# H-2A Reform Scenarios

Philip Martin: plmartin@ucdavis.edu

February 6, 2025



## Summary

US farms employ an average 1.5 million farm workers, including 1.1 million or three fourths on crop farms. Due to seasonality and turnover, about 2.5 million individuals are employed for wages on US farms sometime during a typical year. Two million or 80 percent of these hired farm workers were born in Mexico, including 1.7 million who have settled in the US and 300,000 who have H-2A visas.

These settled Mexican-born farm workers are aging out of farm work. Some are replaced by younger Mexican H-2A workers who are hired by 15,000 US agricultural employers for an average six months. This means that 160,000 full-time equivalent H-2A workers account a seventh of average employment on US crop farms.

Three changes could benefit H-2A employers and H-2A workers: ABC ratings of employers and workers, expediting the yearly return of experienced seasonal crews, and favoring fewer and larger H-2A recruiters.

First, DOL could develop a rating system analogous to TSA pre-check and allow A-rated employers to self-certify their need and housing for H-2A workers. A-rated H-2A workers could return directly to the US employers for whom they worked the previous year, allowing them to skip the US consulate and travel directly to their US workplace. When H-2A workers arrive at a US port of entry, CBP agents can confirm the validity of their current-year contract with their US employer to reduce opportunities for smugglers to send workers with fake contracts into the US.

Second, experienced H-2A crews could become analogous to FIFO (fly in, fly out) mine and oil workers who live in one place and work in another, as with US workers in live in the lower 48 states and work for three to six weeks in the oil fields of Alaska's North Slope followed by time off. FIFO labor systems allow the minimum number of trained and experienced workers to perform needed work.[1] Applied to agriculture, this means that experienced H-2A crews would perform seasonal farm work during their six months in the US.[2]

Third, DOL cannot easily process and vet 22,000 H-2A applications from 15,000 employers, most of whom seek only a few H-2A workers. The pressure to deal with H-2A applications quickly allows some employers to develop business models that include falsifying the US work to be performed, charging fees to and underpaying H-2A workers, and not providing H-2A workers with required housing and other benefits. If DOL encouraged small employers to obtain H-2A workers via larger entities that have HR and compliance units, guest workers would have a layer of private protection and the H-2A program more integrity.[3]

This report includes two appendices. Appendix 1 outlines additional H-2A issues that are the subject of ongoing policy debates. Appendix 2 outlines other farm labor scenarios, including how particular fruits and vegetables may adjust to higher labor costs, efforts to improve farm labor law compliance, and emerging issues that range from the conversion of seasonal to year-round work, the implications of Controlled Environment Agriculture that offers year-round jobs in urban areas, and the effectiveness of the ethical charter and other private-sector efforts to bolster labor compliance and achieve environmental sustainability, food safety, and related goals in the fresh produce supply chain.

**Evolution: From H-2 to H-2A**

The H-2(A) program has since 1952 allowed US farmers who anticipate too few US workers to be certified by the US Department of Labor (DOL) to recruit and employ migrant workers to fill seasonal farm jobs if employers satisfy three major criteria. First, DOL must certify that the employer tried and failed to recruit enough US workers to fill the jobs being offered. Second, after being certified, employers must recruit workers abroad, pay H-2A worker travel expenses to and from their home countries to the US

[1] FIFO mining and oil workers often work three-to-six week shifts of 72 to 84 hours a week, followed by three to six weeks off.

[2] By planning in advance, H-2A workers could return to visit their families when there is less US work, reducing issues that arise from family separation and dis-satisfaction when H-2A workers in the US have little work.

[3] Australia, New Zealand, the United Kingdom are among the countries that vet and approve firms to recruit seasonal workers abroad and transport them to farmers. In these countries, fewer than 20 approved employers account for over 80 percent of farm guest workers, enabling them to invest in compliance and achieve economies of scale in the recruitment and transport of migrant workers.

workplace, and offer free and approved housing to H-2A workers while they are employed in the US and daily transportation between this housing and work sites.[4]

Third, the employer must offer and pay the higher of the federal or state minimum wage, the prevailing wage rate, the collective bargaining rate covering the jobs, or the DOL-set Adverse Effect Wage Rate (AEWR) to H-2A and US workers in similar employment. The AEWR is normally the highest of these wages, and ranges from than $15 to $20 an hour across states in 2025. Adding at least $5 an hour for transportation, housing, and other expenses makes the total cost of H-2A workers $20 to $25 an hour, compared with $15 to $20 an hour for US workers. H-2A guest workers tend to be younger and more productive than settled US workers, and guest workers provide a form of labor insurance because they are tied to their US employer by a contract (Martin and Rutledge, 2021).[5]

The US has been importing seasonal farm workers under the H-2 program since 1952, and under H-2A since 1986, but the H-2(A) program was small until the recovery from the 2008-09 recession. During the 1950s, the separate Bracero program was much larger, peaking at over 445,000 admissions in 1956 when DOL certified fewer than 10,000 jobs to be filled by H-2 workers (Martin, 2007). US farm workers were not covered by federal minimum wage laws until 1967, so US farm workers were sometimes paid less than Braceros and H-2 workers who had contracts that specified a minimum wage.

DOL studied the effects of the Bracero program in the late 1950s, concluded that the presence of Braceros held down the wages of US farm workers, and developed AEWRs to prevent Bracero employment from adversely affecting US farm workers (Martin, 2007). After the Bracero program ended in 1964, DOL required farmers who hired H-2 guest workers to pay US workers in similar jobs the AEWR.[6] Few farmers switched from Braceros to H-2 workers because they did not want to pay US farm workers the AEWR at a time when there was no minimum wage for US farm workers. The H-2 program remained small in the 1960s and 1970s, certifying fewer than 20,000 jobs a year for Caribbean workers who cut sugarcane in Florida and picked apples in east coast states.[7]

The Immigration Reform and Control Act of 1986 legalized unauthorized farm workers who did at least 90 days of farm work in 1985-86 and divided the H-2 program into H-2A for seasonal farm workers and H-2B for seasonal nonfarm workers. Unauthorized

---

[4] Any out-of-area US workers who are hired in response to employer pre-certification efforts to recruit US workers receive the same travel to and from home and housing benefits as H-2A workers.

[5] H-2A employers may change employers and remain in the US, but few do. Similarly, H-2A workers may bring family members, but few do.

[6] In response to DOL's insistence in 1965 that farmers must pay the AEWR to H-2A and US farm workers on their farms, Senators from California and Florida sought to transfer responsibility for certifying farm employer requests for foreign workers from DOL to USDA. This effort that failed on a 46-45 vote because Vice President Hubert Humphrey cast a vote to break the previous tie (Martin, 2008, p39).

[7] The Fair Labor Standards Act of 1938 sets minimum wages and restricts child labor, and exempted farm workers until 1966; the federal minimum wage for farm workers was lower than the federal minimum wage for nonfarm workers until 1978.

workers were a relatively small share of the US hired farm workforce in early 1980s, less than 25 percent in California (Martin, Mines, Diaz, 1985).

IRCA was expected to end the employment of unauthorized farm workers and increase the number of H-2A migrants for several reasons. First, IRCA-legalized workers were expected to demand higher wages or seek nonfarm jobs. Second, sanctions on employers who hired unauthorized workers were expected to deter further unauthorized migration because foreigners who eluded the US Border Patrol and entered the US would be unable to find jobs as US employers shunned them to avoid fines.

IRCA failed to stop unauthorized migration. Instead, IRCA's legalization program helped to create a false documents industry that allowed newly arrived unauthorized workers and their employers to satisfy I-9 procedures with little risk.[8] Workers presented false documents when hired, and employers were not required to confirm the authenticity of worker documents, so falsely documented unauthorized workers spread throughout the US farm labor market, keeping the H-2A program at less than 20,000 jobs a year even as the share of unauthorized crop workers reached 50 percent by the mid-1990s (NAWS).

The H-2A program began to expand after 2000 for several reasons. First, the INS and later DHS's Immigration and Customs Enforcement (ICE) agency began to audit the I-9 forms completed by newly hired workers and their employers, discovered that many employees presented false documents, and instructed employers to inform the employees that they should contact government agencies to fix their records. Most suspect workers quit, prompting employers to form associations such as the NC Growers Association and the Snake River Farmers' Association in ID to recruit and transport H-2A workers to member farms that wanted to employ legal workers. The rising number of Border Patrol agents who checked the status of workers who are bussed daily to fields in border areas prompted border-area employers to employ H-2A workers.

