workers sometimes made only six or seven U.S. dollars per week.<sup>60</sup> Reporting unlawful employment practices under these conditions was not an option.

Debate over the extension or elimination of the bracero program deeply divided Congress in 1963<sup>61</sup> and ultimately led to its termina-

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53. Deductions from paychecks included legitimate expenses but were often supplemented with illegal deductions for room, board, transportation, and farm tools and supplies. RONALD L. MIZE & ALICIA C.S. SWORDS, *CONSUMING MEXICAN LABOR: FROM THE BRACERO PROGRAM TO NAFTA* 11–12 (2011).

54. *HARVEST OF LONELINESS: THE BRACERO PROGRAM* (Films Media Group 2010).

55. Holley, *supra* note 15, at 584.

56. For example, the U.S. Department of Labor monitored compliance with contract pay rates, while state housing authorities oversaw housing conditions. MIZE & SWORDS, *supra* note 53, at 13.

57. *Id.* at 14; NGAI, *supra* note 16, at 143.

58. Mexican workers applying to the bracero program were required to obtain letters from local officials stating that there were no labor shortages in his community. On average, these letters cost 200 pesos. Workers also paid for transportation to recruitment and processing centers, which were located close to the border, to alleviate transportation costs on U.S. growers. MIZE & SWORDS, *supra* note 53, at 22.

59. *Id.* at 16.

60. *HARVEST OF LONELINESS: THE BRACERO PROGRAM* (Films Media Group 2010).

61. *Compare Mexican Farm Labor Program: Hearings on H.R. 1863 and H.R. 2009 Before the Subcomm. on Equipment, Supplies, & Manpower of the Comm. on Agric.*, 88th Cong. 202–13 (1963) (statement of Arnold Mayer, Amalgamated Meat

tion on December 31, 1964.<sup>62</sup> Today, the bracero program is widely criticized for perpetuating a system of “legalized slavery”<sup>63</sup> and for contributing significantly to patterns of unauthorized immigration from Mexico.<sup>64</sup> However, the end of the bracero program did not eliminate all legal avenues for growers to import foreign workers for agricultural work. The lesser-known H-2 visa program became the primary U.S. guestworker scheme in the void left by the bracero program.

### C. Immigration Reform and Evolution of the H-2A Visa

The bracero program was not the only guestworker program operating in the United States during the 1950s. The H-2 provisions of the Immigration and Nationality Act (INA) of 1952 established the first permanent statutory authority for the admission of unskilled contract labor,<sup>65</sup> not merely a temporary addition to meet a specific national manpower shortage.<sup>66</sup> Whereas prior programs, like those during wartime, took an ad hoc approach to the admission of guestworkers and consistently treated farm labor as wholly separate from other temporary unskilled work, the H-2 provisions applied to all unskilled workers.<sup>67</sup> The express purpose of the H-2 program was to provide U.S. employers access to foreign workers to alleviate domestic labor shortages, subject to “strong safeguards for American labor.”<sup>68</sup> The provisions required a certification by the Secretary of

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Cutters & Butcher Workmen of North America) [hereinafter *1963 Hearings on Mexican Farm Labor Program*], with *Extension of Mexican Farm Labor Program: Hearings on H.R. 2010 Before the Subcomm. on Equipment, Supplies, & Manpower of the Comm. on Agric.*, 87th Cong. 207–211 (1961) (statement of Edward F. Hayes, Manager, Imperial Valley Farmers’ Association of El Centro, California).

62. Creagan, *supra* note 45, at 550.

63. George Kuempel & Howard Swindle, *Ex-chief Recalls Bracero Slavery*, *DALLAS MORNING NEWS*, Apr. 30, 1980 (quoting a former U.S. Labor Department executive who oversaw the day-to-day operations of the bracero program from 1959 to 1964).

64. See CONG. RSCH. SERV., SEN. COMM. ON THE JUDICIARY, 96TH CONG., *TEMPORARY WORKER PROGRAMS: BACKGROUND AND ISSUES* 41 (Comm. Print 1980) (“Without question the bracero program was also instrumental in ending the illegal alien problem in the mid-1940s and 1950s.”) [hereinafter *TEMPORARY WORKER PROGRAMS*].

65. See Immigration and Nationality Act of 1952, Pub. Law No. 414, § 101(a)(15)(H)(ii), 66 Stat. 163, 168; § 214, 66 Stat. at 189. This provision was not limited to agricultural work but included all other types of unskilled contract labor such as domestic labor, landscaping, forestry, and construction (to name a few).

66. *TEMPORARY WORKER PROGRAMS*, *supra* note 64, at 62 (describing the major differences between the H-2 provision and the bracero program).

67. Semler, *supra* note 45, 191–92.

68. H.R. REP. NO. 82-1365, at 50 (1952).

Labor that qualified persons in the United States were not available and that “the employment of foreign workers will not adversely affect the wages and working conditions of workers in the United States similarly employed.”<sup>69</sup> These requirements followed the pattern established by other temporary foreign labor programs. However, between 1952 and 1964, the expansion of the bracero program greatly limited the use of the H-2 provisions. A small number of agricultural employers used the H-2 program to admit contract workers from the British West Indies, the Bahamas, and Canada—primarily to work along the East Coast and in the Midwest<sup>70</sup>—but the admission of Mexican workers under the bracero program dwarfed the number of workers admitted under the H-2 program.<sup>71</sup> Even after the end of the bracero program, the H-2 program continued to decrease in size.<sup>72</sup> A narrow vote in the Senate ultimately rebuffed attempts by farm employers to use the H-2 program to routinely admit large numbers of contract workers,<sup>73</sup> relegating the H-2 program to a footnote in the larger immigration scheme. However, the rise of illegal migration over the next two decades reignited discussions about the expansion of a legally sanctioned guestworker program.<sup>74</sup>

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69. Immigration and Nationality Act of 1952, Pub. L. No. 414, § 212(14), 66 Stat. 163, 183.

70. Semler, *supra* note 45, at 194.

71. TEMPORARY WORKER PROGRAMS, *supra* note 64, at 62.

72. Lee, *supra* note 39, at 25; Semler, *supra* note 45, at 197 (“The struggle to terminate the bracero program led to significant changes in the size and scope of the H-2 program reducing admissions by forty percent over four years.”). At the end of 1964, the year that the bracero program was allowed to terminate, the Secretary of Labor controlled the certification decision to determine the need for or availability of agricultural labor. Secretary of Labor Willard Wirtz was opposed to the use of contract labor in agriculture and interpreted Congressional intent in ending the bracero program as a desire to “reduce the country’s dependence on imported labor.” TEMPORARY WORKER PROGRAMS, *supra* note 64, at 65. Following the end of the bracero program, Secretary Wirtz began to phase out permitted uses of H-2 workers by crop and region by denying H-2 certifications. Semler, *supra* note 45, at 195–96.

73. The Secretary of Labor, who was opposed to the expansion of contract labor and sought to end even the existing uses of H-2 workers, controlled the certification decisions for the H-2 program. Agricultural interests wanted to empower the more sympathetic Secretary of Agriculture to determine the need for agricultural labor. Semler, *supra* note 45, at 196–96.

74. TEMPORARY WORKER PROGRAMS, *supra* note 64, at 5.

A legally sanctioned large-scale temporary alien worker program has increasingly been mentioned as one possible way to control illegal entry of aliens into the United States. The principal objection to a legal temporary alien worker program is obvious—in view of current and projected U.S. unemployment rates, the large-scale importation of supplemental temporary alien labor is difficult to justify on the basis of need. The rebuttal to this objection is equally obvious—the United States has a large-scale alien labor program, made up of undocumented aliens. The principal dif-

The Immigration Reform and Control Act (IRCA) of 1986 and the advent of the modern-day H-2A guestworker program developed in the context of a larger debate about the need to curb unauthorized migration. Prior to 1986, American employers underutilized the H-2 program and instead hired undocumented immigrants, a practice for which employers faced no legal sanctions or criminal liability.<sup>75</sup> In response, the IRCA focused on three modifications to combat illegal immigration: (1) imposing sanctions on employers for hiring undocumented workers, (2) legalizing some of the existing undocumented worker population, and (3) expanding the guestworker program.<sup>76</sup> The employer sanction provision closed a previous loophole in the program by generally prohibiting the employment of undocumented workers and extending injunctions, civil fines, and criminal penalties to those who knowingly hired undocumented laborers.<sup>77</sup> This provision sought to decrease the employment incentives for unauthorized migrants to come to the United States by deterring employers from hiring undocumented workers.<sup>78</sup> Under the Special Agricultural Workers amnesty provision, undocumented workers could apply for permanent resident status if they could demonstrate that they had at least ninety days of experience in qualifying agricultural work.<sup>79</sup> Recognizing U.S. agriculture's "long-standing dependence on foreign labor" and the unique nature of perishable crop farming,<sup>80</sup> the amnesty provision sought to stabilize the agricultural labor supply.<sup>81</sup> Although the program was expected to grant legal status to only 350,000 agricultural workers, over 1.3 million workers applied.<sup>82</sup> Contrary to the

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ference between this program and a legally sanctioned one is the absence of official regulation and control.

75. MIZE & SWORDS, *supra* note 53, at 94.

76. Steven M. Kaplan, *The Employer Sanctions Provision of IRCA: Deterrence or Discrimination?*, 6 GEO. IMMIGR. L.J. 545, 545 (1992).

77. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 274A, 100 Stat. 3359, 3360 (1986) (codified as amended at 8 U.S.C. § 1324a(1)(A) (2021)) ("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 . . . an alien knowing the alien is an unauthorized alien . . . with respect to such employment.").

78. Kaplan, *supra* note 76, at 546–49.

79. Baker, *supra* note 14, at 87.

80. Perishable crop farming presents two distinct challenges. "First, it is impossible for growers to predict more than a few days in advance when their needs for workers will occur. Second, their need for workers is very short and it is very intense." *Northwest Forest Workers Ass'n v. Lyng*, 688 F. Supp. 1, 6 (D.D.C. 1988) (*quoting* 131 CONG. REC. S11330 (Sept. 12, 1985) (statement of Sen. Dennis DeConcini)).

81. See Steven Alan Elberg, *Agriculture and the Immigration Reform and Control Act of 1986: Reform or Relapse?*, 3 SAN JOAQUIN AGRIC. L. REV. 197, 198 (1993).

82. See Eric Schlosser, *In the Strawberry Fields*, THE ATLANTIC (Nov. 1995), <https://www.theatlantic.com/magazine/archive/1995/11/in-the-strawberry-fields/>

purpose of the program, many of the recipients left the agricultural sector for other jobs as soon as they received authorization to work legally in the United States.<sup>83</sup> Finally, the IRCA substantially reformed the H-2 program, splitting it into two subcategories: the H-2A visa,<sup>84</sup> for temporary agricultural labor, and the H-2B visa,<sup>85</sup> for all other temporary non-agricultural unskilled labor. Despite implementing substantial reforms to U.S. immigration law, the IRCA has been widely critiqued for failing to stem the flow of unauthorized migration.<sup>86</sup>

The history of agricultural work in the United States and efforts to reform immigration laws reveal the competing ideals that underlie guestworker programs in the United States—the desire for a temporary, cheap, dependable workforce, but one that does not displace domestic workers. The aspects of a guestworker program that render a temporary foreign workforce available and disposable, by keeping them entirely separate from and not entitled to the benefits of U.S. citizenship, create a set of conditions that makes hiring migrant workers more attractive than hiring U.S. workers. The current H-2A visa program attempts to limit U.S. employers’ access to migrant farmworkers when domestic workers are available to fill farm jobs and provides migrant workers with protections to ensure equivalent wages and working conditions to domestic workers. These restrictions are intended to prevent employers from favoring migrant workers over domestic workers when hiring for agricultural jobs. As the next section will show, the legal rights afforded to migrant agricultural workers under the H-2A program are substantial, but the failure of the labor

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305754/ [https://perma.cc/6PNP-F6UL] (calling the Special Agricultural Worker Program “one of the greatest immigration frauds in American history”).

83. Baker, *supra* note 14, at 87.

84. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 301, 100 Stat. 3359, 3411 (1986). *See also* 8 U.S.C. § 1101(a)(15)(H)(ii)(a) (2021).

85. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(b) (2021).

86. *See* Elberg, *supra* note 81, at 207. *See e.g.*, Brad Plumer, *Congress Tried to Fix Immigration Back in 1986. Why Did It Fail?*, WASH. POST (Jan. 30, 2013, 2:40 PM), <https://www.washingtonpost.com/news/wonk/wp/2013/01/30/in-1986-congress-tried-to-solve-immigration-why-didnt-it-work/> [https://perma.cc/YA5N-GX6N]; Ingrid Rojas, *The 1986 Immigration Reform Explained*, ABC NEWS (May 5, 2013, 3:17 PM), [https://abcnews.go.com/ABC\\_Univision/Politics/1986-amnesty/story?id=18971179](https://abcnews.go.com/ABC_Univision/Politics/1986-amnesty/story?id=18971179) [https://perma.cc/9Y5U-M9GC]; Jerry Kramer, *The Border at Work*, NAT’L REV. (July 26, 2018, 11:06 AM), <https://www.nationalreview.com/magazine/2018/08/13/border-security-enforcement-time-now/> [https://perma.cc/NCF6-5WPV]; Jerry Kramer, *Forget the Border Wall, Mr. President. Look to the Hole in Worksite Enforcement Rules*, PBS (Sept. 25, 2013, 5:46 PM), <https://www.pbs.org/newshour/politics/column-forget-border-wall-mr-president-look-hole-worksite-enforcement-rules> [https://perma.cc/KE7S-5JLZ].



certification process to correctly identify labor shortages and the lack of an efficient mechanism to enforce those rights contravenes the program's statutory purpose.

