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# DEFICIENCIES IN THE AGRICULTURAL LABOR MARKET

*Rafael Rodriguez\**

## I. INTRODUCTION

The United States permits thousands of workers into the country to legally work in agriculture.<sup>1</sup> The welcome is short-lived however, as the program has been said to promote indentured servitude.<sup>2</sup> One way temporary or seasonal agricultural workers acquire work placement is through H-2 visa petitions.<sup>3</sup> In order to qualify for an H-2A visa, the employer must demonstrate that (1) the job they offer is of a temporary or seasonal nature, (2) there are not sufficient U.S. workers who are able and available to do the temporary work, and (3) the employment of H-2A workers will not adversely affect the wages and working conditions of similarly employed U.S. workers. Employers must also submit the petition so that the U.S. Department of Labor can issue a valid temporary labor certificate.<sup>4</sup>

The second type of visa available under the H-2 program is the H-2B visa.<sup>5</sup> The H-2B program employs practically the same process by which an employer can request temporary

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<sup>1</sup> U.S. CITIZENSHIP AND IMMIGRATION SERVICES, *Working in the United States*, <http://www.uscis.gov/working-united-states/working-us> [https://perma.cc/G69Y-9XQD] (last visited Dec. 19, 2016).

<sup>2</sup> See Mary Bauer, *Close To Slavery: Guestworker Programs in the United States*, SOUTHERN POVERTY LAW CENTER 2 (2013), [https://www.splcenter.org/sites/default/files/d6\\_legacy\\_files/downloads/publication/SPLC-Close-to-Slavery-2013.pdf](https://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/publication/SPLC-Close-to-Slavery-2013.pdf) [https://perma.cc/H7NG-W5AB].

<sup>3</sup> U.S. CITIZENSHIP AND IMMIGRATION SERVICES, *Temporary (Nonimmigrant) Workers*, <http://www.uscis.gov/working-united-states/temporary-workers/temporary-nonimmigrant-workers> [https://perma.cc/HS32-DN2T] (last visited Dec. 19, 2016) [hereinafter *Temporary (Nonimmigrant) Workers*].

<sup>4</sup> U.S. CITIZENSHIP AND IMMIGRATION SERVICES, *H-2A Temporary Agricultural Workers*, <http://www.uscis.gov/working-united-states/temporary-workers/h-2a-agricultural-workers/h-2a-temporary-agricultural-workers> [https://perma.cc/4FVC-AR6F] (last visited Dec. 19, 2016) [hereinafter *Temporary Agricultural Workers*].

<sup>5</sup> *Temporary (Nonimmigrant) Workers*, *supra* note 3.

workers.<sup>6</sup> The key differences between H-2A and H-2B visas are that H-2B visas provide for a cap on the number of individuals who may receive H-2B classification during a fiscal year, and the work in H-2B classification is unrelated to agriculture.<sup>7</sup> However, H-2B work can include forestry, reparation efforts on natural disaster sites, and seafood processing.<sup>8</sup>

While the H-2 program makes itself seem beneficial and lucrative to thousands of immigrants, in many cases the benefits derived from the program are minimized once the worker arrives at the work site.<sup>9</sup> Former House Ways and Means Committee Chairman Charles Rangel criticized the program by comparing it to slavery.<sup>10</sup> Even though this program was intended to limit unauthorized migration from Mexico, the effect of deterrence on unauthorized migration can easily be circumvented when authorized immigrants realize that they are as poor as, or even worse off than undocumented immigrants.<sup>11</sup> This economic outcome is not because the legally mandated minimum wage is too low, rather it is because employers are exploiting their immigrant workers.<sup>12</sup>

In Kentucky, exploitation is common. For example, a tobacco farmer “unknowingly” violated his H-2A workers because he illegally charged them for their H-2A visas, underpaid them, provided them with shabby living quarters, and falsified wage-and-hour paperwork making it appear as if they had worked fewer hours.<sup>13</sup> Another farm in Kentucky has been ordered by a

<sup>6</sup> Compare U.S. CITIZENSHIP AND IMMIGRATION SERVICES, *H2-B Temporary Non-Agricultural Workers*, <http://www.uscis.gov/working-united-states/temporary-workers/h-2b-non-agricultural-workers/h-2b-temporary-non-agricultural-workers> [<https://perma.cc/F549-ZAYW>] and *Temporary Agricultural Workers*, *supra* note 4.