A second reason for more H-2A workers was the 2008-09 recession, which marked a turning point in unauthorized Mexico-US migration. Mexicans stopped coming to the US illegally for fear that, after paying thousands of dollars in smuggling fees, they would be unable to find jobs. In 2000, over half of US crop workers were unauthorized, including a quarter who were newcomers, meaning they were in the US less than a year before being interviewed (NAWS). After 2010, the unauthorized share of crop workers fell slightly and the share of newcomers dropped to two percent.[9]

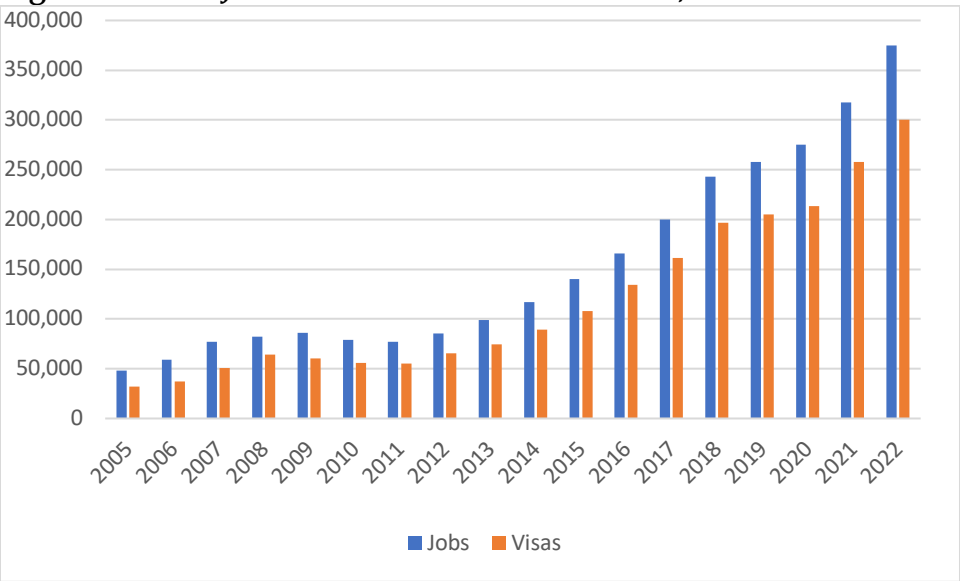
Reduced Mexico-US unauthorized migration was mirrored in the rising number of H-2A guest workers. The number of farm jobs certified to be filled by H-2A workers increased from less than 100,000 in FY13 to 385,000 in FY24. Not all of the jobs certified to be filled by H-2A workers are in fact filled by such workers, and some H-2A visa

[8] Newly hired workers must present work authorization documents that employers see but do not verify. E-Verify is a government program that allows employers to check the authenticity of worker-presented documents.

[9] https://migration.ucdavis.edu/rmn/blog/post/?id=2643

holders fill two or more certified jobs. The number of H-2A visas issued is about 80 percent of the number of jobs certified, about 320,000.

**Figure 1. H-2A Jobs Certified and Visas Issued, FY05-24**




Third, farm employers realized that they could profitably employ H-2A workers despite their higher costs because H-2A workers are younger and more productive than settled US workers. Most settled and unauthorized Mexican-born farm workers arrived in the US in the 1990s and early 2000s when they were in their 20s and 30s. Settled farm workers are now in their 40s and 50s and unable to work as fast as they did when they were younger.

Most H-2A workers, by contrast, are in their 20s and 30s and, because education levels have been rising in Mexico, H-2A workers often better educated than the older unauthorized Mexican-born workers who have settled in the US and thus better able to understand the technology that is creeping into some hand labor jobs, including robots that take harvested bins of grapes and berries from individual pickers to collection stations.

There are about 1.5 million full-time-equivalent jobs in US agriculture, including 1.1 million in crops and 400,000 in animal agriculture.[10] H-2A workers are in the United States an average six months, so 320,000 H-2A workers are equivalent to 160,000 full-time workers, and they fill about a seventh of the full-time equivalent jobs in US crop agriculture.

**H-2A Program**

Should the rapid expansion of the H-2A program be welcomed or feared? Answering this question requires an understanding of how the program works and the options to change it, including proposals to end the requirement that employers try to recruit US

[10] California has almost a third of these jobs, 425,000 year-round equivalent farm jobs, including 390,000 in crops.

workers, to allow farmers to provide H-2A workers with a housing allowance of $1 to $2 per hour worked rather than providing them with free housing, and freezing or eliminating the AEWR.

Second, does DOL certification prevent H-2A workers from adversely affecting US farm workers? H-2A workers are generally younger than US workers and selected for their ability to do the job, which means they are typically 15 to 30 percent more productive than US workers in terms of bins of apples or oranges picked per hour or day. Can US workers be protected if H-2A workers are more productive, willing to work long hours if needed, and tied to their US employer by a contract?

Third, how does the availability of H-2A workers affect grower interest in labor-saving mechanization (Martin, 2009; San 2023)? Can H-2A workers act as a bridge to mechanization, as when their availability facilitates the planting of new apple varieties in high-density orchards with dwarf trees designed to permit the eventual use of machines rather than hand pickers? Do US growers have any obligation to guest and US workers who may be displaced after mechanization or if imports substitute for US production?

**Procedures, Costs, Issues**

Three federal agencies (1) determine whether employers need H-2A workers and enforce H-2A regulations (DOL), (2) whether the employer petition for H-2As is accurate and check incoming workers with H-2A visas (DHS), and (3) issue H-2A visas to eligible foreign workers abroad (DOS).

DOL certification of an employer's need for H-2A workers means that DOL agrees with the employer that (1) US workers are not available to fill seasonal farm jobs and (2) the presence of H-2A workers will not adversely affect similar US workers. DHS ensures that the employer is legitimate and that H-2A workers did not pay for their jobs, and DOS determines whether each worker recruited by the employer is eligible for visas.

Employers begin the H-2A process at least 60 days before their need date by filing a job offer with their local State Workforce Agency (SWA).[11] Employers assert in their Form ETA 790A job orders that they are (1) offering full-time temporary or seasonal jobs, (2) require a specific number of H-2A workers to fill them, and (3) have accurately described the job, the anticipated hours of work per day and days per week, and the start and stop dates.[12] Employers also provide information on the housing available to H-2A workers, whether they will provide workers with meals or cooking facilities, and spell out hourly and piece rate wages and any experience requirements or productivity standards.

---

[11] https://flag.dol.gov/programs/H-2A#:~:text=The%20H%2D2A%20temporary%20agricultural,a%20temporary%20or%20seasonal%20nature.

[12] The job offer and other information are completed on Agricultural and Food Processing Clearance Order Form ETA-790A and the Application for Temporary Employment Certification ETA Form 9142A: www.foreignlaborcert.doleta.gov/h-2a_details.cfm

State SWAs review employer job offers and assign a SOC job title before uploading the job information into a data base available to US job seekers.[13] DOL's Office of Foreign Labor Certification has a National Processing Center (NPC) in Chicago that reviews employer-submitted information and must make a decision on the employer's application at least 30 days before the need date.[14]

The result is a two to three week window for employers and SWAs to recruit US workers before the NPC certifies or denies the employer's need for H-2A workers.[15] SWAs refer workers seeking jobs to employers, and employers must submit a recruitment report to the NPC at least 30 days before their start date that identifies US workers who responded to their job ads and, if the US workers were not hired, provides "lawful job-related reason(s)" for not hiring them. The NPC subtracts any US workers who were hired or should have been hired and certifies an employer's need for sufficient H-2A workers to fill the remaining jobs.[16]

There is no fee to apply for DOL certification, although employers pay $100 plus $10 per job for DOL certification, far less than DOL and SWAs spend on the program. Many employer groups support additional government funding for DOL and the SWAs but oppose raising fees for H-2A certification.

Employers attach DOL's certification to the I-129 petition for nonimmigrant workers that is submitted with a $460 fee to the Department of Homeland Security's (DHS) US Citizenship and Immigration Service (USCIS) agency, which checks that the employer is legitimate and ensures that neither the employer nor the recruiting agent abroad charged recruitment fees to H-2A workers.[17] Most petitions for nonimmigrant workers do not name the foreign workers requested, so USCIS forwards approved petitions to the Department of State consulate abroad specified by the employer.

The foreign workers recruited by the employer travel to a US consulate, where they are fingerprinted and may be interviewed by US consular officers before receiving H-2A visas, which cost $190 plus an additional $100 for biometrics processing.[18] Over 90 percent of H-2A workers are Mexicans, most of whom are bussed by their US employers from consulates in Mexico to the US border, inspected by DHS's Customs and Border Protection officers as they enter the US, and continue by bus to their US workplace.

---

[13] The Standard Occupational Classification (SOC) system assigns job titles to 867 detailed occupations https://www.bls.gov/soc/ SWAs post jobs are at: https://seasonaljobs.dol.gov/

[14] NPC analysts must explain what employers must do to make their deficient applications acceptable rather than simply reject them.