## II.

### OVERVIEW OF THE CURRENT H-2A VISA PROGRAM

The H-2A visa program allows U.S. employers to bring foreign workers into the United States to fill temporary or seasonal agricultural jobs.<sup>87</sup> Because the H-2A visa is a temporary, nonimmigrant visa,<sup>88</sup> a noncitizen who receives an H-2A visa must depart the United States after the visa expires.<sup>89</sup> There is no opportunity for a foreign national on a nonimmigrant visa to gain citizenship. In order to remain in the United States, a worker must adjust to legal permanent resident status by obtaining an immigrant visa or adjust to another valid nonimmigrant status.<sup>90</sup> Unlike immigrant visas, which often contain strict quota limits, there is no annual cap on the number of H-2A visas the government may issue.<sup>91</sup> However, the admission of temporary H-2A workers is limited by two conditions. First, the petitioner (a U.S. employer, agent, or association of agricultural producers)<sup>92</sup> must demonstrate that there are not enough workers who are able, willing, qualified, and available to perform the temporary work.<sup>93</sup> Second, the petitioner must show that employing H-2A workers will not adversely affect the wages and working conditions of similarly employed U.S. workers.<sup>94</sup> Federal regulations detail the procedures for obtaining an H-2A visa. Although these regulations provide certain protections for

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87. *H-2A Temporary Agricultural Workers*, U.S. CITIZENSHIP AND IMMIGR. SERVS., <https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-2a-temporary-agricultural-workers> (last visited Jan. 15, 2022).

88. 8 U.S.C. § 1101(a)(15)(H)(ii)(a) (defining a “nonimmigrant alien” as “an alien . . . having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform agricultural labor or services”).

89. Daniel Costa, *Temporary Migrant Workers or Immigrants? The Question for US Labor Migration*, 6 RUSSELL SAGE FOUND J. OF SOC. SCI. 18, 19 (2020).

90. *Id.*

91. In contrast, the H-2B nonagricultural temporary visa has an annual limit of 66,000. 8 U.S.C. § 1184(g)(1)(B) (2021); ANDORRA BRUNO, CONG. RSCH. SERV., R44849, H-2A AND H-2B TEMPORARY WORKER VISAS: POLICY AND RELATED ISSUES 10–11 (2020).

92. *H-2A Temporary Agricultural Workers*, *supra* note 87.

93. 8 U.S.C. § 1188(a)(1)(A) (2021) (“[T]here are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services involved in the petition.”).

94. 8 U.S.C. § 1188(a)(1)(B) (2021) (“[T]he employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed.”).

foreign workers, the primary goal is to effectuate the purposes of the INA—employ U.S. workers wherever possible and maintain domestic employment standards when migrant workers are admitted.<sup>95</sup>

Obtaining an H-2A visa involves a complex and multi-step process. Four federal agencies participate in the screening, approval, and admission of foreign workers into the U.S.<sup>96</sup> First, an employer must obtain a labor certification from the Department of Labor (DOL) to verify there are no sufficient and qualified American workers able to perform the job.<sup>97</sup> Farmers must initiate the labor certification process 60 days before the job's start date, submit job orders to State Workforce Agencies (SWAs) to advertise the job to unemployed U.S. workers,<sup>98</sup> and engage in positive recruitment efforts.<sup>99</sup> Once certified, employers petition U.S. Citizenship and Immigration Service (USCIS) to admit foreign workers, specifying the number of nonimmigrant workers needed.<sup>100</sup> Workers then apply for a visa through the State

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95. 20 C.F.R. § 655.0(a)(3); U.S. GOV'T ACCOUNTABILITY OFF., GAO-15-154, H-2A AND H-2B VISA PROGRAMS: INCREASED PROTECTIONS NEEDED FOR FOREIGN WORKERS 5 (2015).

96. U.S. GOV'T ACCOUNTABILITY OFF., GAO-15-154, H-2A AND H-2B VISA PROGRAMS: INCREASED PROTECTIONS NEEDED FOR FOREIGN WORKERS 11–14, Fig. 2 (2015).

97. See 20 C.F.R. § § 655.50–655.57 (2021).

98. David J. Bier, *H-2A Visas for Agriculture: The Complex Process for Farmers to Hire Agriculture*, CATO INST. (Mar. 10, 2020), <https://www.cato.org/publications/im-migration-research-policy-brief/h-2a-visas-agriculture-complex-process-farmers-hire#h-2a-program-rules>. See generally 20 C.F.R. § 655.100–655.235 (2021).

99. 8 U.S.C. § 1188(b)(4). Positive recruitment efforts traditionally required employers to place print advertisements for the position in newspapers serving the traditional or expected labor supply states. Recently, the Department of Labor acknowledged the increased rates of innovation in job search technologies and improved internet access in rural communities. As such, the DOL amended the rule to rescind requirements that an employer advertise its job opportunity in a print newspaper of general circulation in the area of intended employment. Instead, the DOL will advertise the employer's job opportunity on its behalf by posting it on "SeasonalJobs.dol.gov," an expanded and improved version of the Department's existing H-2A job registry website. The DOL also noted that the officer in charge of the labor certification process for an employer may require the use of a particular method of advertising (e.g., community-based newspaper, agricultural careers website), whether in print and/or electronic, if he determines that it may be effective in recruiting U.S. workers for a particular position, in a specific location, or during a certain period of the year. 20 C.F.R. § 655 (2019). Under the fifty percent rule, employers must provide employment to any qualified, eligible U.S. worker who applies for the job opportunity during the first half of the work contract. ANDORRA BRUNO, CONG. RSCH. SERV., R44849, H-2A AND H-2B TEMPORARY WORKER VISAS: POLICY AND RELATED ISSUES 6 (2020).

100. See 8 C.F.R. § § 214.2(h)(5)(i), (6)(iii). H-2A petitions may only be approved for nationals of countries that the Secretary of Homeland Security has designated, with the concurrence of the Office of the Secretary of State, as eligible to participate in the H-2A program each year. *H-2A Temporary Agricultural Workers*, *supra* note

Department. Officials interview workers, review their supporting documentation, and apprise workers of their rights at consular offices in their home country<sup>101</sup> (almost always Mexico).<sup>102</sup> If granted a visa, workers seek admission at the border, where Customs and Border Protection (CBP) makes a final determination of whether to grant entry into the U.S.<sup>103</sup> The responsibilities of federal agencies throughout this process often overlap,<sup>104</sup> and both the DOL and the Department of Homeland Security independently issue rules governing the H-2A visa process,<sup>105</sup> resulting in a tangled administrative web of regulation.

At a high level, the H-2A program guarantees migrant workers fair pay, a safe and healthy workplace, and freedom from discrimination and harassment.<sup>106</sup> Specifically, workers are entitled to be paid the highest of the Adverse Effect Wage Rate (AEWR), prevailing wage rate, agreed-upon collective bargaining rate, or statutory minimum wage, and employers must guarantee each covered worker employment for at least seventy-five percent of the contract period.<sup>107</sup> Employers must reimburse workers for reasonable costs incurred for inbound transportation and provide or pay for return transportation at the end of employment.<sup>108</sup> During the contract period, employers must

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87. For a list of eligible countries from November 10, 2021, through November 10, 2022, see Identification of Foreign Countries Whose Nationals Are Eligible to Participate in the H-2A and H-2B Nonimmigrant Worker Programs, 86 Fed. Reg. 62,559 (Nov. 10, 2021).

101. U.S. GOV'T ACCOUNTABILITY OFF., GAO-15-154, H-2A AND H-2B VISA PROGRAMS: INCREASED PROTECTIONS NEEDED FOR FOREIGN WORKERS 7, Fig. 1 (2015).

102. Milli Legrain, *'Be Very Careful': The Dangers for Mexicans Working Legally on U.S. Farms*, THE GUARDIAN (May 16, 2019, 9:37 AM), <https://www.theguardian.com/us-news/2019/may/16/us-mexico-immigration-seasonal-work-visas-h-2a>.

103. Bier, *supra* note 98.

104. For example, USCIS conducts a duplicative review of the number of H-2A jobs employers request after other agencies (namely the DOL and SWAs) have already conducted and approved a labor market test. *Id.* See also U.S. GOV'T ACCOUNTABILITY OFF., GAO-15-154, H-2A AND H-2B VISA PROGRAMS: INCREASED PROTECTIONS NEEDED FOR FOREIGN WORKERS 7 (2015) ("USCIS can either approve the petition—for the number of workers requested by the employer, or fewer—or it can deny the petition.").

105. ANDORRA BRUNO, CONG. RSCH. SERV., R44849, H-2A AND H-2B TEMPORARY WORKER VISAS: POLICY AND RELATED ISSUES 7–9 (2020).

106. U.S. DEP'T OF STATE, KNOW YOUR RIGHTS 2–3, 5 [hereinafter KNOW YOUR RIGHTS PAMPHLET]. To view the State Department's "Know Your Rights" pamphlet in a language other than English, see *Rights and Protections for Temporary Workers*, U.S. DEP'T OF STATE BUREAU OF CONSULAR AFFAIRS, <https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/temporary-workers.html> (last visited Jan. 15, 2022).

107. U.S. DEP'T OF LABOR WAGE & HOUR DIVISION, FACT SHEET #26: SECTION H-2A OF THE IMMIGRATION AND NATIONALITY ACT (INA) 1–2 (2010).

108. *Id.* at 3.

also provide housing and daily transportation that meets applicable safety standards at no cost to the worker.<sup>109</sup> Workers must receive a copy of the work contract—in a language understood by the worker—describing the terms and conditions of employment.<sup>110</sup> Deductions for costs of equipment and recruitment fees are illegal, as is holding or confiscating workers' passports or other immigration documents.<sup>111</sup> Finally, employers cannot discriminate or retaliate against workers who assert their rights under this program.<sup>112</sup> These protections are similar to the protections afforded under the Bracero program<sup>113</sup> and earlier versions of the H-2 program.<sup>114</sup> Once a worker receives his visa, his legal immigration status is tied directly to the employer who sponsored the visa.<sup>115</sup> Employees who wish to leave their employer, either to switch jobs or stop working, must leave the U.S. and re-apply for a visa from the beginning of the process or risk deportation. The “Know Your Rights Pamphlet,” provided by the Department of State to all H-2A applicants, unhelpfully states that employees have a right to leave an abusive employment situation but will simultaneously lose their legal immigration status if they leave their employer.<sup>116</sup> Deportation is often economically devastating for these workers. Guestworkers commonly pay hundreds to thousands of dollars in fees to Mexican recruiters<sup>117</sup> to secure a valuable H-2A visa. To afford these fees, most workers have no choice but to take out pre-employment loans from private lenders, banks, or recruiters, with interest rates ranging from five to seventy-nine percent.<sup>118</sup> Some lenders fur-

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109. *Id.*

110. *Id.* at 2.

111. *Id.*

112. *Id.* at 3. For a list of civil penalties associated with a violation of these provisions, see *H-2A Temporary Agricultural Employment of Foreign Workers*, U.S. DEP'T OF LABOR, <https://www.dol.gov/agencies/whd/agriculture/h2a> (last visited Jan. 16, 2022).

113. See *supra* text accompanying notes 42–60.

114. See *supra* text accompanying notes 65–74.

115. POLARIS, HUMAN TRAFFICKING ON TEMPORARY WORK VISAS: A DATA ANALYSIS FROM 2015–2017 10, 24 (2018) [hereinafter HUMAN TRAFFICKING ON TEMPORARY WORK VISAS] (describing how employers “weaponize” tied visas by threatening the loss of legal immigration status).

116. KNOW YOUR RIGHTS PAMPHLET, *supra* note 106, at 5 (“Though your visa status will no longer be valid if you leave your employer, you may be able to change your visa status or employer. You may need to leave the United States to do so. Even if your visa status is not valid, help is available once you leave your abusive employer.”).

117. Despite the illegality of these fees under both U.S. and Mexican law, they remain a common practice. See *infra* text accompanying notes 250–260.

118. Elyse T. Watkins, Note, *Inhospitable Hosts: Fundamental Flaws in the Recruitment Practices of H-2A Guest Workers and Recommendations for Change*, 8 Ky. J.

ther require that workers provide deeds to their residences or title to other property as collateral.<sup>119</sup> Workers facing the loss of their H-2A visa risk becoming imprisoned in debt<sup>120</sup> and losing fundamental property like homes and vehicles from collateral loan requirements, increasing guestworkers' dependence on the employers who sponsored their visas and decreasing the likelihood that workers will report hazardous or abusive conditions.

Although the intent of the labor certification process and the workers' rights provisions is to limit the use of migrant workers to cases of domestic labor shortages, the data reveals that the H-2A program is expanding at an unprecedented rate.<sup>121</sup> As the gross number of H-2A applications continues to increase, the refusal rate decreases;<sup>122</sup> as more workers are admitted on H-2A visas year after year, approved workers steadily constitute a higher percentage of total applications. Even in 2020, during the height of the Covid-19 pandemic, the H-2A

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EQUINE, AGRIC. & NAT. RES. L. 467, 481 (2015). Some workers take no- or low-interest loans from family members or friends, but others face extremely high rates when they turn to local banks, private lenders, or even the recruiters themselves. CENTRO DE LOS DERECHOS DEL MIGRANTE, INC., RECRUITMENT REVEALED: FUNDAMENTAL FLAWS IN THE H-2 TEMPORARY WORKER PROGRAM AND RECOMMENDATIONS FOR CHANGE 18 (2013) [hereinafter RECRUITMENT REVEALED].

