



**Digital Commons@**  
Loyola Marymount University  
LMU Loyola Law School

## Loyola of Los Angeles International and Comparative Law Review

---

Volume 45 | Number 1

Article 2

---

Fall 3-22-2022

### Strengthening Immigration Support for Agricultural Labor Migration and Ending Modern Day “Harvest of Shame” A Comparative Study of the American and Australian Approaches

Dr. Ying Chen  
*University of New England School of Law*

Follow this and additional works at: <https://digitalcommons.lmu.edu/ilr>



Part of the [Agriculture Law Commons](#), and the [Immigration Law Commons](#)

---

#### Recommended Citation

Dr. Ying Chen, *Strengthening Immigration Support for Agricultural Labor Migration and Ending Modern Day “Harvest of Shame” A Comparative Study of the American and Australian Approaches*, 45 Loy. L.A. Int'l & Comp. L. Rev. 19 (2022).

Available at: <https://digitalcommons.lmu.edu/ilr/vol45/iss1/2>

This Article is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles International and Comparative Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact [digitalcommons@lmu.edu](mailto:digitalcommons@lmu.edu).

# Strengthening Immigration Support for Agricultural Labor Migration and Ending Modern Day “Harvest of Shame” A Comparative Study of the American and Australian Approaches

BY DR. YING CHEN\*

I.	INTRODUCTION .....	21
II.	THE SILENT STRUGGLE AND THE IMPORTANCE OF AGRICULTURAL LABOR REFORM.....	23
III.	THE AMERICAN APPROACH .....	27
	A. <i>Temporary visa scheme for migrant farmworkers</i> .....	27
	1. America’s early attempts to bring in temporary farmworkers from abroad.....	27
	2. The H-2A visa program.....	29
	i. The strengths of the H-2A visa.....	29
	ii. The weaknesses of the H-2A visa .....	30
	(1) Visa application process.....	30
	(2) The power imbalance between agricultural employers and migrant workers .....	33
	iii. Mitigating the H-2A limitations .....	35
	(1) H-2A expansion .....	36
	(2) Streamlining and simplifying the H-2A visa application process.....	37
	(3) Redressing the power imbalance.....	38
	(i) Re-aligning the temporary worker visa scheme by looking at the Australian	

---

\*Dr. Ying Chen, Senior Lecturer, Chair of International Committee, University of New England School of Law, Armidale, NSW, 2351, Australia. Email: ychen56@une.edu.au. The author would like to thank Professor Michael Adams, Head of UNE Law School, for his continuous encouragement and support. The author is also grateful to Ms. Carlie Drew and Associate Professor Guy Charlton for their extremely helpful suggestions. The responsibility for any oversights or mistakes remains mine alone.

	practice .....	38
	(ii) Other solutions .....	39
	B. <i>A pathway to permanent residency</i> .....	40
IV.	THE AUSTRALIAN APPROACH .....	43
	A. <i>Labor use in Australian agriculture</i> .....	43
	B. <i>Temporary visa options for migrant farmworker</i> .....	44
	1. The Options .....	44
	2. The Merits of the Australian Approach .....	49
	C. <i>Amnesty for undocumented farmworkers: a rejected proposal</i> .....	51
V.	PROPOSED IMMIGRATION REFORMS .....	52
	A. <i>The United States</i> .....	52
	B. <i>Australia</i> .....	54
VI.	CONCLUSION .....	55

*Abstract:* Both the United States and Australia rely extensively on migrant farmworkers, specifically those without lawful working permits, to meet their labor demands. This excessive dependence sparks debate over the effectiveness of immigration policies in safeguarding access to, and the sustainability of, the agricultural workforce. It also raises human rights concerns as migrant farmworkers often face a myriad of dangers and injustices on the job. In particular, undocumented farmworkers remain largely marginalized and exploited, but they are not entitled to full rights under the law, and they are reluctant to speak up against abusive labor practices due to their immigration status and the fear of detention and deportation.

This Article aims to identify feasible immigration solutions for the United States and Australia to strengthen their short-term and long-term agricultural workforce, and to uphold migrant farmworkers' rights. Part II of the Article reveals migrant farmworkers' silent struggle and discusses the importance of agricultural labor reform. Part III and Part IV compare the two immigration systems and their respective responses to the workforce and human rights issues associated with the use of migrant farmworkers. The comparison primarily focuses on the H-2A visa program and the 2021 agricultural labor bill in the United States, as well as the temporary visa schemes and the amnesty proposal in Australia. The Article acknowledges the merits of the two immigration systems, but argues that weaknesses prevail in some aspects. The United States and Australia should look at each other's practices and re-align their immigration policies so that they both create effective immigration systems that ensure the short-term and long-term agricultural workforce, and protect migrant

farmworkers' human rights. A brief conclusion re-emphasizes the importance of agricultural labor reform and highlights remaining concerns regarding the reform.

## I. INTRODUCTION

The United States and Australia are two major agricultural producers and exporters in the world.<sup>1</sup> Their agricultural sectors make vital contributions to their respective economies.<sup>2</sup> However, they both rely heavily on migrant farmworkers,<sup>3</sup> specifically those without lawful working permits (“undocumented farmworkers”),<sup>4</sup> to meet labor demands. In the United States, migrant farmworkers account for 73% of its total agricultural workforce, and approximately half of the workforce are undocumented.<sup>5</sup> Similarly, in Australia, migrant farmworkers make up more than half of the workforce employed on crop farms,<sup>6</sup> and undocumented farmworkers compose close to one third of the total agricultural workforce.<sup>7</sup>

1. See generally Matthew Howden & Kirk Zammit, *Analysis of United States and Australian Agriculture – A Comparison*, AUSTL. BUREAU AGRIC. RES. ECON. & SCI., Sept. 2019, at 1, 3.

2. OECD, *The Role of Agriculture in the U.S. Economy*, in EVALUATION OF AGRIC. POL'Y REFORMS IN THE UNITED STATES 14 (2011); see also Wen Wu et al., *The Future of Australia's Agricultural Workforce*, CSIRO DATA 61, at 1 (2019) (noting that “[t]he Australian agricultural sector plays a crucial role in the national economy”).

3. Press Release, Zoe Lofgren, House of Representatives, Summary of the Farm Workforce Modernization Act, at 1 (Mar. 3, 2021), <https://www.lofgren.house.gov/sites/lofgren.house.gov/files/3.3.21%20-%20Farm%20Workforce%20Modernization—Two%20Pager.pdf> [hereinafter FWMA Summary] (noting that “[d]ue to the diminishing supply of U.S. workers willing to perform [...] [agricultural work], [the American farms] are increasingly dependent on foreign workers to meet labor demands. Without foreign workers, many U.S. farms will go out of business, causing a ripple effect in our economy and increasing our reliance on imported food.”); see generally Diane van den Broek et al., *Pro-Market Governance, Migration Status and Worker Vulnerability: The Case of Australian Horticulture*, ECON. & INDUS. DEMOCRACY, 7 (2019).

4. Matthew J. Mittelstadt, Note, *The Silent Crimes: Abuse of Central American Migrants in Mexico and Possible Reform Measures*, 34 ARIZ. J. INT'L & COMPAR. L. 253, 274 (2017) (noting that “agricultural work in the United States is considered an industry heavily dependent on illegal immigration”); John Azarias et al., *National Agricultural Workforce Strategy: Learning to Excel*, NAT'L AGRIC. LAB. ADVISORY COMM., 2020, at 206, <https://www.agriculture.gov.au/sites/default/files/documents/national-agricultural-workforce-strategy.pdf> [hereinafter *Learning to Excel*] (noting that the number of undocumented farmworkers in Australia ranges from 60,000 to 100,000).

5. *Farm Labor*, USDA ERS, <https://www.ers.usda.gov/topics/farm-economy/farm-labor/> (last updated Aug. 18, 2021) (noting that “[i]n 2014-16, 27 percent of crop farmworkers were U.S. born, 4 percent were immigrants who had obtained U.S. citizenship, 21 percent were other authorized immigrants (primarily permanent residents or green-card holders), and the remaining 48 percent held no work authorization.”).

6. Peter Martin et al., *Labour Use in Australian Agriculture*, AUSTL. BUREAU AGRIC. RES. ECON. & SCI. 1, Dec. 2020, at 1.

7. *Learning to Excel*, *supra* note 4, at 206 (noting that the number of undocumented workers in Australia ranges from 60,000 to 100,000); see also *Agricultural Workforce*, AUSTL. GOV'T DEP'T OF AGRIC., WATER, & ENV'T, (Jun. 10, 2021), <https://www.agriculture.gov.au/ag-farm->

This excessive dependence on undocumented farmworkers sparks debate about the effectiveness of immigration policies in safeguarding the accessibility and sustainability of the agricultural workforce.<sup>8</sup> Researchers and practitioners, such as Collins<sup>9</sup> and Davis,<sup>10</sup> argue that an immigration system is broken when it fails to accommodate labor needs with authorized migrants; reform is desperately needed so that the system can create a stable workforce and “provide legal opportunities for migration.”<sup>11</sup> Another concern is that migrant farmworkers often face a myriad of dangers and injustices on the job in both countries. Particularly, undocumented farmworkers are most vulnerable to abusive labor practices;<sup>12</sup> they suffer from wage theft,<sup>13</sup> and are exposed to dangerous working conditions,<sup>14</sup> sexual harassment,<sup>15</sup> and other mistreatment.<sup>16</sup> But, because they are not entitled to full rights under the law,<sup>17</sup> they are reluctant to report mistreatment predominantly due to their immigration status and fear of detention and deportation.<sup>18</sup> Although governments in the United States and Australia have attempted to solve these issues by adjusting their immigration policies, their agricultural sectors still struggle

---

food/agricultural-workforce (“The Australian agriculture sector employed about 334,000 people [...] in 2019-2020”).

8. See generally Alexander Reilly & Joanna Howe, *Australia’s Future Horticultural Workforce: Assessing the Agricultural Visa Concept*, 84 J. POL. ECON. 90 (2020).

9. See generally LAURA COLLINS, SOLUTIONS FOR THE UNDOCUMENTED 1 (2021), <https://www.gwbcenter.imgix.net/Publications/Resources/Immigration/gwbi-immigration-white-papers-undocumented.pdf>.

10. Brandon E. Davis, *Immigration and Other Political Issues: The Changing Face of Employment Law*, in THE IMPACT OF RECENT REGULATORY DEVELOPMENTS IN EMPLOYMENT LAW 29 (2015) (noting that “[e]mployers generally agree America’s immigration system is broken. This is because numerous employers break employment laws by hiring undocumented workers.”).

11. COLLINS, *supra* note 9, at 6.

12. Joseph S. Guzmán, *State Human Trafficking Laws: A New Tool to Fight Sexual Abuse of Farmworkers*, 46 COLUM. HUM. RTS. L. REV. 288, 298 (2015).

13. See generally Lezlie Green Coleman, *Procedural Hurdles and Thwarted Efficiency: Immigration Relief in Wage and Hour Collective Actions*, 16 HARV. LATINO L. REV. 1 (2013) (noting that undocumented workers are subject to wage theft).

14. See, e.g., Elizabeth Lincoln, *Accountability for Pesticide Poisoning of Undocumented Farmworkers*, 24 HASTINGS ENVTL. L.J. 383, 383 (2018) (noting that “[t]he illness burden experienced by farmworkers from exposure to pesticides is unparalleled in any other workforce in the United States.”).

15. Guzmán, *supra* note 12, at 288-324; see also Julie Solis-Alvarado, Note, *From Fields of Opportunity to Fields De Calzones: Workplace Sexual Violence in America’s Agricultural Industry*, 25 DRAKE J. AGRIC. L. 293, 299 (2020).

16. Guzmán, *supra* note 12, at 298 (other mistreatment includes, e.g., debt bondage, and exclusion from federally funded legal services in the United States).

17. Maria L. Ontiveros, *Lessons from the Fields: Female Farmworkers and the Law*, 55 ME. L. REV. 157, 183 (2003).

18. Osuna, *supra* note 17, at 161 (noting that in the United States, “undocumented workers live with the constant risk of being deported.”); see also *Learning to Excel*, *supra* note 4, at 190.

with ongoing labor shortages, and undocumented farmworkers continue to suffer constant and horrific human rights violations.<sup>19</sup>

The purpose of this Article is to identify feasible immigration solutions for the United States and Australia to strengthen their short-term and long-term agricultural workforce, and to uphold migrant farmworkers' rights. Part II of the Article reveals migrant farmworkers' silent struggle and discusses the importance of agricultural labor reform. Part III and Part IV compare the immigration systems between both countries and their respective responses to the workforce and human rights issues associated with migrant farmworkers. The comparison primarily focuses on the H-2A visa program and the 2021 agricultural labor bill (Farm Workforce Modernization Act of 2021)<sup>20</sup> in the United States, as well as the temporary visa schemes and the amnesty proposal in Australia.<sup>21</sup> Part V of the Article acknowledges the merits of the two systems but argues that weaknesses prevail in some aspects. The United States and Australia should look at each other's practices and re-align their immigration policies so that they both create effective immigration systems that support the short-term and long-term agricultural workforce, and also protect migrant farmworkers' human rights. A brief conclusion re-emphasizes the importance of agricultural labor reform and highlights remaining concerns regarding the proposed reform.