[15] The SWA or NPA verifies if U.S. works have been found for the job but not offered the job that the employer provides a valid reason for the choice.

[16] DOL certifies employers to fill about 97 percent of the jobs they want to fill with H-2A workers.

[17] https://www.uscis.gov/forms/all-forms/h-and-l-filing-fees-for-form-i-129-petition-for-a-nonimmigrant-worker

[18] https://www.farmers.gov/working-with-us/h2a-visa-program

Employers typically pay $100 to $250 per worker to a recruiter to find workers abroad and $1,500 to $3,500 per contract in agent or attorney costs if the employer does not have in-house staff to process H-2A applications. If recruitment fees average $100 per worker, 300,000 workers generate $30 million in recruiter revenue, or $60 million at $200 per worker. A typical employer application requests 20 H-2A workers, making the per worker cost of agent or attorney fees $75 to $175, but these fees can be $15 to $35 per worker for a contract requesting 100 workers. If agent/attorney fees average $50 per worker, agents and attorneys have revenue of $15 million a year for 300,000 H-2A workers.

The cost of each Mexican H-2A worker is about $750 in government fees and processing costs and $500 to $750 to house workers at the US consulate while they obtain visas and then transport them to the US. Once in the US, H-2A workers earn $120 to $150 a day, and employers pay $10 to $30 a day to house and transport each worker between the housing and the fields.

Over a typical six month or 25-week contract that involves to 125 to 150 days of US work, the extra costs of an H-2A worker over a US worker who is not housed or transported by the employer is about $5,000, based on $2,000 to get an H-2A worker to the US worksite and $3,000 at $20 a day for housing and food over 150 days. The wage bill for 125 days of work at $130 a day is $16,250, making the total costs of an H-2A worker $21,250.

If employers hired US workers who received the same $16,250 wages, they would incur payroll taxes of eight to 12 percent depending on whether the state requires unemployment insurance taxes to be paid on H-2A earnings, adding about $1,500 to US worker costs and narrowing the H-2A-US worker labor cost gap from $5,000 to $3,500. If H-2A workers are 20 percent more productive than US workers, the US-H-2A worker cost gap narrows or disappears. H-2A workers are tied by contracts to their employers, providing a form of labor insurance.

H-2A program administration raises three major challenges. First, how should DOL balance an employer's desire for guest workers against DOL's obligation to protect US workers from adverse effects? Employers are encouraged to hire US workers by their extra costs, and are rewarded with productive H-2A workers whose presence can ensure that work is done in a timely and efficient way. What is the optimal balance between employer access to the guest workers versus protecting US farm workers?

The second challenge involves the funding for and the incentives of the agencies that administer the H-2A program. State SWAs are perennially underfunded, helping to explain why few US workers are recruited and few prevailing wage and practice surveys are conducted.[19] Underfunded SWAs are generally more responsive to employers and their agents who complain if their job offers and housing inspections are not handled in a timely way than to US workers who may be seeking seasonal farm jobs.

[19] SWA prevailing wage and practice surveys that have been accepted by OFLC are posted at: https://www.foreignlaborcert.doleta.gov/aowl.cfm In June 2022, there were no prevailing wage results published for CA for 2020 and 2021.

The third challenge involves the expansion of the H-2A program to new commodities, areas, and types of employers. Understaffed SWAs and the NPC may accept misleading or false employer job offers, as when an employer calls workers who construct buildings on farms "crop workers" and pays them a crop worker wage rather than a construction worker wage.[20] Some trucking firms call their drivers "agricultural equipment operators," which allows them to pay lower farm wages rather than higher truck driver wages and avoid overtime pay, since the federal FLSA exempts employers of farm workers from paying premium wages for work after eight hours a day or 40 hours a week.[21] The growing importance of labor contractors, who employ almost half of H-2A workers, poses special concerns because of their history of violations of labor laws and exploitation of farm workers.

**H-2A Recruitment**

The recruitment issue arises first in the US, when employers try and fail to find US workers, and then in Mexico and other countries where employers recruit foreign workers. Employers set recruitment in motion by preparing job offers and requesting DOL certification to hire foreign workers,[22] which also obliges them to try to recruit US workers.

Why is it so hard to find US workers to fill jobs that pay more than the minimum wage? Employers say that US workers do not want the seasonal jobs they offer, or that US workers want a job right now rather than 30 days in the future when farm work will begin.[23] The number of H-2A workers is reduced for each US worker who is or should have been hired, which means that if the employer hires US workers who do not report or quit, they may be short-handed when work begins (US House, 2022, 2011, 2008; US Senate, 1981).

Worker advocates tell a different story. They cite examples of farm employers who discourage US workers from applying or assign them more to difficult tasks to encourage them to quit.[24] A farm labor contractor who was eventually debarred from the H-2A program, Global Horizons, told the US workers it hired to report to worksites

---

[20] DOL tried to deal with this mis-classification program in regulations issued February 28, 2023. See https://migration.ucdavis.edu/rmn/blog/

[21] California and a few other states require farm employers to pay overtime to workers on an 8/40 basis. See https://migration.ucdavis.edu/rmn/blog/post/?id=2606

[22] Employers prepare a job order for the local, intrastate, and interstate recruitment of U.S. workers. Job orders are posted on private job search sites as well as a government web site, https://seasonaljobs.dol.gov/ so that interested U.S. workers may apply directly to the employer or the closest SWA. Employers must also contact former U.S. workers to advise them of the seasonal jobs available and continue to engage in "active recruitment" of U.S. workers until the H-2A workers depart for the United States, usually three days before the scheduled start of work.

[23] Employers have testified in many Congressional hearings on the difficulty of recruiting and retaining US farm workers in jobs they want to fill with H-2A workers. See https://www.congress.gov/116/meeting/house/109235/witnesses/HHRG-116-JU01-Wstate-BrimB-20190403.pdf

[24] Tofani, Loretta. 1987. Preferring Foreign Labor, Farmers Spurn Americans. Washington Post, May 25. Reprinted in US Senate. 1981, pp145-149.

where there was no work, leaving them with travel expenses and no work because Global Horizons filled the jobs with Thai H-2A workers who had unlawfully paid for their jobs.[25] Almost all employers have already identified their desired foreign workers before seeking DOL certification, and less than five percent of the jobs advertised by employers seeking H-2A certification are filled by US workers (US House, 2008; GAO, 1988).

Recruitment issues in Mexico and other migrant-sending countries sometimes involve workers who pay recruiters for US jobs (CDM or Centro de los Derechos del Migrante, CDM, 2020). Recruiters travel to the rural areas where potential H-2A workers live and promise high US wages and employer-paid transportation and housing. Some recruiters are legitimate agents of US farm employers who screen workers and do not charge workers for jobs, while others charge workers for real or non-existent jobs. Both Mexican and US laws require employers to pay all of the costs associated with hiring migrant workers for jobs away from their homes in Mexico or the US, but these laws are hard to enforce, especially in rural Mexico.

One survey found that 44 percent of US farm employers listed recruitment agents on their petitions to USCIS for H-2A workers (GAO, 2017). Since US employers are required to pay all recruitment costs, recruiters in Mexico who typically receive $100 to $250 per worker from US employers should not receive any payments from workers.[26] However, interviews with H-2A workers after they return to Mexico find that most paid recruitment fees (CDM or Centro de los Derechos del Migrante, 2020).[27]

When H-2A workers enter the US, they are asked by CBP officers if they paid recruitment fees, but most are coached to say no to avoid being refused entry. Once in the United States, H-2A workers may tell their US employers that they paid no fees to avoid being blacklisted by the Mexican recruiters who offered them jobs, or say that they paid recruitment fees and expect the employer to reimburse them (Hernández-León, 2020).[28]

Recruitment costs should fall as labor mobility streams mature. Over 80 percent of H-2A workers have been employed in the US with H-2A visas before, so they know that they do not have to pay recruitment fees and can inform their first-time friends and relatives of the no-fee rule. Returning workers who can educate new workers is often

---

[25] https://migration.ucdavis.edu/rmn/more.php?id=1824

[26] Some US employers and associations ask arriving H-2A workers if they paid fees in Mexico for their jobs and reimburse the workers for any fees that were paid. Since no receipts are required, some employers suspect that some workers falsely report they paid recruitment fees. Migrant advocates say that most Mexican H-2A workers pay fees, but are warned to tell US consular officials in Mexico that they did not pay any fees to get their US jobs.

[27] Article 28 of Mexico's 1970 labor law, revised in 2019, requires that contracts for foreign jobs be registered with the Ministry of Labor. Mexico had 433 registered labor recruiters in 2019, including nine registered to recruit workers for foreign jobs. MOL conducted 81 inspections of recruiters between 2009 and 2019, and found no violations of Article 28.