119. *Id.*

120. As explained in Part I, trapping workers in a cycle of debt to pressure them to continue working in exploitative conditions is a practice endemic in American agriculture. Following the end of slavery in the 1800s, Southern landowners relied on sharecropping and debt peonage to prevent newly freed black slaves from seeking better wages and working conditions elsewhere. *See supra* text accompanying notes 22–24.

121. The number of H-2A positions requested and approved increased fivefold in the past 14 years, from about 48,000 positions certified in Fiscal Year 2005 to nearly 258,000 in Fiscal Year 2019. *Farm Labor*, U.S. DEP'T OF AGRIC., <https://www.ers.usda.gov/topics/farm-economy/farm-labor/> (last visited Aug. 18, 2021).

122. From 2013 to 2020, the refusal rate for H-2A visa applications decreased from 10.8% to 6.7%. This downward trend was consistent throughout that period, with one exception in 2018 where refused visas represented 10.5% of total applications. *See* U.S. DEP'T OF STATE BUREAU OF CONSULAR AFFAIRS, FY2020 NIV WORKLOAD BY VISA CATEGORY 1 (2020); U.S. DEP'T OF STATE BUREAU OF CONSULAR AFFAIRS, FY2019 NIV WORKLOAD BY VISA CATEGORY 1 (2019); U.S. DEP'T OF STATE BUREAU OF CONSULAR AFFAIRS, FY2018 NIV WORKLOAD BY VISA CATEGORY 1 (2018); U.S. DEP'T OF STATE BUREAU OF CONSULAR AFFAIRS, FY2017 NIV WORKLOAD BY VISA CATEGORY 1 (2017); U.S. DEP'T OF STATE BUREAU OF CONSULAR AFFAIRS, FY2016 NIV WORKLOAD BY VISA CATEGORY 1 (2016); U.S. DEP'T OF STATE BUREAU OF CONSULAR AFFAIRS, FY2015 NIV WORKLOAD BY VISA CATEGORY 1 (2015); U.S. DEP'T OF STATE BUREAU OF CONSULAR AFFAIRS, FY2014 NIV WORKLOAD BY VISA CATEGORY 1 (2014); U.S. DEP'T OF STATE BUREAU OF CONSULAR AFFAIRS, FY2013 NIV WORKLOAD BY VISA CATEGORY 1 (2013). For H-2A visa refusal rates prior to 2013, *see Nonimmigrant Visa Statistics*, U.S. DEP'T OF STATE, <https://travel.state.gov/content/travel/en/legal/visa-law0/visa-statistics/nonimmigrant-visa-statistics.html> (last visited Jan. 16, 2022).

visa category was the only visa category that saw an increase in the number of visas issued compared to fiscal year 2019.<sup>123</sup> A labor migration system that increasingly relies on temporary workers rather than permanent immigrants diminishes the ability of workers to integrate into the United States and prevents them from earning higher wages.<sup>124</sup> Cultural narratives, originating with the Bracero program, relied on racial and ethnic assumptions that framed Mexican guestworkers as “agreeable, dependable, and hardworking”<sup>125</sup> and therefore particularly well-suited for agricultural work.<sup>126</sup> Since almost all H-2A workers are from Mexico,<sup>127</sup> these ideas persist today to reinforce the idea that migrant workers are separate from and not entitled to inclusion in the American polity. Cultural narratives work simultaneously with an insufficient legal and regulatory framework to increase reliance on agricultural guestworkers in a way that displaces American labor. By excluding migrant workers from the American polity, the H-2A program perpetuates an agricultural system that originated with slavery and allows employers to continue relying on a subordinated, vulnerable workforce that is legally restricted from seeking better wages and working conditions elsewhere.

### III.

#### EVALUATING THE H-2A VISA PROCESS

The H-2A visa program is a complex administrative regime. Assessing an administrative process cannot be considered in the abstract, but must be grounded in the substantive policies behind the statutory

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123. U.S. DEP’T OF STATE BUREAU OF CONSULAR AFFAIRS, NONIMMIGRANT VISAS ISSUED BY CLASSIFICATION (INCLUDING BORDER CROSSING CARDS): FISCAL YEARS 2016-2020 2 (2020). For earlier years, see *Nonimmigrant Visa Statistics*, *supra* note 122.

124. Costa, *supra* note 89, at 36.

125. See Lee, *supra* note 39, at 35–38 (noting that these generalizations are tied to racial, ethnic or class assumptions and stem from earlier, problematic eugenics-based conceptions of workers).

126. These cultural narratives took hold during the Bracero program. Growers described those of Mexican nationality as “better at this type of work because of their short stature.” Proponents of the Bracero program advocated for Mexican workers explaining that “Mexicans are generally a good deal shorter than the Anglos—they’re built closer to the ground.” Even government officials justified the use of braceros for farm work by relying on stereotypes about their proficiency for this type of labor because of their “manual ability” and “skill in the handling of tools.” DEBORAH COHEN, BRACEROS: MIGRANT CITIZENS AND TRANSNATIONAL SUBJECTS IN THE POSTWAR UNITED STATES AND MEXICO 56 (2011).

127. In 2020, 92% of all H-2A visas were issued to Mexican workers. U.S. DEP’T OF STATE BUREAU OF CONSULAR AFFAIRS, FY2020 NIV DETAIL TABLE 20 (2020). For earlier years, see *Nonimmigrant Visa Statistics*, *supra* note 122.

framework.<sup>128</sup> The substantive policies underlying the H-2A program are twofold: to provide access to foreign workers in the event of domestic agricultural labor shortages and to ensure that the employment of foreign workers does not degrade the wages or working conditions of similarly employed U.S. workers.<sup>129</sup> The following section evaluates the success of the H-2A visa program, in light of these statutory objectives, by applying Roger Cramton's<sup>130</sup> fundamental process values of accuracy, efficiency, and acceptability.<sup>131</sup> Unlike value-laden terms such as "fairness" or "due process," the criteria espoused by Cramton have sufficiently definite meanings. However, these terms are not so specific that their usefulness is limited to certain areas of law. Quite the opposite, legal scholars and practitioners have employed these criteria to evaluate a range of administrative procedures governing judicial review,<sup>132</sup> agency management,<sup>133</sup> and immigration,<sup>134</sup> to name a few. Although some commentators suggest varia-

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128. Roger C. Cramton, *Administrative Procedure Reform: The Effects of S. 1663 on the Conduct of Federal Rate Proceedings*, 16 ADMIN. L. REV. 108, 112 (1964).

129. 8 U.S.C. § 1188(a)(1).

130. Roger C. Cramton was the former dean of Cornell Law School and Chairman of the Administrative Conference of the United States (ACUS), a federal agency charged with convening expert representatives from the public and the private sectors to recommend improvements to administrative process and procedure. As Chairman of the ACUS, Cramton oversaw a comprehensive review of the Administrative Procedure Act and focused studies of specific government functions. See Blaine Friedlander, *Roger Cramton, Former Cornell Law Dean, Dies at 87*, CORNELL CHRONICLE (Feb. 7, 2017), <https://news.cornell.edu/stories/2017/02/roger-cramton-former-cornell-law-dean-dies-87>; Talia Hutchinson, *Former Chairman Roger Cramton Dies at 87*, ACUS NEWSROOM (Feb. 10, 2017, 4:01 PM), <https://www.acus.gov/newsroom/news/former-chairman-roger-cramton-dies-87>. Cramton's administrative process criteria, developed to evaluate the operations of procedural systems, have been widely adopted by scholars seeking to evaluate administrative procedures. See *infra* notes 131–134.

131. Cramton, *supra* note 128, at 112; Roger C. Cramton, *A Comment on Trial-Type Hearings in Nuclear Power Plant Sitting*, 58 VA. L. REV. 585, 592–93 (1972).

132. See e.g., Michael Asimow, *The Scope of Judicial Review of Decisions of California Administrative Agencies*, 42 UCLA L. REV. 1157, 1160 (1995); James T. O'Reilly, *Burying Caesar: Replacement of the Veterans Appeals Process is Needed to Provide Fairness to Claimants*, 53 ADMIN. L. REV. 223, 227 (2001); Robert Pauw, *Judicial Review of "Pattern and Practice" Cases: What to Do When the INS Acts Unlawfully*, 70 WASH. L. REV. 779, 790 (1995).

133. See e.g., Ronald A. Cass, *Allocation of Authority Within Bureaucracies: Empirical Evidence and Normative Analysis*, 66 B.U. L. REV. 1, 14–16 (1986); Bradley C. Bobertz & Robert L. Fischman, *Administrative Appeal Reform: The Case of the Forest Service*, 64 U. COLO. L. REV. 371, 439 (1993); Margaret Gilhooley, *The Administrative Conference and the Progress of Food and Drug Reform*, 30 ARIZ. ST. L.J. 129, 133 n.24 (1998).

134. See e.g., Jill E. Family, *A Broader View of the Immigration Adjudication Problem*, 23 GEO. IMMIGR. L.J. 595, 633–35 (2009); Stephen H. Legomsky, *Forum Choices for the Review of Agency Adjudication: A Study of the Immigration Process*, 71 IOWA L. REV. 1297, 1313–14 (1986); Jeffrey S. Lubbers, Symposium: Closing

tions on or additions to these criteria,<sup>135</sup> any administrative process necessarily requires balancing competing values,<sup>136</sup> which accuracy, efficiency, and acceptability sufficiently encompass.<sup>137</sup> Based on an assessment of these fundamental process values, the H-2A visa process inaccurately assesses agricultural labor needs through the labor certification process, is administered inefficiently by multiple agencies performing duplicative tasks and lacking sufficient enforcement resources, and unacceptably leads to human trafficking and other labor abuses, further devaluing agricultural work. A process that facilitates the abuse of foreign workers and, in doing so, fails to achieve its statutory objectives cannot be considered a workable administrative procedure. The following section will show that the problems of accuracy, efficiency, and acceptability are endemic within the H-2A program, and the process requires a substantial change to end the systemic exploitation of migrant agricultural workers.

#### A. Accuracy

Accuracy evaluates the extent to which an administrative procedure leads to the correct results.<sup>138</sup> The end product of agency decision-making must be both factually correct and faithful to the legislative objectives behind the regulatory scheme.<sup>139</sup> Consistent with prior versions of U.S. agricultural guestworker programs, the stated purpose behind the H-2A program is to provide access to foreign agricultural workers when the employer can show that the need for foreign

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Remarks, 59 ADMIN. L. REV. 621, 622 n.4 (2007); Lenni B. Benson, *Breaking Bureaucratic Borders: A Necessary Step Toward Immigration Law Reform*, 54 ADMIN. L. REV. 203, 262–64 (2002); David A. Martin, *Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*, 138 U. PA. L. REV. 1247, 1292 (1990).

135. See e.g., Paul R. Verkuil, *The Emerging Concept of Administrative Procedure*, 78 COLUM. L. REV. 258, 280 (1978) (framing the criteria as fairness, efficiency, and satisfaction); Legomsky, *supra* note 134, at 1313 (employing a fourth criteria of consistency); Amisow, *supra* note 132, at 1160–61 (evaluating “political theory” and “separation of powers” in addition to accuracy, efficiency, and acceptability); Benson, *supra* note 134, at 262–64 (describing the essential process values of an immigration system as integrity, efficiency and transparency); Bobertz & Fischman, *supra* note 133, at 439–41 (enumerating the “fundamental objectives” of wisdom, efficiency, and legitimacy).

136. See Verkuil, *supra* note 135, at 280 n.113.

137. See Family, *supra* note 134, at 634 n.251 (explaining that other process values, such as consistency, often overlap with and can be considered in the context of Cramton’s original three criteria—accuracy, efficiency, and acceptability).

138. Cramton, *supra* note 128, at 112 (“The ascertainment of truth, or, more realistically, as close to an approximation of reality as human frailty permits is the major goal of most contested proceedings.”).

139. See Asimow, *supra* note 132, at 1160; Cass, *supra* note 133, at 9 (explaining that policy coherence, even if difficult to measure, is a noncontroversial goal).



workers is genuine and truly temporary.<sup>140</sup> Accordingly, the purpose of the labor certification process is to exclude foreign workers when qualified and willing U.S. workers are available.<sup>141</sup> Therefore, the accuracy of the H-2A program depends on the extent to which the labor certification process correctly tests the availability of U.S. workers in the domestic agricultural labor market.

Farm worker advocates and U.S. growers have opposing views on the number of U.S. workers who are willing, qualified, and able to perform farm labor. Proponents of the H-2A program argue that farmers hire foreign workers because very few U.S. workers want farm jobs.<sup>142</sup> U.S. workers tend not to apply to seasonal farm jobs,<sup>143</sup> and farmers consistently complain of challenging hiring searches during labor shortages.<sup>144</sup> On the other hand, farm worker advocates, domestic labor groups, and other opponents of the H-2A program assert that the labor certification process is inherently flawed, and the expansion of the H-2A program does not accurately reflect a lack of available U.S. workers.<sup>145</sup> Instead, the expansion of the H-2A program demonstrates a preference for foreign workers who are dependent on em-

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140. OFFICE OF INSPECTOR GENERAL, U.S. DEP'T OF LABOR, REP. NO. 06-21-001-03-321, OVERVIEW OF VULNERABILITIES AND CHALLENGES IN FOREIGN LABOR CERTIFICATION PROGRAMS 14 (2020) [hereinafter DOL OIG 2020 Report].