<sup>7</sup> *Id.*

<sup>8</sup> Mary Bauer, *supra* note 2, at 8, 10.

<sup>9</sup> *See id.* at 1.

<sup>10</sup> *Id.*

<sup>11</sup> Lauren A. Apgar, *Authorized Status, Limited Returns: The Labor Market Outcomes of Temporary Mexican Workers*, ECONOMIC POLICY INSTITUTE (May 21, 2015), <http://www.epi.org/publication/authorized-status-limited-returns-labor-market-outcomes-temporary-mexican-workers/> [<https://perma.cc/WE5G-8X8Q>].

<sup>12</sup> *See* Allissa Wickham, *Foreign Workers Need Better Labor Protections*, GAO SAYS, LAW 360, (Mar. 9, 2015), <http://www.law360.com/articles/628796/foreign-workers-need-better-labor-protections-gao-says> [<https://perma.cc/C48W-MQ34>].

<sup>13</sup> John Cheves, *How A Scott County Tobacco Farm Allegedly Mistreated Workers From Mexico*, LEXINGTON HERALD-LEADER, (Aug. 8, 2015),

Department of Labor administrative judge to pay \$18,900 in unpaid wages and \$17,000 in civil penalties due to its exploitation of immigrant workers by failing to pay the required wage rate and not providing workers a copy of their work contracts.<sup>14</sup> As early as May of this past year, there were three separate lawsuits in federal court alleging civil rights violations in the Kentucky tobacco industry by forty different H-2A workers.<sup>15</sup>

Although Congress has created several laws to combat the exploitation of immigrant workers, the penalties are not severe enough to dissuade employers from violating their worker's rights.<sup>16</sup> In this Note, I will compare provisions that protect legally admitted immigrant workers and citizen workers. The analysis will provide comparisons to the remedies available to each class of workers and stipulate how to diminish the exploitations by employers who use the H-2 visa program for their benefit. Specifically, employer's responsibilities will be scrutinized and alternative solutions to protect immigrant workers will be evaluated.

This Note will examine the H-2 visa program by exploring its historical evolution from the old Bracero program to the modern influx of immigrant workers. Section II of this note will address the weaknesses of the H-2 Visa Program and its contribution to the deficiencies in the labor market by visiting immigration problems that persist to this day. Furthermore, Section II will address how the H-2A program is detrimental to

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<http://www.kentucky.com/news/local/watchdog/article44614560.html>  
[<https://perma.cc/89GH-U3N6>].

<sup>14</sup> Aaron Vehling, *Kentucky Farm To Pay \$36K in Temporary Worker Row*, LAW 360 (Mar. 25, 2015), <http://www.law360.com/articles/635645/kentucky-farm-to-pay-36k-in-temporary-worker-row> [<https://perma.cc/GH7D-SQZ5>].

<sup>15</sup> Whitney Jones, *Guestworkers Allege Unlawful Pay, Substandard Housing On Some Kentucky Tobacco Farms*, WESTERN KENTUCKY MURRAY STATE (May 29, 2015), <http://wkms.org/post/guestworkers-allege-unlawful-pay-substandard-housing-some-kentucky-tobacco-farms#stream/0> [<https://perma.cc/43TX-CENJ>].