## II. THE SILENT STRUGGLE AND THE IMPORTANCE OF AGRICULTURAL LABOR REFORM

Agricultural work requires long hours in fields in almost all weather conditions.<sup>22</sup> It is physically demanding work and often extremely dangerous.<sup>23</sup> Farmworkers are susceptible to serious injury, illness, and even

---

19. Stephen Clibborn, *Why Undocumented Immigrant Workers Should Have Workplace Rights*, 26 ECON. LAB. REL. REV. 465, 466 (2015) (arguing that Australia's approach of excluding undocumented immigrant workers from employment law is failing and is exposing these workers to harm); see also COLLINS, *supra* note 9, at 1 (noting that in the United States, "immigration policy has been reformed at the margins, with executive orders filling in where legislation has been desperately needed"); *Learning to Excel*, *supra* note 4, at 190 (noting that "undocumented workers are at [the] highest risk of exploitation").

20. Farm Workforce Modernization Act, H.R. 1603, 117th Cong. (2021).

21. *Learning to Excel*, *supra* note 4, at xiv.

22. CLETUS E. DANIEL, BITTER HARVEST: A HISTORY OF CALIFORNIA FARMWORKERS 1870-1941, 25-26 (1981).

23. John Hoddinott, *Agriculture, Health, and Nutrition: Toward Conceptualizing the Linkages*, in RESHAPING AGRIC. FOR NUTRITION & HEALTH 16 (Shenggen Fan & Rajul Pandya-Lorch eds., 2012).

death<sup>24</sup> from operating heavy farm machinery and equipment, and from exposure to pesticides, fertilizers, and other chemicals.<sup>25</sup> Despite the high occupational hazards and risks, farmworkers in the United States and Australia are not well compensated in terms of wages and other employment benefits.<sup>26</sup> Thus, the domestic labor force has little interest in taking up agricultural work.<sup>27</sup> Migrant workers, particularly the undocumented,<sup>28</sup> on the contrary, are willing to accommodate long-working hours and low wages in poor working conditions.<sup>29</sup>

Despite their commitment to agriculture, migrant farmworkers face a power imbalance in the workplace.<sup>30</sup> For example, some of those workers depend solely on their employers for salaries, accommodation, transportation, and the right to work and live in the country,<sup>31</sup> and this excessive reliance prevents them from asserting their employment rights.<sup>32</sup>

---

24. Margaret Shikibu, *Work Like a Dog: Expanding Animal Cruelty Statutes to Gain Human Rights for Migrant Farmworkers in the U.S.*, 71 NAT'L LAW. GUILD REV. 44, 44–45 (2014) (noting that “death is not all that unusual in the U.S. . . . Farm work is [America’s] second most dangerous occupation.”); see also *Agricultural Safety*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/niosh/topics/aginjury/default.html> (last updated Oct. 5, 2020).

25. Beth Lyon, *Farm Workers in Illinois: Law Reforms and Opportunities for the Legal Academy to Assist Some of the State’s Most Disadvantaged Workers*, 29 S. ILL. U. L.J. 263, 264–65 (2005) [hereinafter “*Farm Workers in Illinois*”] (noting that “[a]gricultural labor is an extremely dangerous and low-paying occupation,” and that “[i]n addition to experiencing higher fatality rates, agricultural workers suffer many occupational diseases relating specifically to pesticides, fertilizers, and general growing conditions”); see also *Farmers, Ranchers, and Other Agricultural Managers*, U.S. BUREAU OF LAB. STAT, <https://www.bls.gov/ooh/management/farmers-ranchers-and-other-agricultural-managers.htm#tab-3> (last modified Apr. 9, 2021) (noting that “[t]ractors, tools, and other farm machinery and equipment can cause serious injury, and exposure to substances in pesticides and fertilizers may be harmful”).

26. *Farm Workers in Illinois*, *supra* note 25, at 266; see also *Learning to Excel*, *supra* note 4, at 189 (noting that undocumented farmworkers are susceptible to exploitation, including underpayment).

27. Michael S. Shaddix, Comment, *USDA Certified Legal Producers: A Program to Give Consumers a Voice and a Choice in Immigration Reform*, 21 SAN JOAQUIN AGRIC. L. REV. 291, 300 (2012) (noting that “domestic labor force is unwilling to work long hours, for low wages, in dirty and dangerous work”).

28. *E.g.*, Solis-Alvarado, *supra* note 15, at 300-02 (noting that while most undocumented workers have limited English language skills and education attainment, agriculture is one of the few labor-intensive sectors overseas workers could work in without specific qualification or further education).

29. *E.g.*, *Learning to Excel*, *supra* note 4, at 189 (noting that undocumented workers are also widely used in Australian horticulture).

30. Guzmán, *supra* note 12, at 298.

31. *Id.*

32. *Id.*; see also Julia Jagow, Comment, *Dairy Farms and H-2A Harms: How Present Immigration Policy is Hurting Wisconsin and Immigrant Workers*, 2019 WIS. L. REV. 1269, 1285-86 (2019) (noting that “[e]mployers can easily take advantage of H-2A workers because the standards for treatment of guest workers are lower than for U.S. workers, because guest workers have inherent forced loyalty, and because regulations governing H-2A are poorly enforced”).

Additionally, migrant farmworkers, working in an unfamiliar foreign country, tend to lack basic knowledge of legal rights and legal process, hindering their ability to seek remedies.<sup>33</sup> As for undocumented farmworkers, their existence in the country is in contravention of immigration law,<sup>34</sup> which often results in additional vulnerabilities.<sup>35</sup> They are subject to dangerous work environments with substandard employment conditions,<sup>36</sup> inhumane treatment,<sup>37</sup> sexual abuse,<sup>38</sup> wage theft,<sup>39</sup> and other mistreatment.<sup>40</sup> However, they are unable to speak up against abusive labor practices due to the fear of detention and deportation.<sup>41</sup> In the United States, the most fundamental difference between documented and undocumented farmworkers, as Guzmán asserts, is that the latter always “live with the ever-present fear of deportation,”<sup>42</sup> and they are forced to put up with labor exploitation and abuse.<sup>43</sup> Australia also witnesses appalling employment violations targeted at undocumented farmworkers.<sup>44</sup> According to a 2020 report released by the Australian Government, undocumented farmworkers “are at highest risk of exploitation, due to the fact that they are unlikely to report mistreatment for fear of losing their [...] ability to stay in Australia.”<sup>45</sup> Furthermore, the legal protection of employment rights in both countries are conditioned upon a worker’s immigration status.<sup>46</sup> In the United States, a significant body of law excludes unauthorized migrant workers “from a range of employment

---

33. Solis-Alvarado, *supra* note 15, at 301 (noting “[n]on-English speaking workers are regularly unaware of protective laws and their rights as victims of sexual violence”).

34. Beth Lyon, *Changing Tactics: Globalization and the U.S. Immigrant Workers Rights Movement*, 13 UCLA J. INT’L L. & FOREIGN AFF. 161, 190 (2008) [hereinafter Lyon, *Changing Tactics*]; see also Shikibu, *supra* note 24, at 45, 56 (noting that undocumented farmworkers’ worst fear is not the dirty, dangerous, physically demanding, and low paying work they perform on a daily basis, but “the deep-rooted societal animus towards them” stemming from “the widespread public disapproval of illegal immigration”).

35. *Learning to Excel*, *supra* note 4, at 55 (noting that “undocumented employment creates high risk of labour exploitation”).

36. *Id.*

37. Shaddix, *supra* note 27, at 298.

38. Guzmán, *supra* note 12, at 290–91.

39. Jagow, *supra* note 32, at 1283 (noting that twenty-eight percent of undocumented farmworkers in the dairy industry reported wage theft).

40. *Id.* at 1282 (such as debt bondage).

41. Ontiveros, *supra* note 17, at 161; see also Guzmán, *supra* note 12, at 299 (noting that “[m]ultiple outlets report testimony from farmworkers regarding their fear of deportation”).

42. Guzmán, *supra* note 12, at 298; see also *Farm Workers in Illinois*, *supra* note 25, at 277 (noting that “many worker rights protections are conditioned upon [...] immigration status”).

43. Guzmán, *supra* note 12, at 299.

44. *Learning to Excel*, *supra* note 4, at 190.

45. *Id.*

46. *Farm Workers in Illinois*, *supra* note 25, at 277; Clibborn, *supra* note 19, at 466.

protections.<sup>47</sup> For example, the 2002 United States Supreme Court decision in *Hoffman Plastic Compounds v. NLRB* denied an award of back pay remedy to an undocumented worker.<sup>48</sup> Similarly, in Australia, undocumented workers are not covered by the eleven minimum entitlements of the National Employment Standards;<sup>49</sup> they are not entitled to full rights and protections under employment laws.<sup>50</sup> Undocumented farmworkers, excluded from the legal system, are unable to protect themselves from being exploited and abused by unscrupulous employers.<sup>51</sup>

Migrant farmworkers, many of whom are undocumented, have been struggling in silence.<sup>52</sup> Nevertheless, they make up a substantial component of the agricultural workforce in both the United States and Australia.<sup>53</sup> They perform essential services to keep people fed;<sup>54</sup> they power the agricultural economies.<sup>55</sup> Without their hard work, hundreds of millions of people would go hungry and economies would shrink.<sup>56</sup> Thus, strengthening immigration support for migrant farmworkers, including

47. *Farm Workers in Illinois*, *supra* note 25, at 277; *see also* Ontiveros, *supra* note 17, at 183.

48. *Hoffman Plastic Compounds, Inc. v. Nat'l Lab. Rels. Bd.*, 535 U.S. 137, 141–42 (2002); Shikibu, *supra* note 24, at 49 (noting that “[s]ince the *Hoffman* decision, unauthorized workers are no longer entitled (as their authorized co-workers are) to the vital remedy of back pay, even if they are terminated in retaliation for having engaged in protected practices. In essence, the decision issued employers a de facto ‘invitation to ignore the law’”); *see also* Christopher David Ruiz Cameron, *Borderline Decisions: Hoffman Plastic Compounds, the New Bracero Program, and the Supreme Court’s Role in Making Federal Labor Policy*, 51 UCLA L. REV. 1 (2003).

49. *Fair Work Act 2009* (Cth), s 61(2) (Austl.) (The eleven minimum entitlements of employment standards are maximum weekly hours, requests for flexible working arrangements, offers and requests for casual conversion, parental leave and related entitlements, annual leave, personal/carer’s leave and compassionate leave, community service leave, long service leave, public holidays, notice of termination and redundancy pay, and Fair Work Information Statement).

50. Clibborn, *supra* note 19, at 465.

51. *Id.*; *Farm Workers in Illinois*, *supra* note 25, at 277.

52. Solis-Alvarado, *supra* note 15, at 300 (“Perpetrators and employers alike prey on victim’s vulnerable lack of immigration status as a way to induce the victim to keep quiet, which permits perpetrators to continue abusing undocumented workers.”); *Learning to Excel*, *supra* note 4, at 190.

53. Van den Broek, *supra* note 3, at 7 (noting that in Australia, the segments of the horticulture industry that are characterized by seasonal production produce jobs that are primarily undertaken by temporary migrant workers); *Farm Labor*, *supra* note 5 (describing that under 20% of hired crop farmworkers in the United States are migrant workers—meaning that they do not work within 75 miles of their home).

54. Press Release, Zoe Lofgren, House of Representatives, Lofgren, Newhouse Introduce the Farm Workforce Modernization Act of 2021 (Mar. 3, 2021), <https://www.lofgren.house.gov/media/press-releases/lofgren-newhouse-introduce-farm-workforce-modernization-act-2021> [hereinafter Lofgren Newhouse Introduction] (noting that undocumented farmworkers “feed the nation”).

55. Joseph Marin, Note, *What Is “Agricultural” Anyway: A Closer Look at the H-2A and H-2B Loophole*, 45 J. CORP. L. 557, 562 (2020) (noting that “[S]tudies have shown that immigrants working in the United States help the agricultural economy”).

56. Lofgren Newhouse Introduction, *supra* note 52 (noting that “[s]tabilizing the workforce will protect the future of our farms and our food supply”).

the undocumented who have worked in this industry for years, is an economic and moral imperative.<sup>57</sup> Effective immigration reforms are urgently needed to secure a strong and sustainable workforce for the agricultural industry, and to protect and promote migrant farmworkers' employment rights.

Some scholars argue that amending existing employment laws (as distinct from immigration reform) is also an enforceable alternative to protect migrant workers from labor abuse and exploitation.<sup>58</sup> This Article acknowledges the merits of employment law reform. Nevertheless, such an approach on its own fails to address the co-existing workforce issues. Thus, this Article will not investigate this alternative.

### III. THE AMERICAN APPROACH

The United States immigration policies on farm labor encompass both short and long-term solutions: the existing temporary visa measure (H-2A) that helps fill the short-term labor shortages,<sup>59</sup> and a bill (Farm Workforce Modernization Act of 2021)<sup>60</sup> that aims to provide a pathway to permanent residency for migrant farmworkers, including those who do not have legal status but have worked in agriculture for a number of years. The following discussion assesses the merits and limitations of the American approach.

#### *A. Temporary visa scheme for migrant farmworkers*

##### 1. America's early attempts to bring in temporary farmworkers from abroad

The American reliance on migrant farmworkers can be traced back to the end of the nineteenth century;<sup>61</sup> however, the first temporary labor migration program was not formally introduced until almost half a

---

57. See generally COLLINS, *supra* note 9 (arguing undocumented farmworkers who have worked in the country for years should be given the opportunity to obtain legal status).