141. Compare 20 C.F.R. § 655.100 (2021) (H-2A labor certification program), with 20 C.F.R. § 656.2(c)(1) (2021) (permanent labor certification program). See also OFFICE OF INSPECTOR GENERAL, U.S. DEP'T OF LABOR, REP. NO. 06-96-002-03-321, THE DEPARTMENT OF LABOR'S FOREIGN LABOR CERTIFICATION PROGRAMS: THE SYSTEM IS BROKEN AND NEEDS TO BE FIXED 5 [hereinafter DOL OIG 1996 REPORT] (explaining the permanent labor certification process does not meet its intent of excluding foreign workers when qualified, willing U.S. workers are available).

142. The share of U.S.-born farmworkers fell from about 40 percent in 1989 to about 25 percent in recent years and new non-H-2A entrants to farm work declined from 27 percent to 4 percent. Bier, *supra* note 98, Fig. 8. ("One of the clearest indicators of the scarcity of farm labor is the fact that the number of H-2A positions requested and approved has increased fivefold in the past 14 years.")

143. Michael A. Clemens, *The Effect of Occupational Visas on Native Employment: Evidence from Labor Supply to Farm Jobs in the Great Recession* 10 (IZA Institute of Labor Economics Discussion Paper No. 10492, Jan. 2017) (finding, in an empirical study, that very few unemployed North Carolina residents showed initial interest in agricultural jobs, and much fewer are willing to report to work and complete an entire season); Bier, *supra* note 98 (concluding that Americans only accept one in twenty H-2A job offers, and most later quit).

144. STEVEN ZAHNISER, J. EDWARD TAYLOR, THOMAS HERTZ & DIANE CHARLTON, U.S. DEP'T OF AGRIC., EIB-201, FARM LABOR MARKETS IN THE UNITED STATES AND MEXICO POSE CHALLENGES FOR U.S. AGRICULTURE 6 (2018).

145. See Jessica Garrison, Ken Bensinger & Jeremy Singer-Vine, *These Three Americans Shared How It Feels to Lose a Job to Foreign Guest Workers*, BUZZFEED NEWS (Dec. 6, 2015, 12:35 PM), <https://www.buzzfeednews.com/article/jessicagarrison/these-3-americans-say-how-it-feels-to-lose-their-jobs-to-for> ("[M]any businesses go to extraordinary lengths to deny jobs to U.S. workers so they can hire foreigners

employers to maintain their valid immigration status and are legally disabled from seeking better wages and working conditions.<sup>146</sup> Arguments that U.S. workers are disinterested in agricultural labor are often rooted in cultural narratives that frame U.S. workers as lazy or too superior for low-wage jobs.<sup>147</sup> These two camps present diametrically opposite views of the domestic agricultural labor market. However, viewing the H-2A program in the context of previous guestworkers programs and the historic devaluation of agricultural work can reconcile these competing perspectives. Farmers may lack sufficient U.S. workers to fill seasonal jobs, but those labor shortages result from the artificial constraints the H-2A regulatory framework places on the domestic agricultural labor market. The problem with the domestic agricultural labor market is not that U.S. workers are unavailable or unwilling to work farm jobs. The problem is that the H-2A program (and its predecessors) have allowed agricultural employers to avoid paying competitive wages by relying upon foreign migrant workers to fill these jobs since the early 20th century. Foreign migrant workers have historically been disabled—legally, politically, and socially—from finding jobs outside the agricultural sector or even switching to other employers, forcing them to accept the wages and working conditions imposed by U.S. employers. These wages and working conditions fall below standards competitive in other areas of the U.S. job market, disincentivizing U.S. workers from applying to farm jobs and increasing agricultural employers' reliance on foreign migrant labor.

The labor certification process cannot accurately reflect the availability of U.S. workers in the absence of a functioning market. However, the H-2A program interferes with a free labor market by driving down wages and denying foreign workers economic and political representation. This approach to American agriculture is not new. Historically, the American legal system has treated agricultural labor as a commodity—interchangeable and disposable. Regulatory structures delegated the authority to set wages to agricultural employers, maintaining an available and subservient labor force even after the end of slavery.<sup>148</sup> At the same time, cultural forces ensured that the migratory

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instead. Since these jobs are unskilled, the Americans who lose out are often poor or working class.”).

146. FARMWORKER JUSTICE, *THE H-2A TEMPORARY AGRICULTURAL GUESTWORKER PROGRAM: AN INHERENTLY FLAWED PROGRAM THAT HARMS FARMWORKERS* (2020) [hereinafter *FARMWORKER JUSTICE H-2A FACT SHEET*].

147. Lee, *supra* note 39, at 35–35.

148. See *supra* text accompanying notes 22–29 (describing debt peonage and sharecropping), 40 (explaining the exclusions of agricultural workers from New Deal

farm labor population lacked representation and access to unions, resulting in their exclusion from critical labor protections.<sup>149</sup> Farm work is difficult and dangerous,<sup>150</sup> requiring greater incentives to attract workers. Repeated government intervention on behalf of agricultural employers has ensured consistent access to low-wage foreign labor, resulting in stagnant wages and substandard working conditions.

Through the H-2A program, employers continue to have the power to set wages below what would be required to competitively recruit U.S. workers.<sup>151</sup> The H-2A program requires employers to pay the highest of the Adverse Effective Wage Rate (AEWR), the prevailing wage, the collective bargaining rate, or the federal or state minimum wage.<sup>152</sup> The U.S. Department of Agriculture (USDA) determines the AEWR for a particular occupation and geographic area through its Farm Labor Survey (FLS).<sup>153</sup> Although the AEWR is often higher than the federal or state minimum wage, there are three problems with the AEWR methodology. First, the USDA relies on farm employers, who have an interest in keeping labor costs low, to self-report quarterly data on their wages, employment counts, and average weekly hours.<sup>154</sup> The USDA conducts the FLS through semi-annual farm interviews with a random sample of farm employers and publishes its Farm Labor report detailing employment and wage estimates based wholly on the data provided by agricultural employers.<sup>155</sup>

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worker protection legislation), 53–60 (highlighting labor abuses under the bracero program).

149. See NGAI, *supra* note 16, at 128–29, 162.

150. NATIONAL CENTER FOR FARMWORKER HEALTH, INC., AGRICULTURAL WORKER OCCUPATIONAL HEALTH AND SAFETY (2018). Farm work has consistently high fatality and injury rates. Workers are particularly susceptible to respiratory problems, noise-induced hearing loss, skin disorders, and certain cancers related to prolonged chemical and sun exposure. *Id.* In 2020, agriculture, forestry, fishing, and hunting ranked as the third highest industry sector for the number of fatal work injuries (511) and had the highest fatal work injury rate (21.5 per 100,000 full-time equivalent workers). *Number and Rate of Fatal Work Injuries By Industry Sector*, U.S. BUREAU OF LABOR STATISTICS (2020), <https://www.bls.gov/charts/census-of-fatal-occupational-injuries/number-and-rate-of-fatal-work-injuries-by-industry.htm>. There were also 45,900 recorded injuries and illnesses for workers in the agriculture, forestry, fishing, and hunting industry sector. *Injuries, Illnesses, and Fatalities*, U.S. BUREAU OF LABOR STATISTICS (Nov. 3, 2021), [https://www.bls.gov/iif/oshwc/osh/os/summ2\\_00\\_2020.htm](https://www.bls.gov/iif/oshwc/osh/os/summ2_00_2020.htm).

151. Lee, *supra* note 39, at 13 (describing the wage provisions under the H-2A program as a “government-enabled price-fixing scheme”).

152. 20 C.F.R. § 655.120(a).

153. 20 C.F.R. § 655.120(b)(1)(i).

154. *Farm Labor*, *supra* note 121.

155. *Id.* For USDA’s most recent Farm Labor report, see NAT’L AGRIC. STATISTICS SERV., U.S. DEP’T OF AGRIC., FARM LABOR (May 25, 2022), <https://downloads.usda.library.cornell.edu/usda-esmis/files/x920fw89s/mp48tj815/0c484p887/fmla0522.pdf>.

Second, the wage rate for farm work has degraded for years, beginning with the importation of Mexican labor during the early 1900s and continuing through the bracero program.<sup>156</sup> However, the DOL's AEW methodolgy does not account for historic wage depression in determining whether the wage rates adversely affect U.S. workers.<sup>157</sup> Finally, the presence of high numbers of undocumented workers in agriculture depresses wages for the industry, driving down the overall AEW for U.S. citizens and authorized immigrants.<sup>158</sup> Undocumented workers lack the freedom and flexibility to seek alternative employment, forcing them to accept unfairly compensated farm work.<sup>159</sup> The deficiencies of the USDA's AEW methodolgy allow employers to apply downward pressure on wages because the widespread availability of foreign farmworkers essentially permits employers to set the AEW as the market rate—one lower than American workers would accept in an otherwise free market.

Persistent violations of the H-2A program's wage rules also contribute to below-market agricultural wages. H-2A workers are routinely cheated out of wages.<sup>160</sup> Workers experience blatant wage theft in the form of non-payment, illegal deductions, and underreported working hours.<sup>161</sup> Employers frequently provide workers with a written contract promising an hourly wage, but later change the payment

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156. Baker, *supra* note 14, at 82–83 (explaining that visas restricting foreign workers to only agricultural work became a legal means for employers to circumvent the usual laws of supply and demand to suppress wages); NGAI, *supra* note 16, at 133 (arguing that the overabundance of Mexican labor during World War I kept agricultural wages low, lowering the prevailing wage rate of future guestworker programs like the bracero program).

157. See *AFL-CIO v. Dole*, 923 F.2d 182, 187 (D.C. Cir. 1991) (agreeing with the DOL that there was no adequate way to quantify the impact of wage depression in the AEW wage methodolgy).

158. Roughly half of hired crop farmworkers lack legal immigration status. *Farm Labor*, *supra* note 121.

159. Cesar L. Escalante, Odeidra Williams, Hofner Rusiana & Luis Pena-Levano, *Costly Foreign Farm Replacement Workers and the Need for H-2A Reforms*, J. OF AM. SOC'Y OF FARM MANAGERS & RURAL APPRAISERS 14, 15 (2019).

160. FARMWORKER JUSTICE, NO WAY TO TREAT A GUEST: WHY THE H-2A U.S. AGRICULTURAL VISA PROGRAM FAILS U.S. AND FOREIGN WORKERS 15 (2011); MARY BAUER, SOUTHERN POVERTY LAW CTR., CLOSE TO SLAVERY: GUESTWORKER PROGRAMS IN THE UNITED STATES 18 (2013) (finding that, in practice, many guestworkers earn substantially less than even the federal minimum wage).

161. See *e.g.*, *Morales-Arcadio v. Shannon Produce Farms, Inc.*, No. 605CV062, 2007 U.S. Dist. Lexis 51950, at \*7–13 (S.D. Ga. July 18, 2007); *Perez-Benites v. Candy Brand*, No. 07-CV-1048, LLC 2011 U.S. Dist. LEXIS 55003, at \*5–7 (W.D. Ark. May 20, 2011). See also H. Claire Brown, *Louisiana Sugarcane Workers Sue Lowry Farms for Wage Theft, Breach of Contract*, THE COUNTER (Aug. 11, 2020, 8:50 AM), <https://thecounter.org/farmworkers-sue-arkansas-based-lowry-farms-wage-theft-breach-of-contract/>.

terms to piece rate, in which the worker is paid for each unit of work performed (e.g., payment of 40 cents per 30-pound bucket of tomatoes harvested).<sup>162</sup> By paying on a piece rate basis, employers set demanding productivity standards that would cause U.S. workers to insist on higher wages but that guestworkers with few alternatives reluctantly accept.<sup>163</sup> Even when guestworkers seek recourse, their options are limited—the Migrant and Seasonal Agricultural Worker Protection Act, the primary labor law that protects farmworkers,<sup>164</sup> excludes H-2A workers.<sup>165</sup> Guestworkers who experience wage theft or other contract violations are unable to bargain for better wages and working conditions because their visas are tied directly to their employer.<sup>166</sup> Workers who demand the wages owed to them risk termination of their contract and deportation.<sup>167</sup> The lack of a pathway to citizenship under the H-2A program further limits the ability of guestworkers to gain the social and political capital of a settled resident workforce.<sup>168</sup>

The H-2A program creates a cycle that fuels U.S. worker shortages and the need for guestworkers.<sup>169</sup> The labor certification process does not and cannot produce accurate results in this context because it relies on a broken labor market that artificially constrains wages. Overall, the AEW is too low. The influx of government-sponsored low-wage guestworkers in the early 1900s and the presence of significant numbers of undocumented workers in agriculture adversely skew the market wage rate. Despite increases in the AEW, employers argue that the farm labor supply in the U.S. is not very responsive to wage changes and that foreign workers are necessary for U.S. farmers to fill labor needs when operating at thin margins.<sup>170</sup>

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162. HUMAN TRAFFICKING ON TEMPORARY WORK VISAS, *supra* note 115, at 14.

163. BAUER, *supra* note 160, at 21. For a discussion on how this reinforces cultural narratives about Mexican and U.S. workers, see Lee, *supra* note 39, at 33–38.