<sup>16</sup> See generally BUREAU OF CONSULATE AFF., U.S. DEP'T OF ST., *Rights, Protections and Resources Pamphlet: English Version 2*, [https://travel.state.gov/content/dam/visas/LegalRightsandProtections/Wilberforce\\_Pamphlet\\_October2016.pdf](https://travel.state.gov/content/dam/visas/LegalRightsandProtections/Wilberforce_Pamphlet_October2016.pdf) [<https://perma.cc/WB9Q-NT96>] (last visited Dec. 20, 2016); see also Amy Klobuchar, *The Economic Contribution of America's Farmers and the Importance of Agricultural Exports*, J. ECON. COMM., U.S. CONG. 6 (2013), [http://www.jec.senate.gov/public/\\_cache/files/266a0bf3-5142-4545-b806-ef9fd78b9c2f/jec-agriculture-report.pdf](http://www.jec.senate.gov/public/_cache/files/266a0bf3-5142-4545-b806-ef9fd78b9c2f/jec-agriculture-report.pdf) [<https://perma.cc/K43B-6BSX>].

the citizen workforce of the United States and how the H-2A program was adopted in its modern version.

Section III of this note will analyze the responsibilities of the employers who bring the H-2A workers from other countries. Their responsibilities will be scrutinized in a way that uncovers the damaging effects the H-2A program has on the workforce of the United States. Moreover, the approval procedure for immigrant workers will be visited so that there is better understanding of what and how the immigrant workers receive their work "placement." In addition, the protections that are afforded to the immigrant workers that come along with their approval notice will be discussed so that initial protections afforded to immigrant workers are not overlooked. In turn, this will reiterate that while workers have minimal workforce protections, they nevertheless have at least some workforce protections.

Section IV will argue that the Fair Labor Standards Act, which is applicable to United States citizens, should apply to guest workers who come from overseas. The section will compare the Fair Labor Standards Act ("FLSA") and the Migrant and Seasonal Agricultural Worker Protection Act ("AWPA") and discuss differences and applications between the two and argue why the FLSA should apply over the AWPA. In addition, undocumented immigrant workers will be discussed as their effect on the labor market and economy dominates modern political discussion. Finally, Section V will conclude with a discussion about the weaknesses of the H-2 program and how some problems might be solved.

## II. THE HISTORICAL WEAKNESS OF THE H-2 PROGRAM AND ITS CONTRIBUTION TO MODERN DEFICIENCIES IN THE LABOR MARKET

Knowledge of the history of the agricultural labor market is essential in understanding the present state of affairs. These immigrant workers play an important role in yielding the produce that is seen at grocery stores and in marketplaces throughout the country. However, the respect for these workers has not always been present. Even now, it still is not so readily apparent.

### A. *The Agricultural Labor Market*

The labor market in the agriculture industry is a significant portion of the U.S. economy, and it is important that there are effective schemes of immigration regulation in place that can positively influence migration trends, job creation, and salaries in the agriculture field.<sup>17</sup> Hired farmworkers, however, make up less than 1 percent of the labor market in the United States, but play an essential role in how produce and livestock are distributed throughout the country.<sup>18</sup> On average, agricultural workers make about \$10.80 per hour and are among the lowest earners in the country, either because the work is seasonal or because the hourly wages are lower than the average amount.<sup>19</sup>

Hired farmworkers were one of the few categories of predominantly manual laborers that did not suffer employment losses during the 2007-2009 Recession; farm work employment actually grew during those years.<sup>20</sup> Unfortunately, this did not result in salary increases.<sup>21</sup> Furthermore, even though employment grew in those recession years, the Bureau of Labor Statistics predicts that employment will decline in the agriculture sector between 2014 and 2024.<sup>22</sup>

Agricultural workers are an important part of the United States economy because they maintain the quality of farms, crops, and livestock by operating machinery and doing physical labor under the supervision of agricultural managers.<sup>23</sup> Their work can include dangerous tasks such as: exposure to pesticides

<sup>17</sup> U.S. DEPT OF AGRIC. ECON. RES. SERV., *Immigration and the Rural Workforce*, <http://www.ers.usda.gov/topics/in-the-news/immigration-and-the-rural-workforce.aspx> [https://perma.cc/JDY4-LMKS] (last updated May 8, 2013).