58. E.g., Clibborn, *supra* note 19, at 468 (suggesting that Australia's Fair Work Act "should be amended to ensure that undocumented immigrant workers benefit from the same minimum employment standards and protections as Australian citizens").

59. For more details regarding the H-2A visa, see *H-2A Temporary Agricultural Workers*, <https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-2a-temporary-agricultural-workers>.

60. H.R. 1603, § 1.

61. Shaddix, *supra* note 27, at 294–95 (noting that "[t]he need for a substantial, seasonal, temporary and low-cost labor force has been evident since United States farmers began producing crops for community consumption toward the end of the 19th century").

century later.<sup>62</sup> In 1942, for the first time in its history, the United States launched a major temporary farm worker program, the bilateral Bracero Program, with Mexico to address chronic labor shortages,<sup>63</sup> particularly in the agricultural sector.<sup>64</sup> Over the following two decades, this program successfully supplied the American agriculture industry with millions of temporary farmworkers from Mexico.<sup>65</sup>

Even after the end of the Bracero program in 1964, the American agricultural sector has continued to bring in migrant farmworkers, predominantly from Mexico, through the H-2 visa.<sup>66</sup> This visa was originally designed to address labor shortages across all sectors in the United States.<sup>67</sup> Nonetheless, different sectors had differing labor demands, with the agricultural industry facing the worst labor crisis.<sup>68</sup> To ensure an adequate supply of farmworkers, the 1986 Immigration Reform and Control Act (IRCA)<sup>69</sup> abolished the broad-sweeping H-2 visa;<sup>70</sup> instead, it created two sub-classifications: the H-2A visa specifically for the agricultural industry, and the H-2B visa for non-agricultural industries.<sup>71</sup> Since its implementation, the H-2A visa has provided a labor solution to American agricultural businesses and helped fill temporary and seasonal agricultural positions by bringing migrant workers into the country.<sup>72</sup> This visa program remains in force to this date, but faces much criticism from

---

62. Bill Ong Hing, *Immigration Policy: Thinking Outside the (Big) Box*, 39 CONN. L. REV. 1401, 1422-23 (2007).

63. See *id.* at 1422; Robert Russo, *Collective Struggles: A Comparative Analysis of Unionizing Temporary Foreign Farm Workers in the United States and Canada*, 41 HOUS. J. INT'L L. 5, 22-23 (2018) (noting that the Bracero Program is generally recognized as America's first major temporary farmworker program, although Mexican farmworkers had a much longer history of working on American farms).

64. Laura Massie, Note, *Workers of the World, Unite?: Politics of Guestworker Protection and U.S. Worker Protection in the Current U.S. Guestworker Debate*, 15 GEO. J. ON POVERTY L. & POL'Y 315, 317 (2008); see also Dennis J. Loiacono & Jillian Maloff, Note, *Be Our Guest: Synthesizing a Realistic Guest Worker Program as an Element of Comprehensive Immigration Reform*, 24 HOFSTRA LAB. & EMP. L.J. 111, 113 (2006); see also Shaddix, *supra* note 27, at 295; Hing *supra* note 62, at 1425.

65. Russo, *supra* note 63, at 22 (noting that “[f]rom 1942-1964, the United States acquired a large amount of Mexican farm labour through the Bracero Program”); see also Shaddix, *supra* note 27, at 295 (noting that the Bracero program, in addition to providing important jobs to Mexicans “at a greater pay rate than they would receive in Mexico,” provided American agricultural businesses with much needed temporary farm workers at a relatively low cost).

66. Shaddix, *supra* note 27, at 295.

67. Russo, *supra* note 63, at 24-25.

68. Marin, *supra* note 55, at 558.

69. Immigration Reform and Control Act of 1986, 8 U.S.C. § 1101.

70. Marin, *supra* note 55, at 558.

71. Marsha Chien, *When Two Laws Are Better Than One: Protecting the Rights of Migrant Workers*, 28 BERKELEY J. INT'L L. 15, 19 (2010); see also Russo, *supra* note 61, at 25.

72. Marin, *supra* note 55, at 558.

migrant advocacy groups.<sup>73</sup> The following Part examines the strengths and weaknesses of the H-2A visa program, and proposes several enforceable solutions to improve its efficiency.

## 2. The H-2A visa program

### (i) The strengths of the H-2A visa

The strengths of the H-2A visa program are threefold. To the agricultural industry, the H-2A visa program enhances its access to the labor market.<sup>74</sup> In fact, certified H-2A positions have increased dramatically over the last fifteen years, rising from 48,000 in 2005 to 258,000 in 2019.<sup>75</sup> The growth in certified H-2A positions enables the agricultural sector to carry out its day-to-day operations. To migrant farmworkers, the H-2A visa program is the most important channel through which they can legally enter the country to perform temporary or seasonal agricultural work.<sup>76</sup> Holding a valid H-2A visa, such workers need not fear the sweeping raids conducted by the U.S. Immigration and Customs Enforcement (ICE) agents; nor do they have the constant threat of detention, deportation, and family separation. Additionally, they are entitled to employment rights and protections under the law.<sup>77</sup> For domestic workers, the H-2A visa is also an important tool to safeguard their interests at work. This visa allows American employers to bring in migrant farmworkers only if the following requirements are satisfied: the job is of “a temporary or seasonal nature;” domestic labor recruitment is not successful; the employment of H-2A workers “will not adversely affect the wages and working conditions of similarly employed U.S. workers”; and a single valid temporary labor certification from the U.S. Department of Labor (DOL) with the H-2A petition has been submitted.<sup>78</sup> These requirements essentially prioritize domestic workers’ job security, and guarantee that

---

73. Russo, *supra* note 63, at 27–28 (describing criticisms of the H-2A Program).

74. *H-2A Temporary Agricultural Program*, U.S. DEP’T LAB., <http://www.dol.gov/agencies/eta/foreign-labor/programs/h-2a> (last visited Apr. 5, 2021) (noting that “[t]he H-2A temporary agricultural program allows agricultural employers who anticipate a shortage of domestic workers to bring nonimmigrant foreign workers to the U.S. to perform agricultural labor or services of a temporary or seasonal nature”).

75. *Learning to Excel*, *supra* note 4, at 55; see also *Farm Labor*, *supra* note 5.

76. *H-2A Temporary Agricultural Program*, *supra* note 74.

77. *Fact Sheet #26: Section H-2A of the Immigration and Nationality Act (INA)*, U.S. DEP’T OF LAB. WAGE AND HOUR DIV. (Feb. 2010), <https://www.dol.gov/sites/dolgov/files/WHd/legacy/files/whdfs26.pdf> [hereinafter *Fact Sheet #26*].

78. *Id.*; *H-2A Temporary Agricultural Workers*, *supra* note 59 (noting that an exception to the fourth requirement is when the petitions are under “emergent circumstances”).

their payments and working conditions are not exacerbated by the employment of migrant farmworkers.

(ii) The weaknesses of the H-2A visa

Notwithstanding its strengths, the H-2A visa program has also drawn extensive criticism for its complicated, lengthy, and expensive application process. Additionally, the program is also criticized for creating a power imbalance between agricultural employers and migrant farmworkers.<sup>79</sup>

(1) Visa application process

Research conducted by the National Council of Agricultural Employers (NCAE) indicates that nearly half of the American agricultural employers seeking access to a legal workforce are not satisfied with the H-2A visa program.<sup>80</sup> The application process is bureaucratically complicated, lengthy, and expensive.<sup>81</sup> Many agricultural businesses have turned to undocumented farmworkers for affordable and convenient labor assistance.<sup>82</sup> The H-2A visa program is increasingly perceived as a last resort to fill shortfalls in the agricultural workforce.<sup>83</sup> The temporary agricultural labor program is in urgent need of reform.

The employer-sponsored H-2A visa requires American agricultural businesses to initiate the application process.<sup>84</sup> Employers seeking to hire temporary migrant farmworkers must provide sufficient evidence to show that the four requirements discussed above have been fulfilled,<sup>85</sup> and that a valid temporary labor certification has been obtained from the DOL.<sup>86</sup>

---

79. David Bier, *H-2A Visas: Open in Theory, Closed in Practice*, COMPETITIVE ENTER. INST. (May 7, 2012), <https://www.cei.org/blog/h-2a-visas-open-in-theory-closed-inpractice/> [hereinafter Bier, *H-2A Visas*].

80. *Why Domestic Agriculture Needs New, Workable Farm Labor Alternatives Now*, NAT'L COUNCIL OF AGRIC. EMP. (Aug. 2019), <http://www.ncaonline.org/wp-content/uploads/2019/08/ALRP-Brochure.pdf>.

81. Marin, *supra* note 55, at 560, 568 (noting that the H-2A visa program is unnecessarily complicated for agricultural employers); see Bier, *H-2A Visas*, *supra* note 79.

82. David J. Bier, *H-2A Visas for Agriculture: The Complex Process for Farmers to Hire Agricultural Guest Workers*, 17 CATO INST. IMMIGR. RSCH. AND POL'Y BRIEF 1, 1 (Mar. 10, 2020), <https://www.cato.org/sites/cato.org/files/2020-03/IRPB-17-update-4.pdf> [hereinafter Bier, *H-2A Visas for Agriculture*].

83. Mittelstadt, *supra* note 4, at 274; see also Bier, *H-2A Visas for Agriculture*, *supra* note 82, at 1 (noting that H-2A visa only supplies only about ten percent of farm labor in the United States).

84. Bier, *H-2A Visas for Agriculture*, *supra* note 82, at 2.

85. *H-2A Temporary Agricultural Workers*, *supra* note 59, at 1 (The U.S. employers include the employers themselves, their agents, or an association of U.S. agricultural producers named as a joint employer).

86. *Id.*

Employers then submit the labor certification, along with the completed Form I-129 (Petition for a Nonimmigrant Worker)<sup>87</sup> to the United States Citizenship and Immigration Services (USCIS) for approval.<sup>88</sup> Upon approval from the USCIS, the prospective worker can apply for a H-2A visa at an overseas United States Embassy or Consulate for entry into the country.<sup>89</sup> The application process on paper appears to be rather straightforward; however, enforcement is complex. Agricultural employers struggle to complete the application because it “involves multiple agencies and numerous detailed program rules that sometimes conflict with other laws.”<sup>90</sup>

The H-2A visa application is a lengthy process;<sup>91</sup> it takes months to complete, causing great distress to employers.<sup>92</sup> Different from other industries, agriculture, specifically crop production, is biological in nature and highly vulnerable to “nuances in the weather and annual climate variances.”<sup>93</sup> The inherent uncertainty in agriculture makes it difficult for employers to make accurate predictions on the date of need or the number of farmworkers required for the farms. Sometimes, they need labor assistance earlier (or later) than expected; sometimes, they do (or do not) need extra pairs of hands owing to various reasons. The H-2A visa program fails to provide flexibility to meet employers’ shifting labor needs.<sup>94</sup> As for employers who have anticipated worker shortfalls and lodged H-2A petitions well in advance, they still experience serious delays in the arrival of migrant workers due to the visa program’s bureaucratic complexity.<sup>95</sup> According to the NCAE, seventy-two percent of employers reported that their temporary or seasonal migrant workers had arrived twenty-two days late on average after the “date of need,” resulting in substantial economic loss.<sup>96</sup> Bier, an immigration policy analyst for the Cato Institute’s Center for Global Liberty and Prosperity, also confirms the NCAE’s

87. *I-129, Petition for a Nonimmigrant Worker*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/i-129> (last visited Jul. 13, 2021) [hereinafter *I-129*].

88. *H-2A Temporary Agricultural Workers*, *supra* note 59.

89. *Id.*; see also Mary Lee Hall, *Defending the Rights of H-2A Farmworkers*, 27 N.C. J. INT’L L. & COM. REG. 521, 522 (2002).

90. Bier, *H-2A Visas for Agriculture*, *supra* note 82, at 2 (citing U.S. GOV’T ACCOUNTABILITY OFF., *H-2A VISA PROGRAM: MODERNIZATION AND IMPROVED GUIDANCE COULD REDUCE EMPLOYER APPLICATION BURDEN* 25 (2012)).

91. Jagow, *supra* note 32, at 1284.

92. Mittelstadt, *supra* note 4, at 274–75.

93. Shaddix, *supra* note 27, at 303; see also Aimin Hao, *Uncertainty, Risk Aversion and Risk Management in Agriculture*, 1 AGRIC. & AGRIC. SCI. PROCEDIA 152 (2010).

94. See Mittelstadt, *supra* note 4, at 274–75.

95. Bier, *H-2A Visas for Agriculture*, *supra* note 82, at 2.

96. NAT’L COUNCIL OF AGRIC. EMP., *supra* note 80, at 2.

findings, revealing that “[d]elays have cost farmers millions of dollars in lost crops.”<sup>97</sup> In January 2021, the DOL released a final rule intending to streamline and modernize the H-2A visa process by “mandating electronic filing of job orders and applications.”<sup>98</sup> The goal of this rule is to make the H-2A visa application less administratively burdensome; however, the actual impact on the agricultural workforce has not yet been assessed due to lack of available data.