[28] Some US employers and associations ask arriving H-2A workers if they paid fees in Mexico for their jobs and then reimburse the costs. Since no receipts are required, there are suspicions of workers learning to falsely report they paid recruitment fees.

expedited by widespread network hiring, as employers ask current workers to bring qualified friends and relatives into the crew and orient and train them to do the work.

**H-2A and US Workers**

H-2A workers are often more productive than US workers who are performing the same job. There are many reasons, including the fact that most H-2A workers are younger than the unauthorized workers who arrived earlier and settled in the US, H-2A workers are in the US without their families, and H-2A workers want to maximize their US earnings. The US-born workers who are about 30 percent of US crop workers typically are employed in jobs with few H-2A workers, such as equipment operator and driver rather than harvester.

The higher productivity of H-2A workers raises a question: should employers be required to hire US workers if H-2A workers are more productive? When Elton Orchards in 1974 sought certification to hire Jamaican apple pickers, the Louisiana SWA found US workers who were willing to travel to New Hampshire and pick Elton's apples. Elton refused to hire them even though his job order did not require apple picking experience, arguing that experienced Jamaican guest workers would be more productive than the Louisiana workers who would be picking apples for the first time.

Elton won a District Court injunction that allowed him to employ the experienced Jamaican guest workers in 1974, but a Court of Appeals later overturned the injunction and asserted that US workers must be hired first. The Court of Appeals emphasized that "there may be good reason for appellee's [Elton's] wish to be able to rely on the experienced crews of British West Indians who have performed well in the past… [but such a] business justification would be to negate the policy which permeates the immigration statutes, that domestic workers rather than aliens be employed wherever possible."[29]

The Elton ruling means that if US workers can work fast enough to earn the AEWR they must be hired even if the H-2A workers are more productive. The result could be more US workers hired to accomplish work that fewer H-2A workers could perform. Enforcing the Elton preference for US workers is very difficult, since there are many factors that contribute to whether employers consider workers to be satisfactory.

**AEWR Minimum Wages**

The H-2A program allows US employers to hire foreign workers to fill seasonal farm jobs if (1) US workers are not available *and* (2) the employment of guest workers will not adversely affect US workers. Economic theory suggests that adding to the supply of labor can depress wages, so how does DOL prevent adverse effects on US farm workers?

DOL's answers are the AEWR minimum wage and prevailing wage rates (PWRs). AEWRs were first implemented in 1958, when DOL established a national minimum wage for Braceros of $0.50 an hour at a time when US farm workers were not covered

[29] Elton Orchards, Inc. v. Brennan, 508 F. 2d 493 - Court of Appeals, 1st Circuit 1974 https://scholar.google.com/scholar_case?case=4116686416235579922&hl=en&as_sdt=6&as_vis=1&oi=scholarr

by the Fair Labor Standards Act that sets minimum wages and regulates child labor (Rural Migration News Blog, 2020c).

Since 1987, the AEWR minimum wage that must be paid to H-2A workers, and any similar US workers employed by the same employer, has almost always been the average hourly earnings of non-supervisory crop and livestock workers reported by employers to USDA's Farm Labor Survey (FLS) for prior year.[30] This means that AEWRs for 2023 are the average hourly earnings reported by farm employers in a state or region to USDA in 2022, and ranged from almost $14 to over $18 an hour.

The AEWR is controversial. Employers complain that the AEWR is too high and ratchets upward each year because it is the mean rather than the median hourly earnings of all types of field and livestock workers, including skilled equipment operators whose higher wages may pull up the average wage of all workers. When designing its wage survey a century ago, USDA recognized that there were many farm wage systems, and developed a methodology to calculate average earnings that involves collecting data on the total wages paid and all of the hours worked of the various types of workers on a farm during the week containing the 12th of the month. USDA divides total wages by hours worked to calculate average hourly earnings.[31]

Figure 4 shows that the hourly earnings of non-supervisory farm workers have been rising faster than the earnings of non-supervisory nonfarm workers since 1989, to an average of almost $15 for farm workers and $26 for nonfarm workers in 2020. In the past, there was a 50-50 rule, meaning that hourly farm worker earnings were half of nonfarm worker earnings. The narrowing farm-nonfarm earnings gap reflects several factors, including a stable demand for farm workers and a shrinking supply, rising state minimum wages, and more employers hiring H-2A workers who must be paid the AEWR. If current trends continue, farm worker earnings could be two-thirds of nonfarm earnings before 2030.

---

uple…and easily put the price of tomatoes out of the range of the average housewife." (p66)

**30** Employment, Hours, and Earnings from the Current Employment Statistics survey, seasonally adjusted.

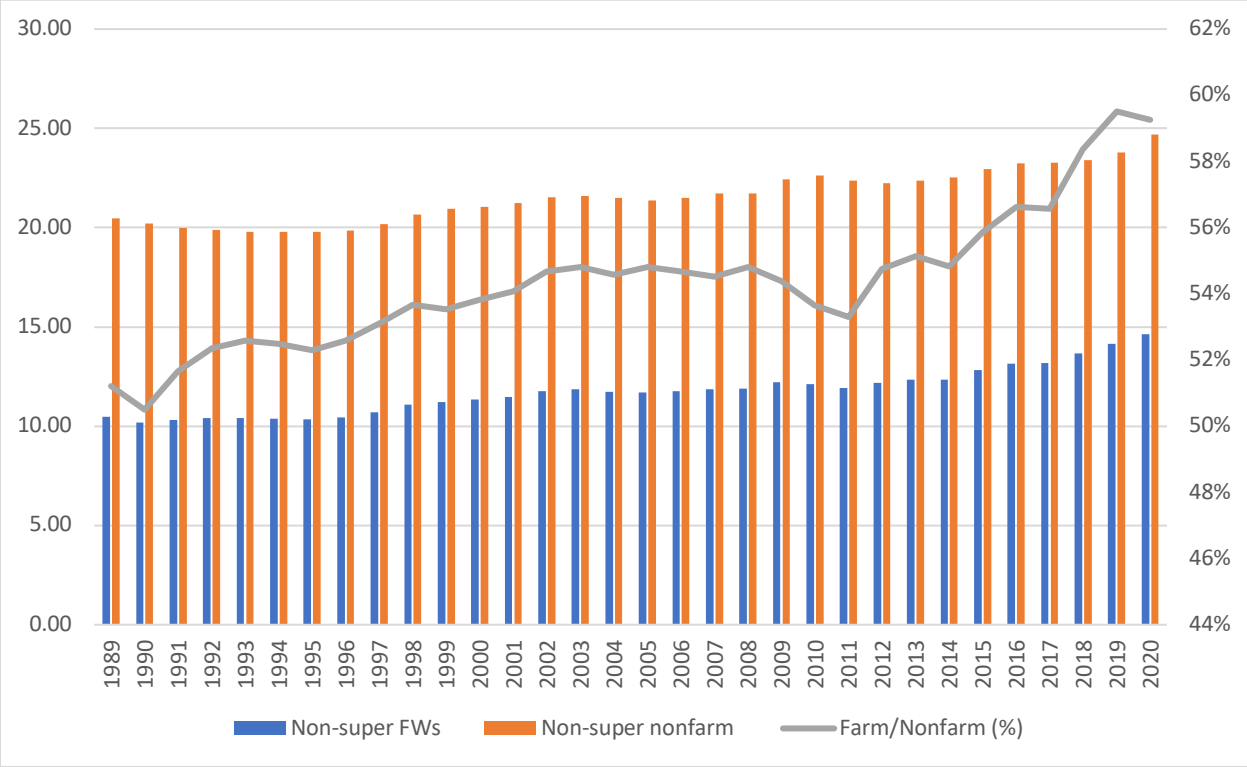
30 Growers in North Carolina created the North Carolina Growers Association and those in Idaho formed the Snake River Farmers' Association to pool management resources to recruit and transport H-2A workers to members' farms.

30 California has almost a third of these jobs, 425,000 year-round equivalent farm jobs, including 390,000 in crops.

30 Associations may file as a joint employer with farmer-members of the association.

31 USDA asks farm operators to report the total earnings of different types of employees, such as workers employed in crops, those involved with animals, and equipment operators, for the week that includes the 12th of the month. Employers also report the total hours worked by each type of employee during the survey week. The FLS divides wages by hours to calculate the average hourly earnings of all hired farm workers, non-supervisory workers, crop workers, livestock workers, equipment operators and other occupations. Mean wages can be pulled up by high-wage workers.

**Figure 2. Average Farm and Nonfarm Hourly Earnings, 1989-2020**




H-2A jobs in FY20 offered an average 168 days and 943 hours of work at an average wage of $13.29 or $12,711, so 275,430 H-2A jobs generated a wage bill of $3.5 billion or about 10 percent of the wages paid by US crop farms to all workers (Castillo, Martin, and Rutledge, 2022). The H-2A wage bill could be lower if employers satisfy only the three-fourths guarantee, meaning that they pay for the minimum three-fourths of the days and hours of work promised in the contract. On the other hand, worker earnings could higher if employers offer and workers accept more hours of work or if H-2A workers are employed under piece rate wage systems and earn more than AEWR or they receive overtime wages and bonuses.