164. Other labor laws like the Fair Labor Standards Act and the National Labor Relations Act exclude farmworkers, or at least differentiate them from other workers and provide lesser protections. See e.g., National Labor Relations Act, Pub. Law No. 74-198, ch. 372, 49 Stat. 449, § 2 (1935) (definition of “employee” excludes agricultural laborers); Fair Labor Standards Act of 1938, ch. 676, 52 Stat. 1060, §§ 13(a)(6), 13(c) (1938) (codified as amended at 29 U.S.C. § 201 (2021)) (excluding any employees employed in agriculture from the minimum wage, maximum hour, and child labor provisions).

165. 29 U.S.C. § 1802(8)(B)(ii) (excluding “any temporary nonimmigrant alien who is authorized to work in agricultural employment in the United States under sections 101(a)(15)(H)(ii)(a) and 214(c) of the Immigration and Nationality Act”).

166. HUMAN TRAFFICKING ON TEMPORARY WORK VISAS, *supra* note 115, at 17.

167. *Id.* at 25.

168. See DANIEL COSTA, ECON. POL’Y INST., TEMPORARY WORK VISA PROGRAMS AND THE NEED FOR REFORM 24–25 (2021).

169. Lee, *supra* note 39, at 19.

170. ZAHNISER, TAYLOR, HERTZ & CHARLTON, *supra* note 144, at 2–3.

However, employers that find it difficult to attract and retain U.S. workers should compete against each other by offering higher than the average wage.<sup>171</sup> The H-2A program provision requiring pay at least equal to the AEWR consequently restrains the domestic agricultural labor market by allowing employers to set the wage at a below-market rate that disincentivizes American workers from applying to farm jobs. Without a functioning labor market, the labor certification process fails to produce the correct results and continues to displace American workers.

### B. Efficiency

Efficiency evaluates the “time, effort, and expense of elaborate procedures.”<sup>172</sup> In this context, efficiency refers to process efficiency, not allocative efficiency.<sup>173</sup> Process efficiency involves both a temporal and a monetary element; it assesses the extent to which an administrative process reaches results quickly while expending minimal costs.<sup>174</sup> A process must be efficient for the parties subject to the process, the state, and the public, given limited social resources.<sup>175</sup> Although efficiency may appear to conflict with other process values,<sup>176</sup> an efficient process is one that attains the decision-making objectives in a cost-effective and timely manner.<sup>177</sup> The H-2A process is not efficient. The objective of the H-2A program is to provide U.S. agricultural employers with expeditious access to foreign workers to resolve time-sensitive labor shortages. In reality, multiple federal agencies administer and enforce the H-2A program but fail to ensure the timely processing of applications and often perform duplicative reviews throughout the process. The administration of the current H-2A process imposes inefficient delays on employers and creates circumstances in which employers cannot access foreign workers during labor shortages.

Employers consistently complain of the bureaucratic nightmare that the H-2A program creates.<sup>178</sup> Three distinct agencies administer

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171. BAUER, *supra* note 160, at 21.

172. Cramton, *supra* note 128, at 112.

173. Cass, *supra* note 133, at 14–15.

174. Asimow, *supra* note 132, at 1160.

175. *Id.*

176. For example, as accuracy requirements rise, the time and costs of making decisions may increase.

177. Barry B. Boyer, *Alternatives to Administrative Trial-Type Hearings for Resolving Complex Scientific, Economic, and Social Issues*, 71 MICH. L. REV. 111, 145–46 (1972).

178. Jessica Garrison, Ken Bensinger & Jeremy Singer-Vine, *The New American Slavery: Invited to the U.S., Foreign Workers Find a Nightmare*, BUZZFEED NEWS

the program: the Department of Labor (DOL), the State Department, and the Department of Homeland Security (DHS).<sup>179</sup> Within these agencies, multiple subdivisions oversee various aspects of the H-2A program. For example, within the DOL, the Wage and Hour Division (WHD) “enforces the terms and conditions of H-2 workers’ employment to ensure compliance with regulations,” while the Employment and Training Administration (ETA) manages employer participation in the program by reviewing and approving labor certifications.<sup>180</sup> State Workforce Agencies’ (SWAs) authority to determine what constitutes prevailing, normal or accepted practices in defining certain terms and conditions of employment further complicates the process for employers.<sup>181</sup> For example, states apply different standards to determine acceptable terms and conditions for housing for workers’ families, advance payment of transportation costs, frequency of payment, and job qualifications.<sup>182</sup> In a 2012 report, the Government Accountability Office found that the complexity of the H-2A program poses a challenge for employers because it “involves multiple agencies and numerous detailed program rules that sometimes conflict with other laws.”<sup>183</sup> The decentralized nature of the H-2A program creates challenges for employers, especially for small- and medium-sized businesses, in complying with program rules.<sup>184</sup> A lack of clarity around application requirements and uncertainty about how long the process

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(July 24, 2015, 10:47 AM), <https://www.buzzfeednews.com/article/jessicagarrison/the-new-american-slavery-invited-to-the-us-foreign-workers-f>.

179. CITIZENSHIP & IMMIGR. SERVS., OMBUDSMAN 2014 ANN. REP. 26 (Jun. 27, 2014).

180. Jennifer J. Lee, *Private Civil Remedies: A Viable Tool for Guest Worker Empowerment*, 46 LOY. L.A. L. REV. 31, 44 (2012).

181. The prevailing practice is one in which: “(1) Fifty percent or more of employers in an area and for an occupation engage in the practice or offer the benefit; and (2) This 50 percent or more of employers also employs 50 percent or more of U.S. workers in the occupation and area (including H-2A and non-H-2A employers) for purposes of determinations concerning the provision of family housing, and frequency of wage payments, but non-H-2A employers only for determinations concerning the provision of advance transportation and the utilization of labor contractors.” 20 C.F.R. § 655.103 (2021).

182. U.S. GOV’T ACCOUNTABILITY OFF., GAO-12-706, H-2A VISA PROGRAM: MODERNIZATION AND IMPROVED GUIDANCE COULD REDUCE EMPLOYER APPLICATION BURDEN 31 (2012) [hereinafter 2012 GAO REPORT]. While SWAs must use the prevailing practice to determine whether employers must provide housing for workers families, advance payment for transportation, and the frequency of pay, job qualifications and requirements are subject to the “normal and accepted” standard. *Compare* 20 C.F.R. §§ 655.122(d)(5), (h)(1), (m) (2021), *with* 20 C.F.R. § 655.122(b) (2021).

183. 2012 GAO REPORT, *supra* note 182, at 25.

184. 2014 CITIZENSHIP & IMMIGR. SERVS. OMBUDSMAN ANN. REP. 26 (noting an increase in the number of case assistance requests by small and medium-sized businesses).

will actually take inefficiently increase both the time and monetary costs of the program.

Both the DOL and employers are subject to specific and strict deadlines for processing H-2A applications.<sup>185</sup> Employers have a narrow window of 60 to 75 days before the anticipated start date, during which they must file the initial job order (which initiates the labor certification process) with the appropriate SWA.<sup>186</sup> The SWA then communicates with the employer to remedy any deficiencies in the application (within seven days), and employers have five days to modify their application.<sup>187</sup> Once an employer obtains an SWA-approved job order, the employer must apply for a temporary labor employment certification with the DOL at least 45 days before the work start date, and the DOL must approve or deny the certification by 30 days before the work start date.<sup>188</sup> If employers wish to stagger the arrival of foreign workers or find they need additional workers throughout the season, employers must restart this entire process.<sup>189</sup> The program's structure requires that employers anticipate upcoming labor shortages. Although the objective of the H-2A program is to provide employers with the needed flexibility to quickly obtain foreign workers when domestic workers are unavailable, the application rules necessarily limit the flexibility of employers to respond to external factors, like weather and crop conditions, because employers must comply with strict application deadlines.

Employers complain that three realities of the H-2A process exacerbate the lack of flexibility inherent in the H-2A program: (1) costly delays in processing times, (2) expensive application fees, and (3) unpredictable requests for further documentation.<sup>190</sup> Delays in approving applications have cost farmers millions of dollars in lost

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185. 2012 GAO REPORT, *supra* note 182, at 7–8.

186. OFF. OF FOREIGN LABOR CERTIFICATION, U.S. DEP'T OF LABOR, EMPLOYER GUIDE TO PARTICIPATION IN THE H-2A TEMPORARY AGRICULTURAL PROGRAM 3 (2012).

187. 2012 GAO REPORT, *supra* note 182, at 8.

188. 20 C.F.R. § 655.130(b) (2021); 20 C.F.R. § 655.160 (2021).

189. Proposed rule changes to the H-2A program would provide employers with greater flexibility by allowing them to stagger worker arrivals without restarting the entire labor certification application process. Temporary Agricultural Employment of H-2A Nonimmigrants in the United States, 84 Fed. Reg. 36,168, 36,172 (proposed July 26, 2019) (to be codified at 20 C.F.R. § 653, 20 C.F.R. § 655, 29 C.F.R. § 501).

190. See *Agricultural Labor: From H-2A to a Workable Agricultural Guestworker Program: Hearing Before the Subcomm. on Immigration & Border Sec. of the H. Comm. on the Judiciary*, 113th Cong. 8 (2013) (“Farmers and ranchers have witnessed increased denials, seemingly arbitrary changes in the interpretation of long-standing program rules, dates of need that have gone unmet.”).



crops.<sup>191</sup> Although the roll-out of electronic applications in 2012<sup>192</sup> greatly increased processing times, in 2019 delays reemerged, and the DOL approved only 86 percent of applications on time, the lowest of any year since 2013.<sup>193</sup> Costly delays hurt not only farmers but the general public. As one farmer explained, “[i]f the farm doesn’t produce, the city doesn’t eat.”<sup>194</sup> In addition to costly time delays, program fees are financially burdensome. Labor certification and visa application fees start at \$766 per worker, while required employer-provided services such as transportation, housing, and food push these expenses well into the tens of thousands of dollars.<sup>195</sup> Employers who hire undocumented workers don’t face these costs.<sup>196</sup> Finally, employers find it difficult to comply with complex program requirements, particularly in light of inconsistent decisions from the agencies involved in the application process. Growers experience conflicting approvals and denials based on whether certain terms and conditions are included in the labor contract, such as rate of pay, minimum productivity standards, termination clauses, and experience requirements.<sup>197</sup> They also face unpredictable and unnecessary requests for further evidence from USCIS, where similar petitions from employers in similar circumstances were previously approved.<sup>198</sup> Unpredictability regard-

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191. See 2012 GAO REPORT, *supra* note 182, at 17 (describing that late worker arrivals, due in part to processing delays at the DOL and DHS resulted in a loss of about \$200,000 of unpicked apples); Joseph Erbentraut, *U.S. Farmers Risk Losing Everything Because of Absurd Immigration Procedures*, HUFFPOST (Aug. 25, 2016, 7:35 AM), [https://www.huffpost.com/entry/farms-h2a-program-immigrant-workers-food-waste\\_n\\_57b5df93e4b034dc73261b36](https://www.huffpost.com/entry/farms-h2a-program-immigrant-workers-food-waste_n_57b5df93e4b034dc73261b36); Geoffrey Mohan, *To Keep Crops from Rotting in the Field, Farmers Say They Need Trump to Let in More Temporary Workers*, LATIMES, (May 25, 2017), <https://www.latimes.com/projects/la-fi-farm-labor-guestworkers/>.

192. See 2012 GAO REPORT, *supra* note 182, at 27.

193. Bier, *supra* note 98. The DOL completed just 63 percent of applications within the mandated thirty-day timeframe in 2011 but successfully processed 97 percent of applications in 2015. *Id.* at Fig. 2.

194. Rod Nickel & Christopher Walljasper, *Canada, U.S. Farmers Face Crop Losses Due to Foreign Worker Delays*, REUTERS (Apr. 6, 2020, 7:04 AM), <https://www.reuters.com/article/us-health-coronavirus-farmworkers/canada-u-s-farms-face-crop-losses-due-to-foreign-worker-delays-idUSKBN21O179>.

195. *H-2A Visa Program*, U.S. DEP’T OF AGRIC., <https://www.farmers.gov/manage/h2a> (last visited Jan. 16, 2022).

196. 2012 GAO REPORT, *supra* note 182, at 7 (“Employers may also choose to violate the law and knowingly hire undocumented workers rather than employing U.S. workers or participating in the H-2A program and meeting its associated requirements.”).

197. For example, a contractor’s application was approved for 10 workers to pick apples at a piece rate of 85 cents in March 2011. However, her next application for 45 workers on the same farm the following month was not approved, and she was required to pay \$1 per bushel instead. See 2012 GAO REPORT, *supra* note 182, at 26.

198. 2014 CITIZENSHIP & IMMIGR. SERVS. OMBUDSMAN ANN. REP. 26.

ing processing times and the sufficiency of information contained in visa applications makes it difficult for employers to obtain timely foreign workers and avoid labor shortages that can result in thousands of dollars in lost crops.

Despite these extensive regulations and the complexity of the process,<sup>199</sup> employers' labor certification applications are rarely denied. In 2020, only 247 labor certification applications were denied out of a total of 14,603, a denial rate of (approximately) 1.7%.<sup>200</sup> Even after multiple levels of review by at least three different agencies, the number of workers granted visas each year is similar to the number of visas initially requested, with an average yearly refusal rate hovering around 8%.<sup>201</sup> Despite the time and money that agencies, growers, and workers devote to the application process, the H-2A visa process continues to inaccurately identify labor shortages and displaces U.S. workers.<sup>202</sup> The time, labor, and monetary resources spent on the H-2A process simply do not justify the results. An administrative process that reaches incorrect results slowly and by expending excessive costs is not efficient.