The H-2A visa application is also an expensive exercise for agricultural employers.<sup>99</sup> Employers must bear the initial costs, such as attorney and/or agent fees, labor certification and visa application fees, as well as other costs associated with the recruitment process.<sup>100</sup> They are required to pay H-2A workers minimum wages that are much higher than the state’s minimum wage by an average of fifty-seven percent.<sup>101</sup> Employers are also responsible for providing free transportation<sup>102</sup> and free accommodation to H-2A workers.<sup>103</sup> To hire workers through the H-2A visa program, practically, employers need to provide an “all-inclusive” package, which is a huge financial responsibility to take on.<sup>104</sup>

To summarize, the H-2A visa application process imposes unbearable bureaucratic and financial burdens on agricultural employers<sup>105</sup> and is long overdue for reform.<sup>106</sup> It fundamentally restricts employers’ abilities to bring in a legal workforce from overseas,<sup>107</sup> driving them to resort to

---

97. Bier, *H-2A Visas for Agriculture*, *supra* note 82, at 2; *see also* U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 90, at 17.

98. Press Release, USDA, Secretary Perdue Statement on H-2A Modernization (Jan. 15, 2021), <https://www.usda.gov/media/press-releases/2021/01/15/secretary-perdue-statement-h-2a-modernization>.

99. Jagow, *supra* note 32, at 1284.

100. *H-2A Visa Program*, USDA, <https://www.farmers.gov/manage/h2a> (last visited Jul. 14, 2021).

101. Bier, *H-2A Visas for Agriculture*, *supra* note 82, at 1.

102. Andrew J. Elmore, *Egalitarianism and Exclusion: U.S. Guest Worker Programs and a Non-Subordination Approach to the Labor-Based Admission of Nonprofessional Foreign Nationals*, GEO. IMMIGR. L.J. 521, 536 (2007) (noting that “[t]he H-2A visa requires that employers reimburse farmworkers for transportation costs after one half of the job term is complete [...] and for the worker’s return to her home country after the work is complete”).

103. Jay Ruby & Andrew P. Galeziowski, *Employment and Immigration Law Compliance in a Heightened Enforcement Environment*, in COUNSELING CLIENTS ON WORKSITE ENF’T: LEADING LAWS ON RESPONDING TO GOV’T INVESTIGATIONS AND IMPLEMENTING EFFECTIVE COMPLIANCE PROGRAMS 1, 13 (2010). *See also Fact Sheet #26*, *supra* note 77.

104. Shaina A. Case, Comment, *Thank You for Taking Our Jobs: The Importance of Integrating the Migrant Farmworker into the United States*, 13 WYO. L. REV. 349, 358 (2013).

105. Bier, *H-2A Visas for Agriculture*, *supra* note 82, at 5.

106. *See generally*, Laura C. Oliveira, Comment, *A License to Exploit: The Need to Reform the H-2A Temporary Agricultural Guest Worker Program*, 5 SCHOLAR 153 (2002); *see also* Mittelstadt, *supra* note 4, at 274; Bier, *H-2A Visas for Agriculture*, *supra* note 82, at 1.

107. Bier, *H-2A Visas for Agriculture*, *supra* note 82, at 1.

undocumented workers for labor assistance.<sup>108</sup> As Bier observes, undocumented farmworkers have dominated the industry since the 1990s; to date, the H-2A visa program still only brings in about ten percent of the agricultural workforce.<sup>109</sup> Furthermore, the demand for undocumented farmworkers also fuels the underground market, indirectly encouraging migrant workers to enter the country illegally or to overstay their visas. Exploitation and abuse arise when the majority of the workforce is not regulated by law.

(2) The power imbalance between agricultural employers and migrant workers

The H-2A visa has been criticized for giving employers too much power.<sup>110</sup> Under this program, workers are only allowed to work for the single employers who have sponsored their visas;<sup>111</sup> they are wholly dependent on their employers for salaries, accommodation, transportation, and most importantly, the right to work and live in the country.<sup>112</sup> The workers' return to the country for future seasons' work is also conditioned on their behavior.<sup>113</sup> If they demand higher wages or improved working conditions, they may jeopardize their opportunities to get invited back for another season.<sup>114</sup> This power imbalance creates an unlevel playing field for employers; it restricts workers' abilities to assert their workplace rights.<sup>115</sup> Russo, a law professor from the University of British Columbia, calls this imbalance "slavery,"<sup>116</sup> whilst Lee Hall, former managing attorney of the Legal Services of North Carolina Farmworker Unit, also describes the power dynamics as H-2A workers passively "serv[ing] at the employer's pleasure."<sup>117</sup>

Undocumented farmworkers sit at the very bottom of the food chain. They do not have authorization to work on the farms and they are not

108. *Id.*

109. *Id.*

110. Russo, *supra* note 63, at 27–28.

111. Hall, *supra* note 89, at 522.

112. Guzmán, *supra* note 12, at 298.

113. Marin, *supra* note 55, at 571.

114. *Id.*

115. Guzmán, *supra* note 12, at 298; *see also* Jagow, *supra* note 32, at 1285–86 (noting that "[e]mployers can easily take advantage of H-2A workers because the standards for treatment of guest workers are lower than for U.S. workers, because guest workers have inherent forced loyalty, and because regulations governing H-2A are poorly enforced").

116. Russo, *supra* note 63, at 28.

117. Hall, *supra* note 89, at 522.

entitled to full employment rights under the law.<sup>118</sup> Although they are desperate for work, their bargaining power is weak due to their immigration status.<sup>119</sup> They are hesitant to speak up against abusive labor practices for fear of arrest, deportation, and family separation.<sup>120</sup> What makes this worse is that the USCIS employer sanctions provision<sup>121</sup> assists employers in manipulating the system to their own advantage. Although Section 274A of the Immigration and Nationality Act (INA) stipulates that it is illegal and punishable by law if employers knowingly hire undocumented farmworkers,<sup>122</sup> in the hiring process, employers are only required to verify documents that can prove the prospective employee's identity and employment authorization,<sup>123</sup> and such documents should only "reasonably appear[] . . . to be genuine."<sup>124</sup> If fraudulent documents are presented, and if they "reasonably appear[] . . . to be genuine," employers are not breaking the law.<sup>125</sup> Section 274A is commonly referred to as the "don't ask, don't tell" provision.<sup>126</sup>

Furthermore, although E-Verify was established in 1996 to assist employers across all sectors in checking their employees' work authorizations through an online platform,<sup>127</sup> it faces significant resistance from the agricultural industry.<sup>128</sup> Indeed, employers who knowingly hire unauthorized workers often choose not to participate in the optional E-Verify program to avoid the associated legal consequences.<sup>129</sup> In practice, Section 274A of the INA shields employers from being penalized even if they are caught hiring undocumented workers.<sup>130</sup> For instance, in 2008,

---

118. Ontiveros, *supra* note 17, at 183; *see also* Linda S. Bosniak, *Exclusion and Membership: The Dual Identity of the Undocumented Worker Under United States Law*, 1988 WIS. L. REV. 955, 1034 (1988) (noting that in the United States, "[a]lthough it is employers who are prohibited from hiring undocumented workers, and not undocumented workers from seeking employment, the law could be interpreted as prohibiting judicial recognition of the treatment of undocumented workers who are hired as 'employees' under a variety of protective labor statutes").

119. Marin, *supra* note 55, at 571.

120. Solis-Alvarado, *supra* note 15, at 300.

121. Immigration and Nationality Act § 274A(a), 8 U.S.C. § 1324(a).

122. *Id.*

123. *Id.* § 274A(b)(1)(B).

124. *Id.* § 274A(b)(1)(A).

125. *Farm Workers in Illinois*, *supra* note 25, at 273–74.

126. Ontiveros, *supra* note 17, at 168; *see also Farm Workers in Illinois*, *supra* note 25, at 275.

127. Juliet P. Stumpf, *Getting to Work: Why Nobody Cares About E-Verify (And Why They Should)*, 2 U.C. IRVINE L. REV. 381 (2012).

128. Mittelstadt, *supra* note 4, at 275–76.

129. Marc R. Rosenblum, *E-Verify: Strengths, Weaknesses, and Proposals for Reform*, MIGRATION POL'Y INST. 1, 17 (Feb. 2011), <https://www.migrationpolicy.org/pubs/E-Verify-Insight.pdf>. *See also* Davis, *supra* note 10, at 9 (noting that E-Verify is optional).

130. Shikibu, *supra* note 24, at 49.

ICE agents raided a farm in Iowa,<sup>131</sup> where 306 of the 600 workers were identified as undocumented and subsequently charged with “working with false papers, including Social Security fraud and identity theft,”<sup>132</sup> while their employer was not held responsible for immigration violations.<sup>133</sup> In some cases, unscrupulous employers take advantage of this loophole, and selectively apply the “don’t ask, don’t tell” provision.<sup>134</sup> To “have a more pliant workforce,”<sup>135</sup> they knowingly hire undocumented farmworkers and turn a blind eye as to whether the documents are fraudulent.<sup>136</sup> It is only when a worker “becomes a ‘problem,’ through, for example, union activity or an on-the-job injury,” that their employer starts questioning the worker’s immigration status and uses that line of questioning as an excuse to terminate the employment relationship.<sup>137</sup>

The imbalance of power favoring employers is one of the key factors enabling the exploitation and abuse of migrant farmworkers. The imbalanced power dynamic makes it difficult for documented farmworkers to “vote with their feet and leave oppressive working conditions.”<sup>138</sup> It also leaves undocumented farmworkers vulnerable to abusive labor practices without proper redress. The H-2A visa program needs to be reformed to rebalance the power dynamic between employer and farmworker, and to ensure fairness, equality, decency, and integrity in the employment relationship.

### (iii) Mitigating the H-2A limitations

The H-2A visa program has the potential to provide a reliable legal workforce for the American agricultural sector;<sup>139</sup> however, to overcome

---

131. *Id.*

132. *Id.*

133. *Id.* at 49–50.

134. *Farm Workers in Illinois*, *supra* note 25, at 273–74.

135. *Id.*

136. *Id.*

137. Ontiveros, *supra* note 17, at 168. *See also Farm Workers in Illinois*, *supra* note 25, at 275 (“For example, one of the Villanova Farmworker Clinic’s clients was fired after he was hurt on the job at a mushroom growing facility and the company nurse alerted human resources to the fact that his “green card” had expired. A workers’ compensation judge later found that the worker had been fired because of his work injury and that the document justification had been a pretext. The Farmworker Clinic is also representing an unauthorized immigrant worker who was injured in an auto accident while on the job.”).

138. Guzmán, *supra* note 12, at 298.

139. Marin, *supra* note 55, at 568 (suggesting “[t]he H-2A visa program has the potential to be less ideological and more pragmatic”).

the current shortcomings, major reforms are needed.<sup>140</sup> The reforms should aim to achieve two main objectives: ensuring employers have adequate and sustainable access to a legal workforce and providing critical protections for migrant farmworkers. Guided by these two objectives, this Article supports three propositions: (1) expand the H-2A visa, (2) streamline and simplify the H-2A visa application process, and (3) re-align the temporary worker visa scheme by analyzing the Australian practice.

### (1) H-2A expansion

Many scholars, such as Mittelstadt,<sup>141</sup> Marin,<sup>142</sup> and Bier,<sup>143</sup> argue to expand the existing agricultural visa program. Multiple bills also advocate for H-2A expansion.<sup>144</sup> Over the last decade, the number of H-2A visas issued has increased nearly fourfold, climbing from 55,921 in 2010 to 202,025 in 2019.<sup>145</sup> However, workers holding H-2A visas only provide about ten percent of farm labor in the United States; there remains an enormous gap between the available legal workforce and the growing labor demand in the agricultural sector.<sup>146</sup> The American agricultural sector needs a significant number of workers from overseas; H-2A expansion is, therefore, crucial. This is an undeniable reality that cannot be ignored and will not change in the foreseeable future.

The proposed H-2A expansion is a two-step process. It should start with the legalization of undocumented workers who have been working on American farms for a certain period of time and are willing to work in this industry in the years to come.<sup>147</sup> In fact, Section 101 of the 2021 agricultural labor bill Farm Workforce Modernization Act (FWMA) proposes something similar. It mandates to create a special temporary visa program for undocumented farmworkers, which is known as Certified Agricultural Worker (CAW) status.<sup>148</sup> The CAW provides legal status to undocumented farmworkers who have “performed agricultural labor or services in the United States for at least 1,035 hours (or 180 work days)

---

140. Lofgren Newhouse Introduction, *supra* note 54 (noting that the American agricultural industry is “in desperate need of a high-quality, reliable workforce,” and the H-2A program is “in need of meaningful, bipartisan reform”).

141. Mittelstadt, *supra* note 4, at 280.

142. Marin, *supra* note 55, at 568.

143. Bier, *H-2A Visas for Agriculture*, *supra* note 82, at 12.

144. Shaddix, *supra* note 27, at 302 (noting that in 2011, there was proposed legislation in Congress advocating for an increased number of H2A farmworkers).

145. Bier, *H-2A Visas for Agriculture*, *supra* note 82, at 15.

146. *Id.* at 1.

147. Shaddix, *supra* note 27, at 302-03 (noting that AgJOBS proposes to legitimize millions of undocumented farmworkers).