Worker advocates sometimes charge that AEWRs put a ceiling on farm wages because foreign workers are readily available at the AEWR. A US worker who may be willing to work in a high-cost-of-living area such as Napa for $25 an hour, but not for the $18 AEWR, can be rejected as unavailable because US employers must hire only US workers willing to accept the $18 AEWR.

Since 1987, there is generally been one AEWR per state or multi-state region for all farm workers, from apple pickers to truck drivers. DOL issued regulations February 28, 2023 to "establish separate AEWRs by agricultural occupation to better protect against [any] adverse effect on the wages of similarly employed workers in the US," creating five to 10 AEWRs in each state based on the wage associated with a particular job title.

Under the 2023 AEWR methodology, DOL first looks to the FLS to determine the AEWR for a particular job title. If the FLS does not provide earnings data for that job

title, DOL uses the Occupational Employment and Wage Survey (OEWS) to establish the AEWR. DOL expects to use the FLS to determine AEWRs for 98 percent of all H-2A jobs because the six FLS job titles account for 98 percent of the farm jobs for which employers seek certification:

- 85 percent of H-2A job certifications in FY 22 were for the job title farmworkers and laborers, crop, nursery and greenhouse workers (45-2092);
- seven percent were for agricultural equipment operators (45-2091);
- four percent were for farmworkers, farm, ranch, and aquacultural animals (45-2093);
- less than one percent were for graders and sorters, agricultural products (45-2041) and all other agricultural workers (45-2099).

DOL uses the average statewide or national mean wage in the OEWS to set the AEWR for the other two percent of jobs that employers want to fill with H-2A workers, including construction worker and van or truck driver. DOL justified changing the wage survey to set AEWRs for the 30 "nonfarm job titles" in employer applications to the OEWS because these job titles typically have higher hourly wages than field and livestock workers. Farm employers oppose this change to the AEWR, and sued in April 2023 to block the use of the OEWS to set AEWRs for nonfarm job titles. Unions and NGOs that have long called for more reliable AEWRs did not react strongly to the new AEWR methodology.

Most industry- and occupation-specific employment and earnings data are collected from employers. The FLS collects data only farm employers, while the OEWS collects data only nonfarm employers, including those who bring workers to farms such as farm labor contractors. FLS wages are generally lower than OEWS wages, providing an incentive to call nonfarm workers such as truck drivers farm workers to pay a lower AEWR.

**PWRs and Productivity Standards**

In addition to the AEWR, employers must also offer and pay the prevailing wage rate (PWR) for the job performed by the H-2A worker *if* a prevailing wage has been determined. For example, if the California AEWR is $18.65 an hour, an employer may have to pay vineyard workers the prevailing wage of $20 an hour in a high-cost area such as Napa. In Washington, employers must guarantee workers at least the hourly AEWR and may also have to offer the prevailing piece rate of $30 to pick a bin of Gala apples.

Workers employed under piece rate wage systems are guaranteed the AEWR. The government-set AEWR and the employer-set piece rate combine to create a productivity standard. For example, a worker who picks six bins of apples in an eight-hour day at $30 a bin earns $180 or $22.50 an hour. If the AEWR increases by 10 percent from $15 to $16.50, but the piece rate remains at $30 a bin, a worker who picks six bins a day would still earn $180 a day or $22.50 an hour, but have less incentive to work fast because his piece rate earnings generate a smaller premium above the AEWR.

If the AEWR continues to rise and the piece rate remains unchanged, workers must work harder to earn more than the AEWR. DOL regulations say that, if the employer

pays by the piece and requires employees to satisfy a minimum productivity standard, the employer must specify a productivity standard in the job order that is the same as the productivity standard required in 1977 unless DOL approves an increased productivity standard.

Employers do not have to retain workers who are unable to earn the AEWR at the employer-specified piece rate, so rising AEWRs and stable piece rates can raise productivity standards[32] and change the composition of the workforce by eliminating slower US workers. This is what occurred in the Florida sugarcane industry, where employers did not raise what they called the task rate as the AEWR rose, instead requiring workers to work faster to accomplish the task they were assigned (Martin, 2009, Chapter 5).

H-2A regulations allow State Workforce Agencies (SWAs) to determine prevailing wage rates (PWRs) and, if they are accepted and posted on DOL's Agricultural Online Wage Library,[33] employers must pay at least the PWR as well as the AEWR. However, most SWAs do not receive enough funding from DOL to accomplish their primary tasks under the H-2A system, viz, review and upload employer job offers and inspect farm worker housing, so few PWR surveys are conducted, leaving the AEWR as the major protection for US workers.

PWRs may become more important because DOL recently changed the methodology to determine them. The previous PWR methodology, laid out in DOL's Handbook 385, required SWAs to survey employers of at least 15 percent of total employment in a particular commodity, task, and area to determine prevailing wages and practices. DOL revised the PWR methodology on November 14, 2022 to, inter alia, eliminate the requirement that SWAs survey workers to check on employer responses and the requirement that employers who account for at least 15 percent of the employment in an activity be interviewed.

The new PWR regulations allow state entities other than SWAs to conduct PWR surveys such as universities, and PWRs can be based on responses from as few as five employers and 30 workers. DOL says that SWAs and state agencies conducting PWR surveys should contact a random sample of employers and determine the "average wage of US workers in the crop activity or agricultural activity and distinct work task(s)… [based on the] unit of pay used to compensate the largest number of US workers."

Some worker advocates want DOL to establish PWRs for more commodities and states to prevent rising productivity standards from squeezing US workers out of the farm workforce. DOL counters that the major protection for US farm workers is the AEWR, which DOL says is the highest wage on 95 percent of H-2A applications because there

---

[32] In NAACP v. Donovan, 558 F. Supp. 218 (D.D.C. 1982), federal district judge Charles Richey blocked DOL's certification of West Virginia apple growers to employ then H-2 workers because they raised the minimum productivity standard from 80 to 90 bushels in an eight-hour day. Richey ruled that apple picking piece rates must increase in tandem with AEWRs. https://law.justia.com/cases/federal/district-courts/FSupp/558/218/1811083/

[33] https://www.foreignlaborcert.doleta.gov/aowl.cfm

are so few PWRs. DOL said it "is not obligated to establish a prevailing wage separate from the AEWR for every occupation and agricultural activity in every state," a goal of some worker advocates.

The likely outcome of the new DOL regulations is varied surveys and disputes over their validity. Some SWAs may submit prevailing wages for very narrowly defined tasks and areas, such as the piece rate for a first harvest of a small acreage fruit or vegetable in a particular county, while others may add questions to existing statewide surveys and generate statewide PWRs, prompting disputes over whether wage differences within a state reflect the relative supply and demand of US workers or cost of living differences. Grower or worker groups could sponsor surveys conducted by universities, raising questions about whether the source of funding influenced the survey results. In sum, the prevailing wage issue is likely to become more rather than less contentious as the H-2A program expands.

**Immigration Reform and Agriculture**

The US has struggled to determine the appropriate roles of foreign workers in US agriculture. The Bracero programs of 1917 to 1921 and 1942 to 1964 are more often seen as examples of government failure to protect foreign and US workers than successes. Many critical reviews of the Bracero program emphasize that most Braceros harvested crops that were in surplus such as cotton and that some Mexican workers were exploited in both Mexico and the US (Rural Migration News, 2020b).

IRCA fundamentally changed the US farm labor market (Martin, 1994). The Special Agricultural Worker Program allowed 1.1 million mostly Mexican men to become legal immigrants by documenting that they did at least 90 days of farm work in 1985-86. However, most of the unauthorized foreigners who were legalized under the SAW program did not do the requisite farm work in what was called "one of the most extensive immigration frauds ever perpetrated against the United States government."[34]

SAW fraud was made possible by regulations that required the then INS to prove that applicant-submitted documents were false. This means that, once an applicant submitted documentation of farm work such as a one-sentence letter from a labor contractor that said "Juan Martinez picked tomatoes for J& L Harvesting for 92 days in the Stockton area in summer 1985," INS had to prove that this documentation was false by showing, for example, that the Stockton tomato harvesting season was only 60 days in 1985 (Martin et al, 1988). The INS was unable to root out fraud among SAW applicants, leading to one INS estimate was that 70 percent of SAW applications were fraudulent.[35]

---

[34] Roberto Suro, "Migrants' False Claims: Fraud on a Huge Scale," New York Times, November 12, 1989. https://migration.ucdavis.edu/rmn/more.php?id=406

[35] In a July 2000 report, the Inspector General of the Department of Justice noted that, in 1995, management at the then-Immigration and Naturalization Service estimated that 70 percent of SAW applications were fraudulent.
https://www.judiciary.senate.gov/grassley-opening-remarks-at-hearing-on-immigrant-farm-labor-reform

Most newly legalized SAWs, including those who had not done farm work, soon found nonfarm jobs away from California and the southwest where unauthorized foreigners were concentrated before IRCA. The SAW program legalized only workers, not family members in Mexico, so unauthorized Mexicans continued to arrive in the 1990s to join now-legal relatives in the midwest and southeast. IRCA diffused legal and unauthorized Mexicans from California and the southwest throughout the US, and from agriculture to construction, meatpacking, and many service jobs (CAW, 1992; Rural Migration News Blog 2020c).