### C. Acceptability

The final factor, acceptability, is arguably the most important but also the most difficult to define. An acceptable process is generally described as one in which the parties involved, and the general public, perceive the process to be "fair."<sup>203</sup> Fairness is critical because parties engaged in what they perceive to be a fair process are more likely to cooperate throughout the process and accept the final results.<sup>204</sup> However, equating acceptability with "fairness" creates exactly the problem that Cramton sought to avoid—using general, value-laden terms

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199. The USCIS Ombudsman describes the program as "highly regulated." *Id.*

200. EMP'T & TRAINING ADMIN., U.S. DEP'T OF LABOR, H-2A DISCLOSURE DATA FY2020 (2020). This denial rate is consistent with prior years. For labor certification denial rates in previous years see *Performance Data*, U.S. DEP'T OF LABOR, <https://www.dol.gov/agencies/eta/foreign-labor/performance> (last visited Jan. 17, 2022).

201. In 2020, there were a total of 228,939 H2-A applications and 213,394 visas issued. The refusal rate decreased from 2018 to 2020 and is currently down from 10% to 6.7%, including during the Covid-19 pandemic. Out of all visa categories that regularly admit more than 100,000 foreigners each year, the H-2A category has the lowest denial rate. See generally *Nonimmigrant Visa Statistics*, U.S. DEP'T OF STATE, <https://travel.state.gov/content/travel/en/legal/visa-law0/visa-statistics/nonimmigrant-visa-statistics.html> (last visited Jan. 16, 2022).

202. See *supra* Part III, A.

203. Acceptability "emphasizes the indispensable virtues of procedures that are considered fair by those whom they affect as well as by the general public." Cramton, *supra* note 128, at 112; see also Cass, *supra* note 133, at 15.

204. Cramton, *supra* note 128, at 112.

that shift over time.<sup>205</sup> To avoid defining acceptability in a way that focuses on an ambiguous “fairness” standard, scholars who have evaluated other administrative procedures have used independently quantifiable metrics as a proxy for acceptability, such as the frequency with which review of an administrative decision is sought and granted.<sup>206</sup> In the H-2A visa context, one appropriate proxy for the acceptability of the visa process is the rate at which H-2A visa holders experience human trafficking. Human trafficking is a widely condemned and criminalized violation of human rights. It is a practice outlawed in the United States at the federal level<sup>207</sup> and by all fifty states.<sup>208</sup> Internationally, the United Nations’ Trafficking in Persons Protocol has reached almost universal ratification, totaling 178 member states.<sup>209</sup> Nationally and internationally, human trafficking laws focus on the “Three Ps”— *protect* victims, *prosecute* traffickers, and *prevent* traf-

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205. *Id.* at 111.

206. Cass, *supra* note 133, at 16 (acknowledging that the frequency of review provides an imperfect measure of acceptability because factors unrelated to the “fairness” of the procedure, such as the value to one party of postponing the decision’s effect, would also affect the frequency with which parties would seek review). *See also* Family, *supra* note 134, at 634 n.251 (arguing that consistency in decisionmaking overlaps with acceptability and that “concerns about unequal treatment would contribute to a conclusion about the fairness of the procedure”); Pauw, *supra* note 132, at 796–97 (arguing that “conditioning justice upon risk” in the immigration context is unacceptable because noncitizens must risk deportation to even get into court).

207. *See* 22 U.S.C. § 7101. Federal laws against human trafficking have improved significantly in the past two decades since the passing of the Trafficking Victims Protection Act of 2000. *See* William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. Law No. 110-457, 122 Stat. 5044 (2008) (directing the government to provide information about workers’ rights to all people applying for work and education-based visas, expanding the crime of forced labor, creating new crimes against obstructing investigations and prosecutions into trafficking crimes, and penalizing those who knowingly benefit financially from participating in a venture that engaged in trafficking crimes); Trafficking Victims Protection Reauthorization Act of 2013, Pub. Law No. 113-4, 127 Stat. 136 (2013) (focusing on eliminating human trafficking in the supply chain of goods); Justice for Victims of Trafficking Act of 2015, Pub. Law No. 114-22, Pub. Law 114-22 (directing any assets seized in a human trafficking case to be used to satisfy victims restitution orders).

208. Although all states have at least minimally sufficient laws to criminalize human trafficking, the extent to which each state provides additional protections such as victim assistance, access to civil damages, asset forfeiture and other investigative tools, special provisions for child victims, etc. varies dramatically among the states. *See* J.C.A. Meshelemiah, *Criminal Provisions for Human Trafficking: Rankings, State Grades, and Challenges*, 5 J. FORENSIC LEGAL & INVESTIGATIVE SCI. 1, 1–8 (Nov. 2019); POLARIS, 2014 STATE RATINGS ON HUMAN TRAFFICKING LAWS (2014).

209. U.N. OFF. ON DRUGS & CRIME, GLOBAL REPORT ON TRAFFICKING IN PERSONS 2020, at 23 (2020) [hereinafter 2020 U.N. TRAFFICKING IN PERSONS REPORT]. *See generally* Trafficking in Persons Protocol, *supra* note 6.

ficking.<sup>210</sup> The H-2A visa process fails all three Ps by creating a cycle of debt and abuse that inhibits workers from reporting trafficking offenses and encourages traffickers to continue to realize enormous profits from their criminal enterprise. The following section will analyze how the H-2A visa process fails to protect workers from trafficking, allows traffickers to commit repeated offenses with little fear of prosecution, and enables, rather than prevents, trafficking.

In practice, the H-2A visa process fails to protect migrant workers from human trafficking because a migrant worker's visa is tied directly to his employer,<sup>211</sup> discouraging workers from reporting instances of human trafficking and perpetuating the cycle of abuse.<sup>212</sup> An H-2A visa permits a worker to only work for a single employer, the employer who sponsored the visa, and requires that the worker leave the country when the visa expires.<sup>213</sup> If a worker is fired by his employer or leaves his employer, the worker loses his legal visa status and becomes immediately deportable.<sup>214</sup> The Department of State's "Know Your Rights Pamphlet," which is provided to each H-2A visa applicant at the time of their interview at the consular office in their home country, states that visa holders have the right to leave an abusive employment situation.<sup>215</sup> However, it further explains that a worker who leaves their employer will lose their visa status and, in order to change their visa status or employer, the worker may need to leave the United States.<sup>216</sup> As a result, the H-2A visa rules effectively silence workers from reporting trafficking and other labor abuses because there is no guarantee that a worker who accuses an employer of abuse will be able to remain in the United States. Many workers, who already face significant debt from the recruitment process,<sup>217</sup> are not willing to risk losing their job, and subsequently their visa, by speaking out about harsh or illegal working conditions.<sup>218</sup>

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210. Trafficking in Persons Protocol, *supra* note 6 (stating the protocol's purpose is to "prevent such trafficking, to punish the traffickers and to protect the victims of such trafficking, including by protecting their internationally recognized human rights"); OFF. TO MONITOR AND COMBAT TRAFFICKING IN PERSONS, U.S. DEP'T OF STATE, THE 3Ps: PROSECUTION, PROTECTION, AND PREVENTION (2019).

211. See 20 C.F.R. § 655.135(i) (2021).

212. HUMAN TRAFFICKING ON TEMPORARY WORK VISAS, *supra* note 115, at 4.

213. FARMWORKER JUSTICE H-2A FACT SHEET, *supra* note 146.

214. Costa, *supra* note 89, at 30.

215. KNOW YOUR RIGHTS PAMPHLET, *supra* note 106, at 5.

216. *Id.* ("Though your visa status will no longer be valid if you leave your employer, you may be able to change your visa status or employer. You may need to leave the United States to do so. Even if your visa status is not valid, help is available once you leave your abusive employer.")

217. See *infra* text accompanying notes 238–48.

218. FARMWORKER JUSTICE H-2A FACT SHEET, *supra* note 146.

Consequently, workers on H-2A visas experience unacceptably high rates of human trafficking. A 2019 study by Polaris, a social justice organization dedicated to the fight against sex and labor trafficking, evaluated the rates of human trafficking across various categories of temporary visa holders and found that between January 1, 2015 and December 31, 2017, 327 H-2A visa holders were victims of human trafficking,<sup>219</sup> as reported to the National Human Trafficking Hotline.<sup>220</sup> Although 327 workers may seem like a small percentage of the over 400,000<sup>221</sup> workers on H-2A visas between 2015 and 2017, human trafficking is notoriously underreported.<sup>222</sup> As explained above, the structure of the H-2A visa itself, which “ties” a worker’s visa to his employer, contributes to this underreporting. Nonetheless, the number of reported victims of human trafficking on H-2A visas has been increasing. In 2019 alone, Polaris reported 372 victims of human trafficking on H-2A visas, more than the total number of victims for the three years from 2015 to 2017.<sup>223</sup> In the first three months of 2020, prior to the Covid-19 pandemic shelter-in-place orders, Polaris reported 268 H-2A victims of human trafficking.<sup>224</sup> For the remainder of 2020, following the issuance of shelter-in-place orders, Polaris reported an additional 629 victims of human trafficking,<sup>225</sup> bringing the 2020 total to 897 (reported) victims on H-2A visas. In evaluating efforts to combat human trafficking in the United States, the 2021 United States Trafficking in Persons Report acknowledges that “the number of cases reported to the national human trafficking hotline involving a potential victim in H-2A status more than doubled [from April 1 to September 30, 2020] as compared to the previous six

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219. HUMAN TRAFFICKING ON TEMPORARY WORK VISAS, *supra* note 115, at 7.

220. See *National Human Trafficking Hotline*, POLARIS, <https://humantraffickinghotline.org/> (last visited Jan. 17, 2022).

221. See sources cited *supra* note 122.

222. HUMAN TRAFFICKING ON TEMPORARY WORK VISAS, *supra* note 115, at 4; U.N. OFF. ON DRUGS & CRIME, GLOBAL REPORT ON TRAFFICKING IN PERSONS 49 n.11 (2009) (“[M]any experts argue that trafficking in adult men and trafficking for forced labour are extremely underreported”). The Trafficking Hotline exists primarily to support victims and survivors; data collection is secondary. Human trafficking is a substantially underreported crime and the information gained through the trafficking hotline “is likely only a miniscule sliver of what is really happening all over the country.” POLARIS, EXECUTIVE SUMMARY: THE LATINO FACE OF HUMAN TRAFFICKING AND EXPLOITATION IN THE UNITED STATES 3 (2020).

223. POLARIS, LABOR EXPLOITATION AND TRAFFICKING OF AGRICULTURAL WORKERS DURING THE PANDEMIC 7 (2021) [hereinafter TRAFFICKING OF AGRICULTURAL WORKERS DURING THE PANDEMIC].

224. *Id.*

225. *Id.*

months.”<sup>226</sup> Overall, the rates of human trafficking reported by H-2A visa recipients evince a disconnect between the rules governing the program, which are intended to protect foreign workers, and the effect of those rules, which make workers more vulnerable to trafficking and other labor abuses.

Substantial underreporting of human trafficking and the low likelihood that the DOL will investigate a farm employer make it difficult to prosecute traffickers and enable repeat offenders. The probability that the Wage and Hour Division (WHD) of the DOL will investigate a farm employer in any given year is only about 1.1%.<sup>227</sup> Despite the low number of investigations and the limited scope of investigations as a result of WHD staff reductions, the vast majority of investigations, around 70%, detect violations that range from wage theft and inadequate housing to more serious abuses such as discrimination, restrictions on freedom of movement, and severe verbal and physical abuse.<sup>228</sup> A high number of these violations come from a few “bad apple” farm employers—the 5% of employers that committed the most violations accounted for half or more of all violations in a particular agricultural industry.<sup>229</sup> Despite the high number of violations, employers are “more likely to get hit by lightning” than to be barred from participation in the program.<sup>230</sup> To comply with the statute of limitations for debarment, the DOL must complete an investigation and issue a notice of intent to debar within two years after the violation occurred.<sup>231</sup> However, as mentioned above, workers often have disincentives to report violations when they occur, which may lead to delays in reporting abusive employers.<sup>232</sup> The DOL’s inability to consider debarment because of the short statute of limitations, even in cases where there are multiple substantiated violations, allows em-

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226. U.S. DEP’T OF STATE, *TRAFFICKING IN PERSONS REPORT 599* (2021) [hereinafter 2021 U.S. *TRAFFICKING IN PERSONS REPORT*].

227. DANIEL COSTA, PHILIP MARTIN & ZACHARIAH RUTLEDGE, *ECON. POL’Y INST., FEDERAL LABOR STANDARDS ENFORCEMENT IN AGRICULTURE 6* (2020).

228. *Id.*

229. *Id.*; CENTRO DE LOS DERECHOS DEL MIGRANTE, INC., *RIPE FOR REFORM: ABUSES OF AGRICULTURAL WORKERS IN THE H-2A VISA PROGRAM 23–26* (2021).

230. Ken Bensinger, Jessica Garrison & Jeremy Singer-Vine, *The Pushovers: Employers Abuse Foreign Workers. U.S. Says, By All Means, Hire More.*, BUZZFEED NEWS (May 12, 2016, 3:06 PM), <https://www.buzzfeednews.com/article/kenbensinger/the-pushovers>. The DOL may debar an H-2A employer who has committed certain violations from program participation for up to three years. 20 C.F.R. § 655.182 (2021).

231. 20 C.F.R. § 655.182(c)(1) (2021); U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-15-154, *H-2A AND H-2B VISA PROGRAMS: INCREASED PROTECTIONS NEEDED FOR FOREIGN WORKERS 52* (2015).