148. H.R. 1603, § 101.

during the 2-year period preceding the date of the introduction of [the] Act,”<sup>149</sup> protecting them from being arrested and deported. The second step is the actual expansion; the number of H-2A visas issued to migrant farmworkers should be substantially increased to accommodate the labor demand. From an economic perspective, the H-2A expansion helps build a stronger agricultural workforce and in turn strengthens the agricultural economy.<sup>150</sup> From a national security perspective, the expansion brings down the number of illegal immigrants and fills the security gaps in the immigration system.<sup>151</sup> From a human rights perspective, the implementation of the CAW or similar legalization program provides undocumented farmworkers with a path to legal status, as well as important access to full legal rights and protections.<sup>152</sup> The H-2A expansion would also help reduce incidents of rape, assault, kidnapping, and other forms of inhumane treatment, and even deaths, as fewer workers would attempt to travel across the border illegally with the assistance of criminal groups.<sup>153</sup>

## (2) Streamlining and simplifying the H-2A visa application process

To mitigate the first limitation of the H-2A program, the United States has made several attempts to make the application process more employer-friendly. In January 2021, the DOL reduced the bureaucratic complexity by requiring electronic filing of job orders and applications.<sup>154</sup> The FWMA endorses the DOL’s initiative and further expands the e-filing requirement to encompass the entire process.<sup>155</sup> Section 201 of the FWMA mandates to create a consolidated single filing electronic platform (e-platform) within twelve months after the enactment of the Act; the e-platform serves as the single point of access for both employers and government agencies.<sup>156</sup> Employers must submit “all information and supporting documentation” to this platform, including those “required for

149. *Id.*

150. *See generally id.; Farm Labor, supra* note 5 (noting that from fiscal year 2005 to fiscal year 2020, the number of requested and approved H-2A positions increased from just over 48,000 to just over 275,000).

151. *See generally*, AMY POPE, IMMIGRATION AND U.S. NATIONAL SECURITY (Doris Meissner et al. eds., 2020), [https://www.migrationpolicy.org/sites/default/files/publications/Immigration-NatlSecurity\\_Final.pdf](https://www.migrationpolicy.org/sites/default/files/publications/Immigration-NatlSecurity_Final.pdf).

152. *See, e.g.*, H.R. 1603, § 102, 111.

153. *See, e.g.*, Mittelstadt, *supra* note 4, at 254 (noting that “rapes, assaults, robberies, kidnapping, extortions, and even death have become commonplace” while traveling across the border between Mexico and the United States).

154. Secretary Perdue Statement on H-2A Modernization, *supra* note 98.

155. H.R. 1603, § 201.

156. *Id.* § 201(a)(1).

obtaining labor certification from the Secretary of Labor and the adjudication of the H-2A petition by the Secretary of Homeland Security.”<sup>157</sup> Employers communicate directly with government agencies via this e-platform, such as receiving and responding to notices of deficiency, receiving notices of approval and denial, and requesting reconsideration or appeal.<sup>158</sup> The Secretary of Homeland Security, the Secretary of Labor, and State workforce agencies can also “concurrently perform their respective review and adjudicatory responsibilities in the H-2A process.”<sup>159</sup> The consolidated single filing process through an online portal helps reduce procedural backlogs, enhances application efficiency, and improves employers’ access to the labor market.

Furthermore, the FWMA proposes to reduce visa-processing costs by granting H-2A workers with visas with a longer period of validity.<sup>160</sup> It further simplifies the application procedure by allowing employers to file a single petition for staggered seasonal labor.<sup>161</sup> These proposals help alleviate employers’ financial and bureaucratic burdens from constantly applying for H-2A visas; they also provide migrant farmworkers with more opportunities to obtain valid visas so they can legally work on the farms and access the legal rights and protections.

### (3) Redressing the power imbalance

#### (i.) Re-aligning the temporary worker visa scheme by looking at the Australian practice

Australia also faces a power imbalance between employers and workers in the agricultural sector. Nonetheless, as compared to the United States, it is not as severe because Australia’s broader visa schemes correct the asymmetry to some extent. Australian employers can recruit migrant farmworkers through a series of visa programs. This also means greater flexibility for migrant farmworkers when seeking employment. They can work on the farms on different visas, for example, the Working Holiday Makers visa (WHM),<sup>162</sup> the Safe Haven Enterprise visa (SHEV),

---

157. *Id.* § 201(a)(1)(A).

158. *Id.* § 201(a)(1)(C).

159. *Id.* § 201(a)(1)(B).

160. *Id.* § 101(e).

161. H.R. 1603, § 202(h)(1)(C).

162. *Specified Subclass 462 Work for Working Holiday Maker (WHM) Program*, AUSTRALIAN GOVERNMENT DEPARTMENT OF HOME AFFAIRS, IMMIGRATION AND CITIZENSHIP, <https://www.homeaffairs.gov.au/what-we-do/whm-program/specified-work-conditions/specified-work-462> (last visited July 14, 2021) [hereinafter *Specified Subclass 462 Work*] (noting that approved industries and areas for specific work include the followings – “plant and animal cultivation in northern Australia and other specified areas of regional Australia;” “fishing and pearling in northern Australia only;” “tree farming and felling in northern Australia only;” “tourism and hospitality in northern Australia only;”

Temporary Protection visa (TPV), the Seasonal Worker Program visa (SWP), the Pacific Labour Scheme visa (PLS),<sup>163</sup> or even student visas.<sup>164</sup> Specifically, Australia’s WHM program enables eligible foreign young adults to apply for the visa without employers’ sponsorship.<sup>165</sup> WHM workers have the freedom to choose their employers and the type of agricultural work they would like to engage in;<sup>166</sup> they are permitted to work for multiple employers for up to thirty-six months.<sup>167</sup> Australia’s visa system reduces the abuse of power in the workplace as most workers can quit and work for other employers if they are mistreated. This Article strongly urges the United States to look at the Australian practice in this matter and explores the possibility of re-aligning its existing visa scheme. The Australian visa system is to be examined in more detail in Part IV.

## (ii.) Other solutions

Mandatory E-Verify, as proposed by the FWMA,<sup>168</sup> can help close the verification loophole and rectify the power imbalance in agricultural employment; however, it must be built on the condition that there are effective workers’ programs in place. If the majority of the workforce remains undocumented, mandatory E-Verify only jeopardizes agricultural recruitment. For example, in Alabama and Georgia, when state laws started to require mandatory E-Verify, large numbers of undocumented

---

“construction in northern Australia and other specified areas of regional Australia;” “bushfire recovery work in declared bushfire affected areas only, after 31 July 2019;” critical COVID-19 work in the healthcare and medical sectors anywhere in Australia, after 31 January 2020).

163. *Visa Options for Workers in Agriculture*, AUSTL. GOV’T DEP’T OF HOME AFF. IMMIG. AND CITIZENSHIP, <https://www.immi.homeaffairs.gov.au/visas/working-in-australia/regional-migration/working-in-agriculture/visa-options> (last visited July 14, 2021).

164. *Id.* (international students are allowed to work for more than 40 hours per fortnight during their study period if working in agriculture).

165. Overview of Working Holiday Maker Program, AUSTL. GOV’T DEP’T OF HOME AFF. IMMIG. AND CITIZENSHIP, <https://www.immi.homeaffairs.gov.au/what-we-do/whm-program/overview> (last visited Apr. 21, 2021) [hereinafter WHM Overview].

166. 6 Month Work Limitation of Working Holiday Maker Program, AUSTL. GOV’T DEP’T OF HOME AFF. IMMIG. AND CITIZENSHIP, <https://www.immi.homeaffairs.gov.au/what-we-do/whm-program/specified-work-conditions/6-month-work-limitation> (last visited Apr. 21, 2021) [hereinafter WHM 6 Month Work Limitation].

167. *Id.*; *Subclass 417 Working Holiday Visa*, AUSTL. GOV’T DEP’T OF HOME AFF. IMMIG. AND CITIZENSHIP, <https://www.immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/work-holiday-417> (July 1, 2021) [hereinafter *Subclass 417*]. See also *Subclass 462 Work and Holiday*, AUSTL. GOV’T DEP’T OF HOME AFF. IMMIG. AND CITIZENSHIP, <https://www.immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/work-holiday-462> (July 1, 2021) [hereinafter *Subclass 462*] (noting that the WHM workers can stay in Australia for twelve months with two more extensions available).

168. H.R. 1603, § 302.

farmworkers chose to head off to other states for work.<sup>169</sup> Furthermore, to redress the power imbalance, Marin also argues that the United States should grant all migrant farmworkers temporary residency status and, most importantly, the same employment rights as domestic workers.<sup>170</sup> Migrant farmworkers would certainly benefit from having such legal status; however, it is dubious whether this proposal will receive support from Congress due to national security, social welfare, and other concerns.

### *B. A pathway to permanent residency*

Many legislators advocate for a pathway program to permanent residency for migrant farmworkers, including the undocumented. They argue that such a program will ensure American agriculture's adequate and sustainable access to a legal workforce. Further, it will also bring sorely needed stability, security, and critical protections to undocumented farmworkers. Since the 2000s, legislators have made a series of attempts; however, to date, such attempts have been unsuccessful.

In 2009, Senator Dianne Feinstein of California introduced the Agricultural Job Opportunities, Benefits, and Security Act (the AgJOBS) to the Senate.<sup>171</sup> This bill proposed that the Secretary of Homeland Security (DHS) grant "blue card" temporary resident status to farmworkers.<sup>172</sup> If the "blue card" holders have fulfilled specified periods of continued substantial agricultural employment, they are eligible for a "green card" and become permanent residents.<sup>173</sup> The AgJOBS failed to become a law.<sup>174</sup> Similarly, in 2013, Senator Charles Schumer of New York proposed the Border Security, Economic Opportunity, and Immigration Modernization

---

169. Mittelstadt, *supra* note 4, at 215.

170. Marin, *supra* note 55, at 570–71.

171. Agricultural Job Opportunities, Benefits, and Security Act of 2009, S.1038, 111th Cong. (2009).

172. *Id.* (eligible farmworkers are those who "(1) ha[ve] performed agricultural employment in the United States for at least 863 hours or 150 work days during the 24-month period ending on December 31, 2008; (2) applied for such status during the 18-month application period beginning on the first day of the seventh month that begins after the date of enactment of this Act; (3) is otherwise admissible to the United States; and (4) has not been convicted of any felony or a misdemeanor, an element of which involves bodily injury, threat of serious bodily injury, or harm to property in excess of \$500."). See also Case, *supra* note 104, at 364.

173. Case, *supra* note 104, at 364.

174. *Id.* at 361–62; see also S.1038 (showing that no action has been taken on the bill since it was introduced, read, and referred to the Judiciary Committee).

Act,<sup>175</sup> reintroducing the “blue card” program<sup>176</sup> through the incorporation of the Registered Provision Immigrant (RPI) provision.<sup>177</sup> The Senate passed the bill on a 68-32 margin, but it was not considered by the House and eventually died in the 113th Congress.<sup>178</sup> Again, in January 2019, U.S. Senator Dianne Feinstein and U.S. House Representative Zoe Lofgren of California sponsored the Agricultural Worker Program Act and called for immigration reform to provide a necessary path towards lawful status and citizenship for millions of migrant farmworkers.<sup>179</sup> Nevertheless, their efforts were also in vain and the bill failed to reach the President’s desk for signature.<sup>180</sup>

In March 2021, U.S. House Representatives Zoe Lofgren and Dan Newhouse reintroduced the FWMA to Congress after the initial failure in December 2019.<sup>181</sup> This bill strives to achieve two important goals: strengthening the agricultural workforce and providing critical protections for migrant farmworkers.<sup>182</sup> To achieve the first goal, the FWMA proposes to modernize the H-2A visa program through the implementation of the CAW program, mandatory E-Verify, and the consolidated single filing electronic platform.<sup>183</sup> To achieve the second goal, the FWMA establishes a pathway for migrant farmworkers to obtain permanent residency through continued agricultural employment in the United States.<sup>184</sup> Under the proposed permanent residency program, migrant farmworkers could be granted temporary status as a certified agricultural worker

175. Border Security, Economic Opportunity, and Immigration Modernization Act, S.744, 113th Cong. (as passed by Senate, June 27, 2013). See Laura A. Hernández, *The Constitutional Limits of Supply and Demand - Why a Successful Guest Worker Program Must Include a Path to Citizenship*, 10 STAN. J. CIV. RTS. & CIV. LIBERTIES 251, 264 (2014).

176. S.744.

177. Mariela Olivares, *Unreformed: Towards Gender Equality in Immigration Law*, 18 CHAP. L. REV. 419, 433-34 (2015).

178. See S.744.

179. Agricultural Worker Program Act of 2019, S. 175, 116th Cong. (2019); Agricultural Worker Program Act of 2019, H.R. 641, 116th Cong. (2019).

180. See S.744 (noting that the Senate received the bill, read it twice, and referred it to the Judiciary Committee on Dec. 12, 2019).

181. A previous version of this bill was originally introduced to Congress in late 2019; however, it did not get the support from both houses and failed to become law. See Farm Workforce Modernization Act of 2019, H.R. 5038, 116th Cong. (as passed by House, Dec. 11, 2019); see also Lofgren Newhouse Introduction, *supra* note 54, at 1 (noting that the 2019 FWMA bill “was negotiated over eight months [...] with input from farmers, agricultural stakeholders, labor organizations, and farmworker advocates. In December 2019, it became the first agriculture labor reform legislation to pass the House of Representatives since 1986”).

182. Lofgren Newhouse Introduction, *supra* note 54, at 1–2 (noting that agricultural workforce can be strengthened by making the immigration system “more responsive and user-friendly for employers,” and by ensuring American agriculture’s access to year-round farm labor).

183. H.R. 1603, §§ 101(a), 201(a), 274E, 302(a).

184. *Id.* § 111(a).