The H-2A program did not expand as expected after IRCA because unauthorized workers were readily available. Instead of arranging housing for H-2A workers and paying an AEWR, farm employers could hire unauthorized workers who paid their own way to the US and found their own housing. The unauthorized share of US crop workers doubled from less than 25 percent in California to 50 percent throughout the US by the mid-1990s, and has remained at almost half in the 21st century (Martin, Mines, Diaz, 1985; NAWS).

Farmers acknowledged that half of their workers were unauthorized and encouraged Congress to approve an alternative to the H-2A program to provide them with more flexible and less costly guest workers. For example, the House Agriculture Committee in March 1996 approved a bill by Rep Richard Pombo (R-CA) that would have granted temporary work visas to 250,000 foreign farm workers at a time when DOL certified 17,000 jobs to be filled by H-2A workers "to provide a less bureaucratic alternative for the admission of temporary agricultural workers."[36]

Pombo guest workers would have received work visas in Mexico, traveled to the US and found their own housing, and "floated" from farm to farm to find work. To encourage these guest workers to leave when they could not find farm work, the US employers of Pombo guest workers were to withhold 25 percent of worker wages and forward them to a US government agency that would return the withheld wages to Pombo guest workers in their home countries.

Congress did not approve the Pombo bill and other alternative H-2A guest worker programs for several reasons, including opposition from Republicans such as Sen Alan Simpson (R-WY), the guiding force in the Senate behind IRCA, and Democrats such as Rep Romano Mazzoli (D-KY), IRCA's advocate in the House. The bipartisan Commission on Immigration Reform chaired by ex-Rep Barbara Jordan (D-TX) issued a statement in June 1995 asserting that "a large scale agricultural guest worker program...is not in the national interest...such a program would be a grievous mistake." President Clinton added: "I oppose efforts in the Congress to institute a new guestworker or 'bracero' program that seeks to bring thousands of foreign workers into the United States to provide temporary farm labor" and threatened to veto any such bill approved by Congress.

Despite Clinton's opposition, the Senate approved the Agricultural Job Opportunity Benefits and Security Act or AgJOBS (S 2337) by a 68-31 vote in July 1998.[37] This first

[36] https://migration.ucdavis.edu/rmn/more.php?id=111
[37] https://migration.ucdavis.edu/mn/more.php?id=1595

version of AgJOBS would have required DOL to maintain registries of legal US workers seeking farm jobs in farming areas, with DOL and INS cooperating to ensure that the workers were authorized to work in the US before they were registered. Farmers would request workers from the registry and, if too few were registered, DOL would certify their need for guest workers to fill any remaining jobs. AgJOBS guest workers would have received renewable 10-month visas from INS to enter the US, and employers would have paid federal social security taxes on AgJOBS worker wages into a separate fund to cover the costs of DOL and INS to administer the AgJOBS program.

There was no cap on the number of AgJOBS workers but, if the Attorney General found that a significant number of AgJOBS workers stayed in the US beyond 10 months, 20 percent of guest worker wages could have been retained and repaid at a US consulate in the country of origin as the worker surrendered his visa-ID that included a photo and biometric information. In a bid to win support from worker advocates, AgJOBS workers who did at least six months of farm work in each of four consecutive calendar years could apply for immigrant visas. The major proponent of AgJOBS, Senator Larry Craig (R-ID), said that AgJOBS would provide farmers with a "stable, predictable, legal work force that would receive good, fair, market-based compensation."

Worker advocates opposed this first version of AgJOBS, arguing that it did not require farmers to truly search for US workers before being certified to employ guest workers, that it eliminated the AEWR that protected US and foreign workers, and that farmers could offer guest workers a housing allowance rather than provide them with free housing. If a state's governor certified that there was sufficient farm worker housing in an area, AgJOBS would have allowed farmers to offer guest workers a housing allowance equivalent to "the statewide average fair market rental for existing housing for nonmetropolitan counties for the State ... based on a two-bedroom dwelling unit and an assumption of two persons per bedroom," that is, one fourth of the rent of a two-bedroom apartment or perhaps $150 to $300 a month per worker.[38]

The election of Mexican President Vincente Fox and US President George W Bush in 2000 prompted worker advocates to negotiate a revised version AgJOBS with growers. This revised AgJOBS repeated the agricultural grand bargain at the heart of IRCA, viz, legalize unauthorized farm workers and make it easier for farmers to employ guest workers. The new AgJOBS, introduced in 2003 by Senators Larry Craig, (R-ID) and Edward Kennedy, (D-MA), would have allowed unauthorized farm workers who did at least 100 days of farm work during a 12-month period in 2002-03 to become provisional legal farm workers. If they did at least 360 days of farm work during the next six years, they could become immigrants. Spouses and minor children of provisional farm workers who were in the US would not be deportable, but they could not get work visas or social safety net benefits. However, they could become immigrants when their farm worker spouse qualified for an immigrant visa by continuing to do farm work.[39]

---

[38] Most labor intensive agriculture is in metro counties. The 40th percentile fair-market monthly rent for a two-bedroom apartment varied from $1,200 in Fresno and similar central valley counties to $2,400 in Napa and Sonoma counties.

[39] https://migration.ucdavis.edu/rmn/more.php?id=778

The Craig-Kennedy AgJOBS bill would have made the H-2A program more employer friendly by ending DOL-supervised recruitment of US workers. Instead, farm employers would have attested that they needed guest workers and, if SWAs could not recruit enough local workers, the employer would be certified to recruit and employ the number of H-2A workers requested by the employer in the attestation. Employers would provide their H-2A workers with free housing or a housing allowance and the AEWR would have been frozen and studied.

The AgJOBS bill went through more revisions but its core grand bargain remained intact, viz, legalization for unauthorized farm workers and easier access to legal guest workers for employers. AgJOBS was included in the comprehensive immigration reform bill approved by the Senate in 2006, and Senator Dianne Feinstein (D-CA) became the AgJOBS champion in 2009, changing provisional legal status to Blue Card status.[40] The UFW and most farm organizations supported AgJOBS, but immigration reformers who feared that enacting only AgJOBS would block comprehensive immigration reforms persuaded the House Hispanic caucus to oppose incremental changes to immigration law such as AgJOBS for fear that enactment may slow comprehensive immigration reforms to legalize most of the unauthorized foreigners in the US.

The failure of comprehensive immigration reforms in 2006 and 2013 that involved the "whole enchilada" of legalization for most unauthorized foreigners, expanded guest worker programs, funding for more border and interior enforcement, and development assistance to tackle the root causes of unwanted migration persuaded most advocates that only incremental or piece meal immigration reforms could be enacted. However, there are still fundamental disagreements between admissionists who want to legalize most unauthorized foreigners in the US and increase legal immigration and restrictionists who want to reduce and prevent unauthorized migration and reduce legal immigration (Rural Migration News Blog, 2023a).

The current admissionist-restrictionist compromise for farm labor is the Farm Workforce Modernization Act, which was approved by the House in December 2019 and again in March 2021 with support from most Democrats and some Republicans; the FWMA re-introduced in June 2023. The FWMA would legalize unauthorized farm workers, make it easier to employ H-2A workers, and require farm employers to use E-Verify to check newly hired workers (Rural Migration News Blog, 2021).

FWMA's legalization program would allow unauthorized foreigners who did at least 180 days of farm work over the previous two years to become Certified Agricultural Workers (CAWs). CAWS would have to continue to do at least 100 days of US farm work a year to maintain their status, and their spouses and minor children in the US could receive work and residence visas and work in any industry or attend K-12 US schools. After CAWs completed four to eight more years of farm work, the CAW and his or her family could apply for immigrant visas,[41] which could lead to the legalization

[40] https://migration.ucdavis.edu/rmn/more.php?id=1466_0_4_0

[41] CAWs in the US for 10 or more years before the enactment of the FWMA could become immigrants by doing at least 100 days of farm work a year for four years; those in the US less than 10 years would have to do farm work for eight more years. CAWS could get credit for days

of perhaps 800,000 unauthorized farm workers and 1.5 million to two million family members.