232. *Id.*

employers who would have or should have been debarred to continue to participate in the H-2A program.<sup>233</sup> Government audits have also found that debarred companies may “reinvent” themselves by starting new companies and submitting applications with slightly different information in order to avoid exclusion from the H-2A program.<sup>234</sup> The low probability that a farm employer will be investigated at all, the even lower probability that an employer will be debarred, and the disincentives for workers to report abuses make it all the less likely that enforcement agencies will discover human trafficking that occurs in the H-2A program.

In the trafficking cases that are ultimately prosecuted, the facts demonstrate that employers have often committed egregious violations for many years against multiple victims. For example, U.S. District Attorneys recently announced two dozen indictments that resulted from a years-long trafficking investigation called “Operation Blooming Onion,” which involved a criminal enterprise spanning Georgia, Florida, Texas, Mexico, Guatemala, and Honduras.<sup>235</sup> Over the past several years, the defendants petitioned for over 71,000 foreign workers through the H-2A program.<sup>236</sup> The defendants allegedly charged exorbitant fees, withheld travel and identification documents, held workers in unsanitary camps, limited workers’ access to food and water, and regularly forced workers at gunpoint to dig up onions from the ground with their bare hands for merely 20 cents per bucket.<sup>237</sup> The indictment further alleges multiple instances of rape and death.<sup>238</sup> A federal grand jury in Florida also recently returned an indictment against three defendants who ran a labor contracting company for their roles in a years-long federal racketeering conspiracy that victimized Mexican H-2A workers.<sup>239</sup> The defendants engaged in forced labor through coercive means by imposing debts on workers, confiscating

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233. *Id.* at 60.

234. *Id.* at 48.

235. Daniella Silva & Phil McCausland, *Feds Bust ‘Modern-Day Slavery’ Ring Amid New Immigration Enforcement Effort*, NBC NEWS (Dec. 9, 2021, 6:01 PM), <https://www.nbcnews.com/news/us-news/feds-bust-modern-day-slavery-ring-new-effort-immigration-enforcement-rcna8273>.

236. Raymond G. Lahoud, *Human Trafficking Indictment Uncovers H-2A Abuses*, NAT’L LAW REVIEW (Dec. 16, 2021), <https://www.natlawreview.com/article/human-trafficking-indictment-uncovers-h-2a-abuses>.

237. *Id.*

238. *Id.*

239. Press Release, U.S. Dep’t of Justice, Defendants Charged in Connection with Multistate Racketeering Conspiracy Involving the Forced Labor of Mexican Agricultural H-2A Workers (Sept. 22, 2021), <https://www.justice.gov/opa/pr/defendants-charged-connection-multi-state-racketeering-conspiracy-involving-forced-labor>.

their passports, subjecting workers to unsanitary and degrading living conditions, isolating workers, and threatening them with arrest, jail time, deportation, and physical harm.”<sup>240</sup> Unfortunately, these conditions are not unusual.<sup>241</sup> Employers have abused Mexican guestworkers in Louisiana strawberry fields,<sup>242</sup> Haitian workers harvesting beans in Florida,<sup>243</sup> Mexican farmworkers on North Dakota sweet potato farms,<sup>244</sup> and Peruvian sheep ranchers in Utah.<sup>245</sup> Abuses against these H-2A workers include confiscating passports and other identification documents; instructing workers to lie to federal inspectors; charging workers exorbitant fees for recruitment, food, and housing; failing to pay workers the legally contracted rate; providing unsanitary housing; refusing workers the ability to seek medical attention; spraying workers with chemicals; firing guns over workers’ heads; starving workers; making verbal abuse and threats; engaging in brutal physical attacks; and even raping workers.<sup>246</sup> As these few examples demonstrate, employers who engage in human trafficking are often repeat offenders; they abuse multiple workers for years without detection.

Despite the extent of the abuse, prosecutions for forced labor trafficking in the United States are extremely low. In fiscal year 2020, the Department of Justice initiated a total of 210 human trafficking prosecutions.<sup>247</sup> However, 195 of these prosecutions involved sex trafficking, while only fifteen involved forced labor—the type of trafficking that workers on H-2A visas experience.<sup>248</sup> These fifteen forced labor prosecutions reflect the total number of forced labor prosecutions for the entire United States in 2020, including for victims brought into the United States on all immigrant and nonimmigrant visas, undocumented immigrants, and even U.S. permanent residents and citizens.

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240. *Id.*

241. *See* Silva & McCausland, *supra* note 235.

242. Complaint at 1–3, Antonio-Morales v. Bimbo’s Best Produce, Inc., No. 08-cv-05105 (E.D. La. Apr. 20, 2009).

243. Complaint at 3–5, United States v. Edouard, No. 10-cr-27 (N.D. Fla. Sept. 2, 2011).

244. Complaint at 2–3, Diaz v. Alexander, No. 10-cv-00114 (N.D. Miss. Nov. 15, 2010).

245. Complaint at 7–10, Rojas v. R. Larson Sheep Co., No. 12-cv-00712 (C.D. Utah July 20, 2012).

246. *See* sources cited *supra* note 242–245.

247. 2021 U.S. TRAFFICKING IN PERSONS REPORT, *supra* note 226, at 586.

248. *Id.* The low rates of forced labor trafficking prosecutions, compared to sex trafficking prosecutions have remained consistent for the past several years. There were 12 forced labor trafficking prosecutions in Fiscal Year 2019 compared to 208 sex trafficking prosecutions; 17 compared to 213 in Fiscal Year 2018; and 16 compared to 266 in Fiscal Year 2017. *Id.*



In contrast, Polaris, through the National Human Trafficking Hotline, identified 897 potential victims of forced labor trafficking in 2020, specifically working on H-2A visas.<sup>249</sup> Even assuming that all forced labor prosecutions in 2020 involved trafficking of workers in the United States on H-2A visas (which they did not) and assuming 897 represents the total number of H-2A workers who were victims of human trafficking in 2020 (which it does not), prosecutions occurred at a rate of only 1.67 prosecutions per 100 victims. The number of prosecutions for forced labor trafficking grossly misrepresents the prevalence of forced labor in the United States, particularly for victims working legally on H-2A visas.

Overall, the visa process facilitates, rather than prevents, trafficking by creating a vulnerable foreign labor force that gives employers the opportunity to maximize productivity and minimize labor costs through abusive and illegal means. The primary means by which the visa process makes workers vulnerable to trafficking is through the elaborate private recruitment system. Both Mexican and U.S. law prohibit recruitment fees in the H-2A process.<sup>250</sup> In practice, nearly all H-2A visa recipients rely on recruiters in their home countries, and about 60% of guestworkers report paying a recruitment fee.<sup>251</sup> In the recruitment process, the H-2A's purported protections for foreign workers and the reality of the guestworker experience diverge. Illegal fees are a fundamental flaw of the recruitment process. Many workers take out high-interest loans and sell property or other possessions to pay recruitment fees.<sup>252</sup> However, workers who reveal they have paid illegal recruitment fees risk being denied a visa.<sup>253</sup> The value of an H-2A visa and the economic opportunity it affords foreign workers create a huge incentive for workers to keep quiet. Recruiters even coach workers before their consulate interviews to ensure they do not mention a fee.<sup>254</sup> Many Mexican workers travel to Monterrey—the third largest city in Mexico, a little more than 100 miles from the U.S. border, and the main hub for farmworkers applying for H-2A visas—for their con-

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249. TRAFFICKING OF AGRICULTURAL WORKERS DURING THE PANDEMIC, *supra* note 223, at 7.

250. See 20 C.F.R. § 655.135(j) (2021); 20 C.F.R. § 655.122(h) (2021); Ley Federal del Trabajo [LFT], Artículo 28, Diario Oficial de la Federación [DOF] 1-04-1970 (Mex.).

251. RECRUITMENT REVEALED, *supra* note 118, at 16 (reporting that 58% of guestworkers involved in the study paid a recruiting fee); Legrain, *supra* note 102 (estimating that 60% of recruiters charge their workers).

252. Legrain, *supra* note 102.

253. RECRUITMENT REVEALED, *supra* note 118, at 16.

254. Legrain, *supra* note 102.

sulate interview.<sup>255</sup> By the time workers arrive in Monterrey, “there can be as many as 10 middlemen between the worker in his community in Mexico and the employer in the U.S.”<sup>256</sup> Each expects a kick-back. Fees charged vary widely, but one recent study by the Centro De Los Derechos Del Migrante, a transnational worker’s rights center, estimates that workers pay an average recruitment fee of \$590 USD.<sup>257</sup> Predatory lending practices leave workers highly vulnerable to later abuse while working in the U.S.<sup>258</sup> An intricate web of recruiters both in Mexico and the U.S. leads to a lack of transparency throughout the process and often leaves workers confused as to who actually employs them.<sup>259</sup> When H-2A workers who arrive in the U.S. in hundreds or thousands of dollars of debt encounter abusive or unsafe working conditions, they are less likely to report violations and are more likely to continue working in those conditions; the necessity to earn back borrowed money makes returning home in even more debt virtually impossible.<sup>260</sup> A system that prohibits recruitment fees but effectively relies on these fees to distribute H-2A visas decreases the likelihood that indebted workers will report abuses and makes workers extremely vulnerable to human trafficking.

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255. *Id.*

256. *Id.*

257. RECRUITMENT REVEALED, *supra* note 118, at 16. Other reports estimate that workers were charged \$900 in San Luis Potosi and up to \$2,400 in Hidalgo. Recruitment fees tend to increase the further a worker’s home community is from the U.S. border. Legrain, *supra* note 102.

258. RECRUITMENT REVEALED, *supra* note 118, at 18.

259. The Centro de los Derechos del Migrante presents five different, non-exhaustive recruitment models used to recruit guestworkers from Mexico on H-2A visas: (1) Employer-Recruiter (Mexico)-Worker: The U.S. employer contracts directly with Mexico-based recruitment agencies and the Mexico-based recruiter then locates workers to fill the job order; (2) Employer-Recruiter (U.S.)-Recruiter (Mexico)-Worker: The U.S. employer hires a U.S.-based recruiter and the U.S.-based recruitment agency subcontracts a Mexico-based recruitment agency or individuals in Mexico to assist them in their efforts; (3) Employer-Recruiter (U.S.)-Recruiter (U.S.)-Recruiter (Mexico)-Worker: The U.S. employer hires a U.S. recruitment agency, the U.S. recruitment agency subcontracts a second U.S. recruitment agency, and the second U.S. recruitment agency subcontracts a Mexico-based recruitment agency or individuals in Mexico to assist with their efforts; (4) Employer-Recruiter (U.S.)-Worker: The U.S. employer hires a U.S. recruitment agency that then directly locates workers to fill the job order; (5) Employer-Worker: Some U.S. employers ask their temporary migrant workers to recruit for them during their annual return to Mexico between seasons. *Id.*

260. *Id.* U.S. law recognizes debt bondage among migrant laborers as a form of human trafficking. 2021 U.S. TRAFFICKING IN PERSONS REPORT, *supra* note 226, at 9. Debt bondage involves the use of debt as a form of coercion to compel a person’s labor. 22 U.S.C. § 7102(7) (2021).

Human trafficking today may look different than the slavery of the 1800s, but is slavery nonetheless.<sup>261</sup> A legal regime that puts workers at risk of human trafficking and, in fact, leads to proven instances of human trafficking is not acceptable. Evaluating the rate of human trafficking among H-2A visa recipients is an appropriate proxy for determining whether the H-2A visa system involves a “fair” process because human trafficking adversely impacts process participants (both workers and employers) and negatively affects the general public. Human trafficking constitutes a grievous human rights violation—a crime second only to murder.<sup>262</sup> H-2A workers experience a process that is not acceptable because the rules governing the process, specifically tying an employee’s visa to his employer, facilitate trafficking and forced labor. The process is not acceptable to employers because it disadvantages employers who comply with all program rules and consequently face increased labor costs. A process that lacks sufficient resources and efficient enforcement mechanisms to ensure that employers comply with the rules leads to a disconnect between how the process was designed to function and how it actually functions. Low rates of forced labor prosecutions and the low likelihood of debarment from the H-2A program in effect penalizes employers who do *not* engage in human trafficking. Finally, human trafficking is a universally condemned social ill; the general public would not accept a process that leads to numerous documented incidences of human trafficking.

#### IV.

#### RECOMMENDATIONS

The H-2A process creates conditions that enable the exploitation of guestworkers and circumvents the usual laws of supply and demand to depress the overall wages and working conditions for agricultural workers. Employers’ exclusive control over workers’ visas and a lack of efficient enforcement of the rules and regulations governing the H-2A program leave workers dependent on their employers to pay back the borrowed funds used to secure a visa and force migrant workers to continue working when they face hazardous and abusive employment situations. Furthermore, the process of applying for, granting, and monitoring H-2A visas fails to achieve the statutory objectives of the program: providing expeditious access to foreign workers in the event of domestic agricultural labor shortages and ensuring that the employment of foreign workers does not degrade the wages or working con-

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261. BALES & SOODALTER, *supra* note 2, at 5–6.

262. *Id.* at 7.

ditions of similarly employed U.S. workers.<sup>263</sup> Based on Roger Cramton's criteria for evaluating the success of an administrative process, two aspects of the H-2A visa process undermine these dual purposes by enabling the exploitation of visa recipients.