(CAW) if they “performed agricultural labor or services in the United States for at least 1,035 hours (or 180 work days)” over a two-year timeframe.<sup>185</sup> This is subject to the condition that they meet admissibility and continuous presence requirements.<sup>186</sup> Workers with CAW status can then apply for permanent residency if they have “performed agricultural labor or services for not less than 575 hours (or 100 work days) each year” for “at least 10 years prior to the date of the enactment of this Act and for at least 4 years in certified agricultural worker status,” or “fewer than 10 years prior to the date of the enactment of this Act and for at least 8 years in certified agricultural worker status.”<sup>187</sup> After being a lawful permanent resident for at least five years, they are eligible to become American citizens through naturalization.<sup>188</sup>

Although the FWMA has sparked debate regarding the length of service migrant farmworkers are required to deliver just to be qualified to apply for permanent residency,<sup>189</sup> the passage of the FWMA will undoubtedly mark an important milestone in U.S. immigration history. It represents a significant improvement in creating a reliable workforce solution for one of America’s most critical sectors. It also brings hardworking migrant farmworkers, particularly the undocumented, one-step closer to earn long-awaited legal status and labor safeguards.<sup>190</sup> Rangel, an advocate of the FWMA, asserts that the passage of the Act “would provide the men and women who harvest all of the food that we eat with the ability to go to work without that fear of not knowing if they’re going to be returning to their families at the end of the day.”<sup>191</sup>

Unlike previous attempts, the FWMA has a much greater chance of becoming law. On March 18, 2021, the FWMA passed in the House with strong bipartisan support; it is now in the Senate Committee on the Judiciary for consideration.<sup>192</sup> President Joe Biden also expressed his support

---

185. *Id.* § 101(a)(1)(A).

186. *Id.* § 101(a)(1)(B)–(D).

187. *Id.* § 111(a)(1)(A).

188. Angela M. Banks, *The Normative and Historical Cases for Proportional Deportation*, 62 EMORY L.J. 1243, 1262 (2013).

189. Nadra Nittle, *A Path to Citizenship Is on the Horizon for Undocumented Farmworkers*, CIV. EATS (Apr. 5, 2021), <https://www.civileats.com/2021/04/05/a-path-to-citizenship-is-on-the-horizon-for-undocumented-farmworkers/> (noting that although the FWMA will legalize undocumented farmworkers, it still takes approximately ten years just to qualify for permanent residency).

190. Russo, *supra* note 63, at 27 (Before the FWMA, eligible H-2A workers were permitted to gain permanent residency “through the family-based immigration stream”; however, they must “have close relatives who are U.S. citizens or permanent residents” to file an immigration petition for them. Furthermore, “it is also theoretically possible for an H-2A worker to attain a Green Card by having an employer sponsor him or her—but in practice, this would be quite difficult.”).

191. Nittle, *supra* note 189.

192. H.R. 1603.

for the passage of the bill.<sup>193</sup> In a statement released on March 18, 2021, he acknowledged that farmworkers were “vital to the wellbeing of [the] country and [the American] economy.”<sup>194</sup> Particularly during the COVID-19 pandemic, farmworkers, both documented and undocumented, “have put their lives and the lives of their loved ones on the line to ensure that families across the country have food on the table.”<sup>195</sup> It is imperative to “address the needs of [...] [the] essential workers, bring greater dignity and security to our agricultural sector, and finally enact the long-term solutions we need to create a safe, orderly, and humane immigration system, in addition to tackling the root causes of migration to the United States.”<sup>196</sup> Biden further affirmed that the passage of the bill will “deliver the lawful status and better working conditions that this critical workforce deserves, as well as much needed stability for farmers, growers, and the entire agriculture industry.”<sup>197</sup>

#### IV. THE AUSTRALIAN APPROACH

##### *A. Labor use in Australian agriculture*

Similar to its American counterpart, Australian agriculture also relies heavily upon migrant farmworkers. Prior to COVID-19 when the border was still open,<sup>198</sup> it employed over 300,000 farmworkers per year;<sup>199</sup> migrant workers constituted “more than half of the temporary workforce” hired in the horticulture industry.<sup>200</sup> After a year of border closure, Australian farmers are struggling to find labor, and fruit and vegetable crops are left rotting in the field.<sup>201</sup> Furthermore, the use of undocumented farmworkers is also widespread in some of the regions in Australia. For

193. Presidential Statement on House of Representatives Passage of the Farm Workforce Modernization Act of 2021, 2021 DAILY COMP. PRES. DOC. 202100237 (Mar. 18, 2021) [hereinafter Farm Workforce Act Statement].

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. Australia’s borders have been closed since March 2020 to help prevent the spread of COVID-19. Only Australian citizens, permanent residents and their immediate family members are allowed to travel into the country. See *Coronavirus (COVID-19) Advice for International Travelers*, AUSTL. GOV’T DEP’T OF HEALTH, <https://www.health.gov.au/news/health-alerts/novel-coronavirus-2019-ncov-health-alert/coronavirus-covid-19-restrictions/coronavirus-covid-19-advice-for-international-travellers> (last visited Jul. 14, 2021) [hereinafter COVID Advice].

199. Martin et al., *supra* note 6, at 2 (“Australian farms employed 326,000 workers on average across 2018–19, including full-time, part-time, casual and contract employees”).

200. *Id.* at 1.

201. Colin Brinsden, *Fruit, Veg Crops being Left to Rot: Labor* (Jan. 8, 2021), CANBERRA TIMES, <https://www.canberratimes.com.au/story/7078920/fruit-veg-crops-being-left-to-rot-labor/>.

example, in the Sunraysia region of northwest Victoria, a major crop growing area,<sup>202</sup> undocumented farmworkers accounted for up to 90% of the workforce.<sup>203</sup>

Australia adopts a different approach in strengthening its agricultural workforce. Instead of relying on a single agricultural visa like the United States (H-2A), it develops a wide range of temporary visa measures to help with labor shortages.<sup>204</sup> Furthermore, Australia holds a conservative view on the development of a path to permanent residency; it has yet to craft a plan to secure a sustainable and skilled agricultural workforce in the long term. The Australian government has recently objected to a one-off farmworker amnesty proposal, despite strong calls from both the National Party of Australia (the Nationals) and the National Agricultural Labor Advisory Committee, to legalize undocumented farmworkers.<sup>205</sup> As to migrant farmworkers, it appears that their rights are better protected in Australia, given they are entitled to choose to work for different employers under a diverse range of visas.<sup>206</sup> However, undocumented workers remain excluded from the legal system despite advocacy campaigns and a series of government and parliamentary inquiries.<sup>207</sup> The rights of migrant farmworkers have yet to be improved.

### *B. Temporary visa options for migrant farmworkers*

#### 1. The options

The Australian Government has a wide range of temporary visa measures in place to support the agricultural sector, notably Working Holiday Makers visa (WHM),<sup>208</sup> Seasonal Worker Program visa (SWP) and Pacific Labour Scheme visa (PLS), Safe Haven Enterprise visa (SHEV), and Temporary Protection visa (TPV).<sup>209</sup> Backpackers on WHM

---

202. *Nyah to Border Community Profile (including Sunraysia, Victoria and NSW)*, section in *Guide to the Proposed Basin Plan Technical background Part III*, MURRAY-DARLING BASIN AUTH., [https://www.mdba.gov.au/sites/default/files/archived/guide\\_pbp/AppendixC\\_Nyah\\_to\\_Border\\_community\\_profile.pdf](https://www.mdba.gov.au/sites/default/files/archived/guide_pbp/AppendixC_Nyah_to_Border_community_profile.pdf) (last visited Jul. 14, 2021) [hereinafter *Basin Plan Guide*] at 1000 (noting that major enterprises for this region include wine grapes, citrus, table grapes, almonds, dried fruit, and vegetables).

203. *Learning to Excel*, *supra* note 4, at 190.

204. See, e.g., *Visa Options for Workers in Agriculture*, *supra* note 163 (describing the variety of available visa options for workers in agriculture).

205. Matt Coughlan, *Illegal Farm Worker Amnesty Gets Torpedoed*, FARMONLINE NAT'L (Mar. 24, 2021), <https://www.farmonline.com.au/story/7180658/illegal-farm-worker-amnesty-gets-torpedoed/>.

206. See generally *Visa Options for Workers in Agriculture*, *supra* note 163.

207. See generally Clibborn, *supra* note 19, at 465–73.

208. *Specified Subclass 462 Work*, *supra* note 162.

209. *Visa Options for Workers in Agriculture*, *supra* note 163.

visas are the main workforce for Australian crop farms, whilst others come to work on the farms primarily through the employer-sponsored SWP and PLS visa programs.<sup>210</sup> SHEV and TPV visas are designed to provide temporary protection for asylum seekers in Australia; however, by providing incentives for them work in agriculture, these visas help mitigate agricultural labor shortages.<sup>211</sup>

The WHM is the most important visa program that helps secure a strong temporary workforce for the horticulture sector;<sup>212</sup> it is often labelled as Australia's "agricultural visa."<sup>213</sup> The WHM permits young adults from over forty partner countries and regions to stay in Australia for up to twelve months, during which time they can undertake some work and short-term study and have a holiday.<sup>214</sup> The visa encompasses two subclasses: Working Holiday (subclass 417) visa, and Work and Holiday (subclass 462) visa.<sup>215</sup> They are designed to accomplish the same purpose: strengthening the temporary and seasonal workforce in Australia, although their respective eligibility requirements differ slightly.<sup>216</sup> In addition to the initial twelve-month stay, the WHM workers, including both subclasses, are permitted to extend their visas for two additional years if they have carried out specified work and meet other WHM visa requirements.<sup>217</sup> They can thereafter engage in any kind of work in any

210. *Family, Locals and Backpackers Fill Farmers' Labour Needs*, AUSTL. GOV'T DEP'T OF AGRIC., WATER & THE ENV'T. (Oct. 2, 2019), <https://www.agriculture.gov.au/abares/news/media-releases/2019/family-locals-backpackers-farmers-labour-needs>.

211. *Subclass 790 Safe Haven Enterprise Visa*, AUSTL. GOV'T DEP'T OF HOME AFF. IMMIGR. AND CITIZENSHIP, <https://www.immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/safe-haven-enterprise-790#When> (last updated Sept. 6, 2021) (noting that any work or full-time study that SHEV visa holders do in specified regional and rural areas in Australia may "count towards meeting the pathway requirements to certain visas in Australia").

212. Van den Broek, *supra* note 3, at 7–8.

213. Beth Orton & Stephen Howes, *Submission to The Joint Standing Committee on Migration: Inquiry into the Working Holiday Maker Program*, JOINT STANDING COMM. ON MIGRATION, at 1, <https://www.aph.gov.au/DocumentStore.ashx?id=ece930e2-85e1-41b0-85dd-65e03a74e582&subId=690563> (July 2020) [hereinafter *Working Holiday Maker Program Inquiry*].

214. WHM Overview, *supra* note 165 (noting that the WHM program is a reciprocal program with over forty partners countries and jurisdictions).

215. *Id.*

216. *See generally id.*

217. For more details, see Eligibility for First Working Holiday Visa, AUSTL. GOV'T DEP'T OF HOME AFF. IMMIGR. AND CITIZENSHIP, <https://www.immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/work-holiday-417/first-working-holiday-417#Eligibility> (last updated July 23, 2021) [hereinafter Eligibility for First Working Holiday Visa]; also Eligibility for First Work and Holiday Visa (Subclass 462), AUSTL. GOV'T DEP'T OF HOME AFF. IMMIGR. AND CITIZENSHIP, <https://www.immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/work-holiday-462/first-work-holiday-462#Eligibility> (last updated Sept. 1, 2021) [hereinafter Eligibility for First Work and Holiday Visa]; Specified Subclass 417 Work for Working Holiday Maker Program, AUSTL. GOV'T DEP'T OF HOME AFF. IMMIGR. AND CITIZENSHIP,

location, occupation, or industry in Australia.<sup>218</sup> To be eligible for an extension of stay (up to twenty-four months), WHM workers must have already completed a prescribed minimum period of work in a specified industry, for example, working in plant and animal cultivation in certain regions for at least three months.<sup>219</sup> Furthermore, although the WHM workers are generally prohibited from working with one single employer for more than six months, they are exempted from this six-month work limitation if they choose to work in agriculture.<sup>220</sup> The differences between the two subclasses are subtle. Subclass 417 is open to young adults with passports from Belgium, Canada, Cyprus, Denmark, Estonia, Finland, France, Germany, Hong Kong, Republic of Ireland, Italy, Japan, Republic of Korea, Malta, Netherlands, Norway, Sweden, Taiwan, and the United Kingdom,<sup>221</sup> and it does not have education and English requirements.<sup>222</sup> Subclass 462 is open to young adults with passports from Argentina, Austria, Chile, China, Czech Republic, Hungary, Indonesia, Israel, Luxembourg, Malaysia, Peru, Poland, Portugal, San Mario, Singapore, Slovak Republic, Slovenia, Spain, Thailand, Turkey, USA, Uruguay, and Vietnam,<sup>223</sup> and unlike subclass 417, subclass 462 does have education and English requirements.<sup>224</sup>

The Seasonal Worker Program and Pacific Labour Scheme, both under subclass 403,<sup>225</sup> are other important visa streams that help fill seasonal labor shortages in Australia. Subclass 403 visa is similar to the United States H-2A visa, although not necessarily agricultural-specific

---

<https://www.immi.homeaffairs.gov.au/what-we-do/whm-program/specified-work-conditions/specified-work-417> (last updated June 30, 2021) [hereinafter Specified Subclass 417 Work].