FWMA would make it easier for employers to hire guest workers by granting three-year rather than the current usual maximum 10-month H-2A visa to the workers recruited by employers and allow dairies and other livestock farms that offer year-round jobs to employ up to 20,000 H-2A workers a year or 60,000 after three years. AEWRs would be set by job title rather than having one AEWR per state, a change implemented by DOL by regulation in 2023 that is opposed by many current H-2A employers, but the FWMA would freeze AEWRs for one year and limit AEWR increases while DOL and USDA studied the need for and effects of AEWRs.

With H-2A workers allowed to remain in the US for up to three years and filling both seasonal and year-round farm jobs, farm employers may recruit guest workers further afield, as in Central or South America or in Asia countries where wages are even lower than in Mexico, making it easier to attract the best workers from these sending countries. Switching from Mexican to farm guest workers from further afield could mark a return to the past; Chinese and Japanese immigrants dominated the seasonal farm workforce in the western states from the 1870s until WWI (McWilliams, 1939, 2000).

**H-2A Reforms**

The US has over 110,000 farm establishments that employ 2.5 million workers sometime during a typical year. Two million or 80 percent of these hired crop workers were born in Mexico, including 1.7 million who have settled in the US and 300,000 who have H-2A visas (Rural Migration News. 2020a). The settled Mexican-born farm workforce is shrinking as the number of H-2A workers rises, putting the US on track for 1.5 million Mexican-born settled and up to 500,000 Mexican H-2A workers by 2030. Some 12,000 or 12 percent of US farm employers are certified to employ H-2A guest workers, and H-2A workers account for a seventh of average employment on US crop farms.

Three changes could benefit H-2A employers and H-2A workers: ABC ratings that grant privileges to A-rated employers and workers, expediting the return of experienced seasonal crews, and encouraging employers who seek only a few H-2A workers to use larger entities to obtain guest workers.

First, DOL could create an ABC rating system for employers analogous to TSA pre-check that allows A-rated employers to self-certify their need for H-2A workers and their housing. H-2A workers who are returning to A-rated employers could receive multi-year visas that allow them to skip the US consulate and travel directly from their homes to their US employer. When these H-2A workers arrive at a port of entry, CBP agents can confirm the validity of the contract sent to them by their US employer to reduce opportunities for smugglers to send workers with fake contracts into the US.

Second, experienced H-2A crews could become analogous to FIFO (fly in, fly out) miners and oil field workers who live in one place and work in another, including

---

not worked due to illness, pregnancy, covid, unfair termination, severe weather and other factors.

remote areas such as the oil fields of Alaska's North Slope. FIFO labor systems allow the minimum number of trained and experienced workers to perform needed work. Applied to agriculture, this means that experienced H-2A crews could return each year to fill seasonal jobs with the opportunity to work longer-than-usual hours while in the US for shorter periods.

Third, DOL could require employers who seek only a few H-2A workers to use associations or larger FLCs to obtain H-2A workers. DOL cannot monitor the 15,000 unique farm employers who file over 20,000 applications for H-2A workers each year seeking fewer than 10 H-2A workers. The pressure on DOL to process applications quickly allows some employers (including FLCs) to develop business models that depend on violating regulations by falsifying the US work to be performed, charging or underpaying H-2A workers, and not providing required housing and other benefits. Encouraging employers who apply for less than 20 workers to use larger entities with HR and compliance units would streamline administrative procedures and add a layer of protection for workers.

These reforms would segment H-2A employers and reward good and compliant employers with less bureaucracy and experienced workers. Enforcement of H-2A regulations is necessary but not sufficient to ensure compliance with labor laws, and segmenting employers and rewarding those in compliance can be an important first step to improve protections for the growing number of H-2A workers.

**Bibliography**

Castillo, Marcelo, Philip Martin, and Zach Rutledge. 2022. The H-2A Program in 2020. USDA ERS EIB 238. August. https://www.ers.usda.gov/publications/pub-details/?pubid=104605

CAW. Commission on Agricultural Workers. 1992. Report of the Commission on Agricultural Workers. http://onlinebooks.library.upenn.edu/webbin/book/lookupname?key=United%20States.%20Commission%20on%20Agricultural%20Workers

Centro de los Derechos del Migrante. 2020. Ripe for Reform: Abuse of Agricultural Workers in the H-2A Visa Program. https://cdmigrante.org/wp-content/uploads/2020/04/Ripe-for-Reform.pdf

De Lone, Sarah. 1992. Farmworkers, Growers and the Department of Labor: The Inequality of Balance in the Temporary Agricultural Worker Program. Yale Law and Policy. https://openyls.law.yale.edu/bitstream/handle/20.500.13051/7739/11_3YaleJL_Lib100_1992_.pdf?sequence=2&isAllowed=y

GAO. 1988. The H-2A Program. Protections for US Workers. https://www.gao.gov/assets/pemd-89-3.pdf

GAO. 2017. H-2A and H-2B Visa Programs: Increased Protections Needed for Foreign Workers. https://www.gao.gov/products/gao-15-154

Hawley, Ellis. 1966. The Politics of the Mexican Labor Issue, 1950-1965. Agricultural History. Vol 40. No 3.
https://www.jstor.org/stable/3740695?seq=20#metadata_info_tab_contents

Hernández-León, Ruben. 2020. The work that brokers do: the skills, competences and know-how of intermediaries in the H-2 visa programme. Journal of Ethnic and Migration Studies.
https://www.tandfonline.com/doi/full/10.1080/1369183X.2020.1731989

Kim, Joon. 2004. The Political Economy of the Mexican Farm Labor Program, 1942-64 Aztlan: Journal of Chicano Studies.
https://www.ingentaconnect.com/content/csrc/aztlan/2004/00000029/00000002/art00003

Martin, Philip. 2019. The Role of the H-2A Program in California Agriculture. Choices. Quarter 1. www.choicesmagazine.org/choices-magazine/theme-articles/the-role-of-guest-workers-in-us-agriculture/the-role-of-the-h-2a-program-in-california-agriculture

Martin, Philip, 2014. The H-2A Program; Evolution, Impacts, and Outlook. Pp 33-62. Chapter 2 in David Griffith, Ed. (Mis)managing Migration. Guestworkers' Experiences with North American Labor Market. SAR Press. https://sarweb.org/mismanaging-migration/

Martin, Philip. 2007. Evaluation of the H-2A Alien Certification Process and the US Farm Labor Market. KRA. DOL. ETA.
https://wdr.doleta.gov/research/FullText_Documents/ETAOP_2013_04.pdf

Martin, Philip and Zach Rutledge. 2021. Proposed changes to the H-2A program would affect labor costs in the United States and California. California Agriculture. Vol 75. No 3. https://calag.ucanr.edu/archive/?article=ca.2021a0020

Martin, Philip, Edward Taylor and Philip Hardiman. 1988. California farm workers and the SAW legalization program. California Agriculture. 4-6.
https://ucanr.edu/repositoryfiles/ca4206p4-68819.pdf

Martin, Philip, Richard Mines and Angela Diaz. 1985. A profile of California farmworkers. California Agriculture. pp16-18
https://calag.ucanr.edu/archive/?type=pdf&article=ca.v039n05p16

McWilliams, Carey. 1939, 2000. Factories in the Field. The Story of Migratory Farm Labor in California. UC Press.
https://www.ucpress.edu/book/9780520224131/factories-in-the-field

Mize, Ronald. 2019. The State Management of Guest Workers: The Decline of the Bracero Program, the Rise of Temporary Worker Visas. pp 123-143 in Marinari, Maddalena, Madeline Hsu, and María Cristina García. Eds. 2019. A Nation of Immigrants Reconsidered: US Society in an Age of Restriction, 1924-1965. University of Illinois Press. www.jstor.org/stable/10.5406/j.ctv9b2wjb.

Rural Migration News Blog. 2023a. Biden and Immigration at 2.