First, the labor certification process serves as an inaccurate proxy for determining the economic need for foreign guestworkers. Agriculture's history of relying on slave labor and, later, imported foreign labor artificially depressed the industry wage rate for decades, resulting in a skewed adverse effect wage rate (AEWR) that does not accurately reflect the wages needed to entice American workers to apply for agricultural jobs. Congress intended the H-2A visa program to serve as a solution to temporary shortages in the agricultural labor market. Instead, the program perpetuates the problem of depressed wages in the agricultural industry and increasingly relies on more guestworkers year after year to keep wages low. Additionally, the bureaucratically confusing and time-consuming process involves an alphabet soup of administrative agencies and inefficiently diverts resources from enforcing compliance with program rules. The labor certification process almost always results in the DOL granting employers, increasingly large farm labor contractors, labor certification approvals. When employers truly experience a labor shortage, recurring delays in the review process and unnecessary requests for further information can have a devastating effect on the timely harvesting of crops. Employers who cannot obtain legal migrant workers alternatively turn to a large pool of available undocumented workers which further entrenches the agricultural industry's reliance on cheap, unregulated, foreign labor.

Second, issuing visas directly to employers, rather than workers, unacceptably makes workers vulnerable to human trafficking and other labor abuses. Tying workers' visas to their employers limits workers' ability to withhold their labor as bargaining leverage for better conditions and to ensure compliance with the terms of their contract. The threat of losing their visa, and subsequent deportation, dissuades many workers, who are already hundreds of U.S. dollars in debt from illegal recruitment fees, from reporting abuses. Instead, many workers continue to endure illegal working conditions, disadvantaging employers who do comply with the many rules and regulations governing the program. Low rates of debarment from the program and the low likelihood of annual inspections by the DOL provide few incentives for employers to observe program rules and

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263. 8 U.S.C. § 1188(a)(1) (2021).

have, in fact, led to numerous documented instances of forced labor and other abuses that often continue for years and involve multiple victims.

Considering these problems, I propose two recommendations to improve the effectiveness of the H-2A visa process and better align the process with the program's statutory objectives: (1) eliminate the labor certification requirement and (2) grant transferrable H-2A visas directly to workers, rather than their employers. By issuing visas directly to workers, workers would have greater agency over the supply of their labor, enabling workers to leave abusive employers without fear of deportation. Workers who control the fungibility of their labor could leverage the ability to withhold and transfer their labor to demand employers comply with the terms of their labor contract and provide satisfactory working conditions. Removing the threat of deportation lessens workers' vulnerabilities for human trafficking and forced labor while simultaneously benefitting employers who comply with their contractual obligations under the program by expanding their access to a larger pool of legal foreign labor. Congress should simultaneously eliminate the labor certification process and reallocate agency resources to monitoring and enforcement. The labor certification process does not effectively test the supply of domestic labor in the agricultural market. Eliminating the labor certification process would give farmers and growers the needed flexibility to hire migrant workers quickly, particularly those who have already been approved for entry into or are currently present in the U.S. Resource reallocation with a focus on monitoring and enforcement would ensure that employers cannot subvert program requirements, increasing the overall cost of hiring/employing guestworkers (i.e., by ensuring that employers actually pay the legally required rate, provide adequate housing and sufficient food, pay for transportation, etc.), and therefore providing fewer incentives to hire guestworkers over American workers. In other words, prioritizing employer compliance with all H-2A program rules would begin to close the gap between the cost of hiring domestic versus foreign guestworkers. Undoubtedly, the large supply of undocumented migrant labor within the agricultural industry still poses an enormous obstacle to the hiring of domestic workers and legal foreign guestworkers. Why would an employer choose to pay significantly higher wages to a U.S. worker or willingly subject himself to the bureaucratic complexities of the H-2A program? By eliminating the labor certification requirement, the program becomes less time-consuming and burdensome for employers, increases the speed with which employers can hire guestworkers to quickly fill labor shortages,

and encourages employers to hire workers legally because they do not face the risks associated with undocumented workers.<sup>264</sup> Shifting DOL resources from labor certification review to monitoring and enforcement would incentivize employers to comply with the rules of the H-2A program so they do not face debarment or other sanctions, which would eliminate a valuable legal supply of labor needed to fulfill temporary shortages. Finally, issuing visas directly to workers rather than their employers would make workers less vulnerable to human trafficking and allow guestworkers to redistribute their labor to employers who provide the best wages and working conditions, reducing the labor cost difference between legal foreign and domestic workers, and increasing agricultural wages overall.

## V.

### CONCLUSION

The time to amend the H-2A visa program is now. During the Covid-19 pandemic, the United States Citizenship and Immigration Services (USCIS), through the Department of Homeland Security (DHS), temporarily amended the H-2A rules to “allow H-2A employees whose extension of stay H-2A petitions are supported by valid temporary labor certifications issued by the Department of Labor to begin work with *a new employer immediately* after the extension of stay petition is received by USCIS.”<sup>265</sup> Effectively, the temporary rule allows guestworkers currently in the U.S. to transfer to a different employer without the need to leave and re-apply for entry on a new H-2A visa. Rather than worker protection, DHS enacted the rule change “as a result of continued disruptions and uncertainty to the U.S. food agriculture sector . . . caused by [Covid-19].”<sup>266</sup> However, this temporary

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264. An employer who knowingly hires unauthorized workers risks both criminal and civil penalties. *See* 8 U.S.C. § 1324a (2021).

265. DHS initially amended the rule on April 4, 2020, to be effective through August 18, 2020. Temporary Changes to Requirements Affecting H-2A Nonimmigrants Due to the COVID-19 National Emergency, 85 Fed. Reg. 21,739 (Apr. 20, 2020) (emphasis added). DHS subsequently extended the rule through December 17, 2020. Temporary Changes to Requirements Affecting H-2A Nonimmigrants Due to the COVID-19 National Emergency: Partial Extension of Certain Flexibilities, 85 Fed. Reg. 51,304 (Aug. 19, 2020). On December 18, 2020, DHS extended the rule again, allowing employers to request flexibilities by filing an H-2A petition through June 16, 2021. The final extension of this temporary rule is effective through December 18, 2023. Temporary Changes to Requirements Affecting H-2A Nonimmigrants due to the COVID-19 National Emergency: Extension of Certain Flexibilities, 85 Fed. Reg. 82,291 (Dec. 18, 2020).

266. Temporary Changes to Requirements Affecting H-2A Nonimmigrants Due to the COVID-19 National Emergency: Partial Extension of Certain Flexibilities, 85 Fed. Reg. at 51,304.

change demonstrates that a system in which H-2A workers, once approved for entry into the U.S., can transfer to different employers is a workable system. The current problems inherent in the H-2A program do not reflect an inability to find a better solution but an unwillingness by Congress to recognize that the H-2A program, as currently structured, fails both domestic workers and foreign guestworkers in the interest of perpetuating low wages and substandard working conditions that benefit agricultural employers.

The current H-2A program reflects the longstanding American tradition of treating agricultural labor as separate from and lesser than other types of labor. It is impossible to understand the U.S. legal system's unique treatment of agricultural labor without recognizing the origins of agricultural labor—slavery. Slavery provided Southern landowners with a “solution” to the problem of domestic labor shortages and a way to keep the costs of wages and working conditions low: by not paying wages and by subjecting slaves to inhumane living and working conditions. Since the ratification of the Thirteenth Amendment, U.S. agriculture has struggled with the transition from slave labor to a system of free, waged labor, adopting practices and programs—like sharecropping, debt peonage, the bracero program, and early versions of the H-2 program—to keep wages low and workers vulnerable to exploitation. The H-2A visa represents the latest attempt to force workers to accept the labor conditions offered by agricultural employers by eliminating a worker's ability to withdraw his labor and transfer it to another employer. A worker's labor supply constitutes his most powerful leverage; by tying a worker's visa directly to his employer, the H-2A program essentially prohibits workers from bargaining for better wages and working conditions. Furthermore, workers who are already hundreds or thousands of dollars in debt from the recruitment process (often unavoidable if a worker wishes to obtain an H-2A visa) are far more willing to accept exploitative working conditions because they need to earn back borrowed money. Workers become trapped in a cycle of debt that perpetuates nominal wages and substandard working conditions that fall far below the legal requirements of the H-2A program. A lack of efficient enforcement mechanisms amongst the multiple agencies that administer the H-2A visa allows unscrupulous employers to subvert the program's protections for years, often without facing any consequences.

Although the documented instances of labor abuse and human trafficking of H-2A visa holders alone render the program in need of substantial change, the negative effects on domestic workers and agri-

cultural employers further warrant congressional reevaluation. Significantly, the program's statutory language grounds the purposes of the program not in terms of protecting guestworkers but in providing employers with a way to address domestic agricultural labor shortages and ensuring that the employment of guestworkers does not negatively affect the wages and working conditions of domestic workers. As explained above, the program fails in both respects. The labor certification process fails to accurately test the supply of American workers in the domestic agricultural labor market because of the program's reliance on an artificially low AEWR—the result of years of downward wage pressure and limited legal protections for agricultural workers. The program's many strict deadlines in the application process and delays in the approval process inefficiently require agricultural employers to estimate labor needs far in advance, preventing employers from expeditiously hiring workers when facing actual labor shortages. These delays can be economically devastating for farmers, given the unique nature of perishable crop harvests, which requires intense labor during narrow and unpredictable windows. Overall, the H-2A program fails each participant subject to the process: guestworkers who face human trafficking and other labor abuses, domestic workers who face competition from cheaper foreign labor, and agricultural employers who face an expensive and burdensome process.

An appeal to Congress for legislative change should focus on how the program fails all three groups and propose solutions that, in combination, would improve the process for all participants. Thus far, many critiques of the H-2A visa program have focused on how it fails only one group of process participants<sup>267</sup> or addresses only a subset of issues.<sup>268</sup> Viewing the problems inherent in the H-2A program holistically increases the likelihood that Congress would consider amending the program in two ways. First, it could beneficially promote coalition-building between process participants that appear to have diverging interests. For example, agricultural employers, domestic workers, and guestworkers would all benefit from amendments to the H-2A

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267. For example, workers' rights advocates tend to focus exclusively on the harms to guestworkers, while failing to acknowledge how the abuses of guestworkers by a few "bad apple" employers negatively affect employers who do follow the H-2A program's rules and regulations.

268. For example, economic policy institutes tend to focus solely on farmers' need for guestworkers to supplement a low domestic agricultural labor supply (because American workers purportedly refuse to accept agricultural jobs), while failing to acknowledge that the program's reliance on an artificially low AEWR forces domestic workers out of the domestic agricultural labor market because they cannot compete with foreign workers.



program that would allow visa holders to switch their visas to other employers and eliminate the labor certification process. Guestworkers would benefit because they would have the leverage to bargain for better wages and working conditions or otherwise threaten to transfer their visa to another employer offering better employment opportunities. Domestic workers would benefit because employers who do not comply with the H-2A program requirements would lose a valuable source of labor (guestworkers), forcing farm owners to improve working conditions in agriculture and incrementally increasing the overall AWER. Employers would also benefit because they would have quicker access to guestworkers already in the United States when facing labor shortages (as employers currently have under the temporary Covid-19 rule changes) without facing delays in the labor certification or visa application process. Second, framing the problems with the H-2A process in the context of the program's statutory purpose (which focuses on the labor needs of agricultural employers and protections of domestic workers' wages and working conditions) in addition to explaining the need to protect guestworkers, would ground proposed amendments to the program on a stronger legal basis.

Today, H-2A guestworkers continue to face human trafficking and other labor abuses at egregious levels. Advocacy groups have made progress at the regional and local level through grassroots efforts like the Coalition of Immokalee Workers' Fair Foods Program ("FFP"), a partnership between growers, workers, retailers, and consumers in which companies at the top of the agricultural supply chain agree to pay a premium—a penny more per pound of their produce—which is then passed down to workers as a bonus on their regular paycheck.<sup>269</sup> Growers representing over ninety percent of Florida tomato production and major tomato operations in five other states on the East Coast have agreed to implement the Fair Food Code of Conduct on their farms.<sup>270</sup> In the 20 years since implementing the FFP, 14 major buyers, including McDonald's, Subway, Whole Foods, and Walmart, have joined the program.<sup>271</sup> While the FFP has been called "the best workplace-monitoring program in the U.S.,"<sup>272</sup> grassroots efforts to improve working conditions for migrant agricultural workers have a limited reach. In September 2021, federal authorities indicted

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269. FAIR FOOD STANDARDS COUNCIL, *FAIR FOOD PROGRAM 2021* 3 (2021).

270. *Id.*

271. *Id.*

272. Steven Greenhouse, *In Florida Tomato Fields, a Penny Buys Progress*, N.Y. TIMES (Apr. 24, 2014), <https://www.nytimes.com/2014/04/25/business/in-florida-tomato-fields-a-penny-buys-progress.html> (calling the Immokalee tomato fields "the best working environment in American agriculture").

three individuals for their role in a forced labor ring enslaving Mexican agricultural workers who came into the U.S. legally on H-2A visas sponsored by the Los Villatros Harvesting company.<sup>273</sup> The ring spanned multiple states, including Kentucky, Indiana, Georgia, North Carolina, and yes, Florida.<sup>274</sup> The indictment emphasizes the ongoing struggle against modern slavery in agriculture and the need to reform the H-2A visa program so that it upholds the guarantees of the Thirteenth Amendment.

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273. *Latest Slavery Indictments Expose Exploitative Nature of H-2A “Guestworker” Program*, COALITION OF IMMOKALEE WORKERS (Oct. 5, 2021), <https://ciw-online.org/blog/2021/10/latest-slavery-indictments-expose-exploitive-nature-of-h-2a-guestworker-program> (noting that the Los Villatros Harvesting company operated only on non-FFP farms).

274. *Id.*