218. Eligibility for First Working Holiday Visa, *supra* note 217.

219. See *Subclass 462 Work*, *supra* note 162; see also *Visa Options for Workers in Agriculture*, *supra* note 163 (noting that WHM visa holders are eligible to apply for a second or third WHM visa to continue working in agriculture if they have completed three or six months of specific work in agriculture).

220. Information for Agricultural Employers, AUSTL. GOV'T DEP'T OF HOME AFF. IMMIGR. AND CITIZENSHIP, <https://www.immi.homeaffairs.gov.au/work-in-australia/Pages/working-in-agriculture/agricultural-employers.aspx> (last updated Jan. 05, 2021).

221. Eligibility for First Working Holiday Visa, *supra* note 217.

222. *Id.*; Specified Subclass 417 Work, *supra* note 217.

223. Eligibility for First Working Holiday Visa, *supra* note 217.

224. *Id.*; Specified Subclass 417 Work, *supra* note 217.

225. Overview of Seasonal Worker Program Stream, section in *Temporary Work (International Relations) Visa (Subclass 403)*, AUSTL. GOV'T DEP'T OF HOME AFF. IMMIGR. AND CITIZENSHIP, <https://www.immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/temporary-work-403/seasonal-worker-program> (last visited June 16, 2021); Overview of Pacific Labour Scheme Stream, Section in *Temporary Work (International Relations) Visa (Subclass 403)*, AUSTL. GOV'T DEP'T OF HOME AFF. IMMIGR. AND CITIZENSHIP, <https://www.immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/temporary-work-403/pacific-labour-scheme> (last updated Sept. 1, 2021).

and not used as widely as the H-2A.<sup>226</sup> Subclass 403 allows individuals from specified countries, mainly Pacific Island countries,<sup>227</sup> to work in Australia for a nominated period of time.<sup>228</sup> To be eligible for subclass 403, individuals must be invited by Australian employers who are registered as “temporary activities sponsors,”<sup>229</sup> and the sponsors must be approved by the Department of Jobs and Small Business (DJSB) or endorsed by the Department of Foreign Affairs and Trade (DFAT).<sup>230</sup> Subclass 403 visa holders are only permitted to work for their sponsors in specified positions and specified industries; they can only stay for the period specified on the visa.<sup>231</sup> Nevertheless, to help fill labor shortages in agriculture during the COVID-19 pandemic, a temporary change has been made to this visa; subclass 403 workers can extend their stay in Australia and continue to “support the agriculture sector” and “work for more than one approved employer” until the pandemic has passed.<sup>232</sup>

The Temporary Protection visa (subclass 785) and Safe Haven Enterprise visa (subclass 790) are designed for asylum seekers who arrive

226. *Pacific Labour Scheme*, FAIR WORK OMBUDSMAN, <https://www.fairwork.gov.au/about-us/community-assistance/pacific-labour-scheme> (last visited June 16, 2021) (noting that the Pacific Labour Scheme “allows people from Pacific island countries to work in low and semi-skilled jobs in rural and regional Australia;” its focus sectors include: accommodation and food services, health care and social assistance, as well as non-seasonal agriculture, forestry and fishing); *see also Seasonal Worker Programme*, FAIR WORK OMBUDSMAN, <https://www.fairwork.gov.au/about-us/community-assistance/seasonal-worker-programme> (last visited June 16, 2021) (noting that this visa program is primarily “open to employers in agricultural industries (including the horticulture, aquaculture, cane sugar and cotton growing industries).” It is also open to “employers in certain locations across Australia in accommodation industries.”).

227. *See Eligibility for Seasonal Worker Program Stream*, AUSTL. GOV’T DEP’T OF HOME AFF. IMMIGR. AND CITIZENSHIP, <https://www.immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/temporary-work-403/seasonal-worker-program#Eligibility> (last updated July 23, 2021) (noting only citizens and residents from Fiji, Kiribati, Nauru, Papua New Guinea, Samoa, Solomon Islands, Timor-Leste, Tonga, Tuvalu, or Vanuatu are eligible for seasonal worker program stream).

228. *Id.*

229. Overview of Seasonal Worker Program Stream, *supra* note 225; Overview of Pacific Labour Scheme Stream, *supra* note 225.

230. Eligibility for Temporary Activities Sponsor, AUSTL. GOV’T DEP’T OF HOME AFF. IMMIGR. AND CITIZENSHIP, <https://www.immi.homeaffairs.gov.au/visas/employing-and-sponsoring-someone/sponsoring-workers/becoming-a-sponsor/temporary-activities-sponsor#Eligibility> (July 26, 2021).

231. Overview of Seasonal Worker Program Stream, *supra* note 225; When You Have a Pacific Labour Scheme Stream Visa, Section in *Temporary Work (International Relations) Visa (Subclass 403)*, AUSTL. GOV’T DEP’T OF HOME AFF. IMMIGR. AND CITIZENSHIP, <https://www.immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/temporary-work-403/pacific-labour-scheme#When> (Sept. 1, 2021) [hereinafter Having a PLSC Visa].

232. Information for Agricultural Employers, *supra* note 220; *see also* Official Webpage for Seasonal Worker Programme, AUSTL. GOV’T DEP’T OF EDUC., SKILLS, AND EMP., (last modified Sept. 7, 2021), <https://www.dese.gov.au/seasonal-worker-programme>.

in Australia without valid visas.<sup>233</sup> TPV and SHEV visa holders are allowed to live, work, and study anywhere in Australia for three or five years, respectively, with time extensions available.<sup>234</sup> Although the purpose of these two visa programs is not to strengthen the agricultural workforce, they encourage employment in the agricultural sector.<sup>235</sup> For example, SHEV visa holders may be granted additional benefits, such as the family tax benefit, the school kids' bonus, and the low-income health care card, to those who choose to live in rural areas and work in agriculture.<sup>236</sup>

Furthermore, Australia implements a series of measures to address the immediate needs for farm labor during the era of COVID-19. It grants "temporary relaxation of working hours for student visa holders,"<sup>237</sup> permitting international students to work in the agricultural sector for more than forty hours per fortnight during their study period in Australia.<sup>238</sup> It creates a special COVID-19 Pandemic Event Visa (subclass 408) to expand options for stranded temporary visa holders<sup>239</sup> to work in critical sectors such as agriculture.<sup>240</sup> It also provides a relocation assistance of

---

233. Overview of Safe Haven Enterprise Visa (Subclass 790), AUSTL. GOV'T DEP'T OF HOME AFF. IMMIGR. AND CITIZENSHIP, <https://www.immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/safe-haven-enterprise-790> (last visited Aug. 16, 2021); Overview of Subclass 785 Temporary Protection Visa, AUSTL. GOV'T DEP'T OF HOME AFF. IMMIGR. AND CITIZENSHIP, <https://www.immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/temporary-protection-785#Overview> (last visited Aug 16, 2021).

234. Overview of Safe Haven Enterprise Visa (Subclass 790), *supra* note 233. Overview of Subclass 785 Temporary Protection Visa, *supra* note 233.

235. *See generally Visa Options for Workers in Agriculture*, *supra* note 163 (noting that SHEV visa holders can work in the agricultural sector).

236. Overview of Safe Haven Enterprise Visa (Subclass 790), *supra* note 233 (detailing the benefits of living, studying, and working in specified regional and rural areas, which includes, for example, tax benefits, school kids bonus, child dental benefit); *see also Visa Options for Workers in Agriculture*, *supra* note 163 (noting that SHEV visa holders can work in the agricultural sector).

237. *Temporary Relaxation of Working Hours for Student Visa Holders*, AUSTL. GOV'T DEP'T OF HOME AFF. IMMIGR. AND CITIZENSHIP, <https://www.immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/student-500/temporary-relaxation-of-working-hours-for-student-visa-holders> (last visited July 27, 2021).

238. *Id.*

239. Eligibility for Australian Government Endorsed Events (COVID-19 Pandemic Event), section in *Temporary Activity Visa (Subclass 408)*, AUSTL. GOV'T DEP'T OF HOME AFF. IMMIGR. AND CITIZENSHIP, <https://www.immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/temporary-activity-408/australian-government-endorsed-events-covid-19#Eligibility> (last visited July 27, 2021) [hereinafter Eligibility for Australian Government Endorsed COVID-19 Events].

240. When You Have an Australian Government Endorsed Events Visa (COVID-19 Pandemic Event), Section in *Temporary Activity Visa (Subclass 408)*, AUSTL. GOV'T DEP'T OF HOME AFF. IMMIGR. AND CITIZENSHIP, <https://www.immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/temporary-activity-408/australian-government-endorsed-events-covid-19#When> (last visited July 27, 2021) [hereinafter Having an AU Government Endorsed Events Visa] (noting that this visa can be used in critical sectors include agriculture, food processing, health care, aged care, disability

up to AUD \$2,000 (about USD \$1,500) to help migrant workers take up agricultural work in high-demand rural areas.<sup>241</sup>

## 2. The merits of the Australian approach

The Australian approach has many advantages and may provide useful insight for the United States. The wide range of temporary visa programs provides maximum flexibility in meeting labor demands. Particularly in the horticultural sector, backpackers on WHM visas play a crucial role in filling temporary or seasonal labor shortages and ensuring smooth agricultural operations.<sup>242</sup> The United States may consider adopting the Australian model and diversifying its agricultural visa schemes; however, this Article also acknowledges that this may not be a viable solution due to the complexity of immigration reforms on multiple visa programs. Rather, a more conservative but practical approach is that the United States integrates the concept of the WHM visa into its existing immigration system, either as part of the H-2A visa or as a separate visa. Together with the H-2A expansion, a visa similar to WHM can strengthen America's temporary and seasonal agricultural workforce.

The merits of the WHM visa program are multifold. First of all, although a large number of farmworkers work full time,<sup>243</sup> the nature of crop farming is such that it also maintains a high demand for temporary and seasonal workers.<sup>244</sup> The WHM program plays a key role in building a robust temporary and seasonal workforce for Australian agriculture.<sup>245</sup> Although many crops are harvested once a year, in some regions, crop harvest needs to be completed “over a matter of weeks only.”<sup>246</sup> The demand for temporary or seasonal labor often shifts from one region to another, depending on the timing of farming and harvesting of key crops in each region.<sup>247</sup>

This is particularly the case for the United States and Australia, as they both have a wide range of climates, and harvest seasons for different crops vary significantly. In Australia, the northern regions have

---

care or child care. Also, a COVID-19 Pandemic Event visa allows temporary visa holders to extend their stay in Australia for another twelve months).

241. *Visa Options for Workers in Agriculture*, *supra* note 163.

242. *Family, Locals and Backpackers Fill Farmers' Labour Needs*, *supra* note 210.

243. *Farmers, Ranchers, and Other Agricultural Managers*, *supra* note 25.

244. See Shaddix, *supra* note 27, at 293 (noting that seasonal workers are in high demand).

245. Martin et al., *supra* note 6, at 1–2 (noting that an important source of farm workers are on WHM visas).

246. *Id.* at 4.

247. *Id.* (noting that “the peak harvest period for mangoes is November to December and occurs mainly in the Northern Territory and north Queensland . . . [while] cherries are mainly harvested from December to February in Tasmania and New South Wales”).

equatorial and tropical climates, while the southern regions are mainly subtropical and temperate.<sup>248</sup> Harvest season typically starts from the north and gradually moves southward.<sup>249</sup> Similarly, in the United States, although fall is most notable for harvesting, the specific harvest dates for different crops in different regions still differ greatly, normally shifting from the south and progressively moving northward.<sup>250</sup> Thus, “[t]he availability of relatively large numbers of workers for short periods is important for performing labor-intensive operations on many horticulture farms[,]” as Martin, Randall, and Jackson advised.<sup>251</sup> Unlike the H-2A visa in the United States, the WHM visa grants foreign workers the right to make their own decisions about their agricultural employment.<sup>252</sup> They can work for the same employer for the duration of their visa or they can freely move around to work for different employers and follow the shifting labor demand in different regions.<sup>253</sup> This employment flexibility maximizes the availability of temporary or seasonal farmworkers from overseas.<sup>254</sup> On the contrary, although most farms in the United States also “employ agricultural workers on a part-time schedule that tracks the seasonal nature of farming[,]”<sup>255</sup> the current H-2A visa program prohibits migrant workers from working for other agricultural employers.<sup>256</sup> As compared to the WHM, the H-2A visa is economically unsound for both migrant farmworkers and agricultural employers. Once H-2A workers complete the season’s work, they must return to their home country and

---

248. *Map of Climate Zones of Australia*, AUSTL. GOV'T BUREAU OF METEOROLOGY, <http://www.bom.gov.au/climate/how/newproducts/images/zones.shtml> (May 18, 2001).

249. E.g., Martin et al., *supra* note 6, at 4.

250. See generally NASS, *Usual Planting and Harvesting Dates for U.S. Field Crops*, Agric. Handbook No. 628 (Dec. 1997).