Rural Migration News Blog. 2023b. DOL Changes AEWRs and PWRs

Rural Migration News Blog. 2021. The Farm Workforce Modernization Act. https://migration.ucdavis.edu/rmn/blog/post/?id=2576

Rural Migration News. 2020a. US Farm Employment and Farm Workers https://migration.ucdavis.edu/rmn/blog/post/?id=2435

Rural Migration News. 2020b. Mexican Braceros and US Farm Workers https://migration.ucdavis.edu/rmn/blog/post/?id=2441

Rural Migration News Blog 2020c. The CAW at 30. https://migration.ucdavis.edu/rmn/blog/post/?id=2469

San, Shmuel. 2023. Labor Supply and Directed Technical Change: Evidence from the Termination of the Bracero Program in 1964. American Economic Journal: Applied Economics, 15(1):136-63. https://sites.google.com/view/mulysan/research

US Department of Labor. Consultants Report. 1959. Mexican Farm Labor Program. https://books.google.com/books/about/Mexican_Farm_Labor_Program_Consultants_R.html?id=WaU_AfEokpIC

US House Education and Labor Committee. 2022. Second Class Workers: Assessing H2 Visa Programs Impact on Workers. July 20. https://edworkforce.house.gov/calendar/eventsingle.aspx?EventID=408422

US House Education and Labor Committee. 2008. Do federal programs ensure that US workers are recruited first before employers hire from abroad? May 6. https://www.govinfo.gov/content/pkg/CHRG-110hhrg41982/html/CHRG-110hhrg41982.htm

US House Judiciary Committee. 2011. The H-2A Visa Program: Meeting the Growing Needs of American Agriculture? April 13. https://judiciary.house.gov/committee-activity/hearings/hearing-on-the-h-2a-visa-program-meeting-the-growing-needs-of-american

US Senate Judiciary Committee. 1981. Temporary Workers. October 22. https://books.google.com/books/about/Temporary_workers.html?id=1o7CEgNuZJ4C

**Appendix: H-2A and Farm Labor Issues**

Win-win H-2A scenarios involve segmenting employers and giving privileges to A-rated employers, expediting returns of experienced crews, and favoring larger H-2A employers with compliance units to provide a second private level of worker protections for employers, especially those who need only a few H-2A workers.

Other H-2A policy issues include:

1. AEWR #1. What are the effects of the 2023 change from one AEWR per state to multiple AEWRs based on job titles? The data source used to set the AEWR depends on the occupation or job title suggested by the employer and verified by the SWA and OFLC. More job titles and AEWRs increase complexity, so the range of wages paid to workers on US farms may widen as some H-2A truck drivers are paid twice as much as H-2A crop workers. Will higher OEWS and lower FLS wages create incentives for employers to mis-classify jobs, as with calling truck drivers ag equipment operators? Can SWAs and DOL detect such mis-classification? Will higher OEWS wages attract more US workers?

2. AEWR #2. The purpose of the AEWR is to prevent H-2A workers from adversely affecting US workers, but the relationship between the 80-85 percent US and 15-20 percent H-2A workers is not well understood. H-2A and US workers in corresponding employment must be treated equally in wages and benefits, but how do AEWRs, housing, transportation, and other benefits provided to H-2As affect the employment and wages of US workers? Do employers favor US workers to avoid these costs, or do employers favor H-2A workers for their higher productivity and labor insurance? Do rising AEWRs pull up or depress the hourly wages of US workers? What about hours worked and seasonal earnings: are farms developing a core of US workers and relying on FLCs to bring supplemental H-2As workers to their farms? Do employers keep H-2A and US workers separate in different crews or combine them?

3. AEWR #3. Farm employers must offer and pay the highest of four wages, the federal or state minimum wage, the Adverse Effect Wage Rate (AEWR), the prevailing wage rate (PWR), or the wage negotiated in a collective bargaining agreement (CBA) that covers the jobs being offered. There are few CBAs or PWRs, making the AEWR (higher than minimum wages) the major wage protection for H-2A and US workers. Many worker advocates want DOL to set PWRs for more or all farm jobs, arguing that many farm jobs pay piece rate wages, such as $30 to pick a bin of apples. If the AEWR rises but the piece rate does not, workers must work harder to earn the AEWR, which could drive aging US workers whose productivity is declining out of the farm workforce.

   The AEWR is the mean hourly earnings of directly hired crop and livestock workers from the year before. The mean wage is higher than the median wage because minimum wage laws put a floor under wages as high earning workers pull up the mean wage. In SSA data, the mean annual earnings in 2022 were $60,000 while median annual earnings were $40,000.[42]

---

42 https://www.ssa.gov/oact/cola/central.html#:~:text=The%20reason%20for%20the%20difference,wage%20level%20is%20highly%20skewed.&text=Median%20net%20compensation%20is%20estimated.

4. Fissuring. Many sectors of the US labor market are fissuring, which means that a core team of directly hired employees is supplemented by workers who are employed as farm labor contractors to perform specific and often seasonal tasks. Competition between FLCs can reduce wages and labor costs, and some FLCs turn money-losing commission arrangements with employers into profits by cheating workers or the government. There are many mechanisms, including underpaying workers and evading payroll taxes. How widespread are such violations, and how can labor laws be enforced in fissured labor markets?

5. Housing. The FWMA would allow farm employers under some circumstances to provide a housing allowance to H-2A workers who would find their own housing and transportation to work. How would housing allowances function for H-2A workers? Would the employer who recruited H-2A workers recommend local housing and transport arriving H-2A workers to this housing? Would H-2A housing providers be licensed to house and transport farm workers? Would there be joint liability between farm employers and housing and transport providers?

6. Visa Portability. The FWMA would establish a pilot program to allow 10,000 foreigners to enter the US and work only in agriculture. The EU and a few other free-movement areas have visa portability (EU citizens do not need visas to enter and work in another member state), but governments have normally made employers who recruit low-wage migrant worker responsible for compliance with employment, housing, and other obligations.

   Sponsorship abuse in the Gulf countries and elsewhere has led to proposals for visa portability, but how would visa portability work in practice? Could employer-paid fees be divided into monthly increments so that the original employer does not have to recoup one-time fees that are paid upfront from subsequent employers? What happens to guest workers who leave one employer but cannot find another employer, that is, how long could migrants workers be unemployed between jobs, and what services could they access while unemployed?

7. Year-round Jobs. The H-2 program allows US employers to hire seasonal guest workers to fill seasonal US jobs, generally defined as lasting up to 10 months. The FWMA would allow 20,000 H-2A workers a year to fill year-round farm jobs in dairies and other establishments, so there could be 60,000 H-2A workers in year-round jobs after three years. These H-2A workers would be allowed to stay for up to three years, and their employers would have to offer them housing for the workers and their families and an annual trip home.

   Many countries have probationary immigrant programs for semi-skilled workers in meatpacking or those who provide elder and child care. For example, Canada allow such guest workers and/or their employers to seek immigrant visas after several years of satisfactory work. How could such a program operate in US animal agriculture, and with what effects on the 400,000+ US workers who currently fill the average 265,000 US animal agriculture jobs, including 40 percent in US dairies?

**Appendix 2: Other Scenarios**

There are several other farm labor scenarios, including updating H-2A issues and exploring alternatives to US hand workers in selected commodities, labor law enforcement in agriculture, and new farm labor challenges.

1. H-2A update: The FY24 H-2A data show that almost 15,000 employers were certified to fill 385,000 farm jobs with H-2A workers. An H-2A update could deal with the structure of H-2A employment, including the roles of FLCs and comparisons between the share of large H-2A employers in total H-2A employment and the share of large farm employers in all US ag employment based on 2022 census of ag and QCEW data.

   In FY22, 12,200 unique employers were certified to fill almost 372,000 seasonal farm jobs with H-2A workers in FY22, an average of 32 each; many employers file several applications, so the average certification is for 20 H-2As. However, the five percent of H-2A employers (around 620), each certified for 100 or more H-2A workers, accounted for two-thirds of all H-2A jobs in FY22, an average 400 each. The 115 employers who were each certified to hire 500 or more H-2A workers accounted for 40 percent of all H-2A jobs certified, an average of 1,300 each. DOL analysts spend most of their time processing applications from employers who are certified for less than 10 workers and collectively account for eight percent of total H-2A certifications

2. Alternatives to US Workers: Fresh Fruits and Vegetables. How do interactions between machines, migrants, and imports determine how fresh fruits and vegetables adjust to rising labor costs? There are likely to be differences in how commodities adjust to rising labor costs, including faster mechanization in raisin grapes, H-2A workers serving as a bridge to robots in apples and strawberries, and shrinking US production and rising imports of tomatoes and melons.

3. Labor law enforcement. DOL's WHD investigates about 1,000 farms a year and finds violations of labor laws on two-thirds of the farms investigated: ¾ of the fines assessed by WHD are for violations of H-2A regulations. WHD data highlight bad apples: the five percent of employers with the most violations account for half to three fourths of all violations found in particular commodities or NAICS codes such as apples, berries, or among FLCs. Is there a way to segment compliant and non-compliant employers and look for lessons from food safety regulations to develop private sector mechanisms to improve labor law compliance?

4. New Challenges. Many factors are reshaping the farm labor market, including Controlled Environment Agriculture (CEA) that produces especially fresh vegetables near consumers and offers year-round jobs, private efforts such as EFI and the ethical charter to improve labor law compliance in the fresh produce supply chain, and the changing availability of water and other climate-related issues that affect farm production and the employment of hired workers. How do these emerging issues determine the demand for and characteristics of farm workers?