251. Martin et al., *supra* note 6, at 4.

252. Compare Eleanor G. Carr, *Search for A Round Peg: Seeking A Remedy for Recruitment Abuses in the U.S. Guest Worker Program*, 43 COLUM. J. L. & SOC. PROBS. 399, 404 (2010) (noting that in the United States, H-2A guest workers “cannot simply switch employers . . . [because] [t]heir visa status is tied to the specific employer, and they face deportation upon job termination, whether voluntary or involuntary”), with *Specified Subclass 462 Work*, *supra* note 162 (showing in an example that in Australia an individual may satisfy the specified work requirement through periods of work with separate employers).

253. See *Specified Subclass 462 Work*, *supra* note 162.

254. Cf. Martin et al., *supra* note 6, at 4 (noting that “[t]he relatively brief period for which labor-intensive activities occur on horticulture farms fits relatively well with the availability of workers from overseas in particular regions, which is often short term”).

255. Guzmán, *supra* note 12, at 293.

256. Elmore, *supra* note 102, at 541, 546 (noting that the H-2A visa is an employer-sponsored visa).

wait for the next invitation to arrive.<sup>257</sup> For agricultural employers, the H-2A recruitment process remains lengthy and costly.<sup>258</sup> Thus, it is strongly recommended that the United States realign its temporary farm labor visa by incorporating the flexibility of the WHM program and relaxing the single employment requirement. As previously discussed, this adjustment guarantees employers' access to a more desirable workforce, while essentially eliminating bureaucratic and financial burdens. From a human rights perspective, an important benefit of permitting migrant farmworkers to choose their own employers is that the power imbalance in the employment relationship can be mitigated to some extent.

### *C. Amnesty for undocumented farmworkers: a rejected proposal*

In December 2020, the Australian National Agricultural Labor Advisory Committee (the Committee) called for a one-time legalization of undocumented workers who resided in Australia during the COVID-19 pandemic.<sup>259</sup> This proposal was put forward to alleviate acute labor shortages during the pandemic,<sup>260</sup> and to “mitigate the public health risks” arising from undocumented farmworkers avoiding clinics or hospitals due to the fear of detention and deportation.<sup>261</sup> Despite the strong call, Australia took a conservative stance on legalizing undocumented immigrants; the Morrison government opposed to pursue the proposal over the concern that amnesty may “undermine the integrity of [Australia’s] strong visa system,” and encourage continued inflows of illegal immigrants.<sup>262</sup>

To be fair, this is a legitimate concern. The United States only granted large-scale amnesty once in its history, and is reluctant to grant another one due to the same concern.<sup>263</sup> In 1986, the Immigration Reform and Control Act (IRCA) was passed by United States Congress to address

257. *Id.* at 541 (“To remain in the U.S. as a guest worker, foreign nationals must engage in circular migration by reapplying for visas from the sending country, each time after having been recruited by a U.S. employer.”).

258. *E.g., id.* at 538 (noting that under the Fair Labor Standards Act, employers must pay “fees and transportation costs knowing by the employer as a necessity of the work arrangement”).

259. *Learning to Excel*, *supra* note 4, at 190.

260. Coughlan, *supra* note 205.

261. *Learning to Excel*, *supra* note 4, at 190. (noting that the number of undocumented farmworkers in Australia ranges from 60,000 to 100,000).

262. Coughlan, *supra* note 205.

263. Pia M. Orrenius & Madeline Zavodny, *The Economic Consequences of Amnesty for Unauthorized Immigrants*, 32 CATO J. 85, 89, 100 (2012) (noting that “it was the first-and so far the only-large-scale amnesty in U.S. history” and that “[h]aving an amnesty can create the expectation of additional future amnesties, which encourages continued illegal inflows”).

the rising problem of illegal immigration.<sup>264</sup> It mandated to impose sanctions on employers who knowingly hire unauthorized workers.<sup>265</sup> To do so, the IRCA decided to first grant immediate amnesty to migrant workers who did not have legal status upon the enactment of the Act but had been in the country for a specified period of time.<sup>266</sup> The 1986 amnesty legalized approximately three million undocumented Mexican farmworkers.<sup>267</sup> Although it provided a strong legal workforce for the American agricultural sector, some scholars still considered the amnesty as a failed attempt.<sup>268</sup> For example, Siegel argued that illegal immigration did not stop, and “many undocumented immigrants in the United States remained without legal status when the opportunity to apply expired.”<sup>269</sup> It is of great importance to use amnesty with extreme caution to minimize negative impact.

## V. PROPOSED IMMIGRATION REFORMS

Having evaluated the strengths and weaknesses of the two immigration systems, this Article proposes the following reforms. The United States should primarily focus on re-aligning its temporary and seasonal workers visa programs, while Australia should consider developing a system that meets long-term farm labor demands.

### A. *The United States*

In the United States, the enactment of the FWMA will make a landmark move towards a more efficient farm labor market, serving the needs of both agricultural employers and migrant farmworkers.<sup>270</sup> In the short term, the H-2A reforms under the FWMA streamline and simplify the agricultural visa application process, making it “more responsive and user-friendly for employers.”<sup>271</sup> It also allows a greater flexibility in

264. Juan P. Osuna, Note, *Amnesty in the Immigration Reform and Control Act of 1986: Policy Rationale and Lessons from Canada*, 3 AM. U. J. INT'L L. & POL'Y 145, 145-46 (1988).

265. *Id.*

266. Russo, *supra* note 63, at 25 (noting that “[a] so-called amnesty provision in the IRCA allowed certain undocumented workers to legalize their status in the U.S., provided that they could prove they worked for ninety days on an American farm from May 1, 1985 to April 30, 1986”).

267. Leah Haus, *Openings in the Wall: Transnational Migrants, Labor Unions, and U.S. Immigration Policy*, 49 INT'L ORG. 285, 288 (1995); *see also* Russo, *supra* note 63, at 25.

268. Bryn Siegel, Note, *The Political Discourse of Amnesty in Immigration Policy*, 41 AKRON L. REV. 291, 297 (2008); *See also* Ryan D. Frei, Comment, *Reforming U.S. Immigration Policy in an Era of Latin American Immigration: The Logic Inherent in Accompanying the Inevitable*, 39 U. RICH. L. REV. 1335, 1373 (2005).

269. Siegel, *supra* note 268, at 298.

270. Lofgren Newhouse Introduction, *supra* note 54, at 1.

271. *Id.* at 1-2.

workforce recruitment by granting employers' access to year-round farm labor.<sup>272</sup> The expansion of the H-2A visa program helps American agriculture acquire a larger number of temporary and seasonal labor; it also supports more migrant workers entering the country via legal means. In the long term, the development of a path to permanent residency through continued agricultural employment ensures a sustainable supply of farm labor; meanwhile, it offers committed migrant workers the opportunities to gain legal status and employment protection under the law.

Although a diverse range of visa programs would better meet the agricultural industry's demand for temporary and seasonal farmworkers, it is administratively unrealistic for the United States to follow the Australian model and create a variety of new visa programs. Australia's WHM still brings new insight into the American immigration reforms on temporary worker programs. Upon a thorough review of the existing program, the United States may consider the following two options: it may integrate the WHM concept into the H-2A visa program, or it may develop a separate visa scheme that resembles Australia's WHM and runs parallel to the H-2A to fill labor gaps that the H-2A is unable to fill. Regardless of the forms of integration, the key change that needs to be made is that the visa should grant some flexibility for workers to perform agricultural tasks for more than one employer. The nature of farm work has decided that a small number of farmworkers may be able to stay in a single region for year-round work, whilst the vast majority cannot, and they have to move around based on agricultural seasons.<sup>273</sup> Thus, farmworkers would appreciate the ability to travel from one region to another for temporary or seasonal employment opportunities. The free movement of labor will maximize workforce efficiency and effectiveness.

Nevertheless, the reality is it may not be fair to ask the H-2A agricultural employers to sponsor migrant farmworkers while permitting their workers to solicit work from other employers. Thus, this Article suggests that a more practical solution would be developing a five-year trial WHM program that runs parallel to the H-2A program. By granting migrant workers the right to move around and work for multiple employers, and by removing the lengthy and costly sponsorship requirement, it is expected that the program can quickly fill temporary and seasonal labor gaps across the country. This is a task that the H-2A visa struggles to accomplish due to its inherent restrictions. Upon the completion of the trial program, an evaluation should be conducted for future improvement;

---

272. *Id.* at 2.

273. See SETH HOLMES, *FRESH FRUIT, BROKEN BONES: MIGRANT FARMWORKERS IN THE UNITED STATES* 4 (2012); see also Guzmán, *supra* note 12, at 294.

alternatively, if the program is proven to be ineffective, the United States also reserves the right to terminate it.

### *B. Australia*

Australia's temporary visa programs provide a consistent supply of temporary and seasonal farm labor; however, it lacks a strategic plan to deliver a stable and highly skilled agricultural workforce in the long run. In response to this issue, this Article argues that Australia consider the American pathway program under the FWMA, and establish a program for migrant farmworkers to earn legal status, and eventually permanent residency, through continued agricultural employment and contributions to the Australian agricultural economy. The establishment of such a program is a two-step process.

The first step is to allow undocumented farmworkers who have been working in Australian agriculture to adjust to a legal status. An amnesty would enable agricultural employers to lawfully maintain their current workforce; it would also give undocumented farmworkers a rare opportunity to come out of the underground economy and into a system protected by the rule of law. Nevertheless, Australia needs to be cautious about the use of an amnesty; specifically, it should be a one-off program to disincentivize anyone from attempting to travel across the border illegally or overstaying their visas. Frequent use or improper use of an amnesty can only backfire, and encourage the continued inflow of illegal immigrants.

The second step is to establish a pathway program to permanent residency. Migrant farmworkers who have worked in agriculture for a specified number of years and who wish to continue their employment in agriculture should be given an opportunity to stay in Australia permanently. However, the implementation of the pathway program faces many obstacles. The employer's preference for cheap illegal labor, to maintain market competitiveness, is often deemed as one of the top challenges.<sup>274</sup> Although the purpose of the pathway program is to encourage skilled migrant farmworkers to make a long-term commitment to agriculture, some employers may still prefer "the bountiful, low-wage labor that the illegal immigrants provide the agricultural industry."<sup>275</sup> This demand

---

274. Van der Broek, *supra* note 3, at 12–13 (noting that intermediaries—who recruit and manage temporary migrants—allow growers to source “cheap labour in an industry where margins are thin and there is pressure to keep costs down”); *see also* HOLMES, *supra* note 273, at 13 (“Systems of labor migration involve economic forces inviting and even requiring the cheap labor of migrants at the same time that political forces ban migrants from entering the country.”).

275. Shaddix, *supra* note 27, at 292.

fundamentally fuels the underground labor market, resulting in the continued inflow of undocumented farmworkers.<sup>276</sup> Meanwhile, undocumented farmworkers still cannot escape the fate of being exploited and abused by unscrupulous employers.

## VI. CONCLUSION

The United States and Australia struggle to deal with two main challenges pertaining to the agricultural workforce. First, they both face a chronic labor crisis, and the crises have been further exacerbated by the global outbreak of COVID-19; agricultural businesses find it harder to fill the labor shortage gaps due to international travel restrictions and some domestic issues as well.<sup>277</sup> Second, the regulation and protection of migrant workers remains an issue. For decades, migrant farmworkers, many of which are undocumented, have helped feed America and Australia; they play a crucial role in strengthening agricultural economies, including risking their own lives and health to work on the farms, particularly during the pandemic.<sup>278</sup> Despite their critical importance, migrant farmworkers, specifically the undocumented, are extremely vulnerable to abusive labor practices.<sup>279</sup> There is an urgent need to re-align the immigration systems so that both countries can strengthen their agricultural workforce in the short-term and long-term, and meanwhile, provide the necessary legal protections to migrant workers.

In the United States, the proposed FWMA lays out the important steps to achieve the modernization of the temporary agricultural visa programs,<sup>280</sup> although the incorporation of the WHM will further improve its efficiency. Furthermore, the establishment of a pathway program to permanent residency provides a strong and sustainable workforce for the agricultural industry; it also grants long-term undocumented farmworkers legal status, as well as critical protections they have long desired. Australia has developed a comprehensive system to help meet temporary and seasonal labor demands; however, more work remains to be done to address heavily disadvantaged farmworkers' demands and to meet the legitimate labor needs in the future.

---

276. See Orrenius & Zavodny, *supra* note 263, at 92–93, 100.

277. Overview of Working in Agriculture, AUSTL. GOV'T DEP'T OF HOME AFF. IMMIGR. AND CITIZENSHIP, <https://www.immi.homeaffairs.gov.au/visas/working-in-australia/regional-migration/working-in-agriculture/overview> (last visited Jul. 14, 2021).

278. *Id.*; see generally H.R. 1603.

279. *Learning to Excel*, *supra* note 4, at 55 (noting that “[u]ndocumented employment creates high risk of labour exploitation”).

280. Lofgren Newhouse Introduction, *supra* note 54, at 1.

The United States and Australia would benefit greatly from effective immigration reforms, and they need to act now to provide certainty to agricultural employers and migrant farmworkers, as well as the industry as a whole. This Article also acknowledges that, since Murrow's documentary *Harvest of Shame* aired in 1960, there have been some improvements in migrant farmworkers rights;<sup>281</sup> however, to end the "shame", there is still a long way ahead, especially if both governments continue to recommend against radical immigration reform on farm labor and they are reluctant to strengthen the protection for migrant workers.

---

281. See generally Richard J. Schaefer, *Reconsidering Harvest of Shame: The Limitations of a Broadcast Journalism Landmark*, 19 JOURNALISM HIST. 121 (1994).