<sup>18</sup> *See id.*

<sup>19</sup> *See id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> BUREAU OF LAB. STAT., U.S. DEPT OF LAB., *Occupational Outlook Handbook, 2016-17 Edition, Agricultural Workers* (last visited Dec. 17, 2015), <http://www.bls.gov/ooh/farming-fishing-and-forestry/agricultural-workers.htm> [https://perma.cc/P9HQ-8GYD].

<sup>23</sup> BUREAU OF LAB. STAT., U.S. DEPT OF LAB., *Occupational Outlook Handbook, 2016-17 Edition, What Agricultural Workers Do* (last visited Dec. 17, 2015), <http://www.bls.gov/ooh/farming-fishing-and-forestry/agricultural-workers.htm#tab-2> [https://perma.cc/KUD8-G8J6].

sprayed on crops or plants, proximity to hazardous machinery, and the possibility of being bitten or kicked by work animals.<sup>24</sup> Despite agricultural workers having to work through these obstacles, their importance to the economy has neither been addressed nor appreciated.

America's farms make an important contribution to the economy by ensuring a safe and reliable food supply, improving energy security, and supporting job growth and economic development.<sup>25</sup> Agriculture is particularly important for the economies of small towns because farming supports machine manufacturers, and food-processing companies generally make up a large component of the employers.<sup>26</sup> Overall, the farm economy in the United States is robust and regularly receives billions in cash for crops and livestock-related products.<sup>27</sup> The workers also help export these products overseas and contribute to the United States' economic power on the world stage.<sup>28</sup> Thus, it is important to find an effective means of protecting the agricultural labor force, especially the portion that comes from different countries.

### *B. The Adoption of the H-2 Program*

The old Bracero program brought thousands of Mexican nationals to the United States during and after the Second World War as a system of "legalized slavery."<sup>29</sup> The Bracero program had many written protections, just as the H-2 program does today, but nonetheless the workers were systematically lied to and cheated.<sup>30</sup> The Bracero program, which was in effect from

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<sup>24</sup> BUREAU OF LAB. STAT., DEPT OF LAB., *Occupational Outlook Handbook, 2016-17 Edition, Work Environment* (Dec. 17, 2015), <http://www.bls.gov/ooh/farming-fishing-and-forestry/agricultural-workers.htm#tab-3> [<https://perma.cc/ZDK7-9B85>].

<sup>25</sup> Amy Klobuchar, *The Economic Contribution of America's Farmers and the Importance of Agricultural Exports*, J. ECON. COMM., U.S. CONG. 6 (Sept. 2013), [http://www.jec.senate.gov/public/\\_cache/files/266a0bf3-5142-4545-b806-ef9fd78b9c2ffjec-agriculture-report.pdf](http://www.jec.senate.gov/public/_cache/files/266a0bf3-5142-4545-b806-ef9fd78b9c2ffjec-agriculture-report.pdf) [<https://perma.cc/YF6R-2ZK9>].

<sup>26</sup> *See id.*

<sup>27</sup> *See id.*

<sup>28</sup> *See generally id.*

<sup>29</sup> Mary Bauer, *supra* note 2, at 1 (quoting interview with U.S. Rep. Charles Rangle, speaking on CNN's Lou Dobbs Tonight (Jan. 23, 2007)).

<sup>30</sup> *Id.* at 1-2.

1942 through 1964, allowed over 4.5 million Mexican nationals to be contracted for work in the United States.<sup>31</sup> The program created the migration trend between Mexico and the United States.<sup>32</sup> Generally, the Mexicans who came over were peasants who had to show that they were agricultural workers by showing their calloused hands to prove their skill in the fields.<sup>33</sup> While this method of proving who is apt to become an agricultural worker for the fields of the United States is no longer in use, practically speaking there is little difference between the old Bracero program and the modern H-2 scheme.<sup>34</sup> Although there are more federal protections now than before, government enforcement of the protections are historically very weak.<sup>35</sup>

After the Bracero program was dismantled in 1964, the H-2 program continued the importation of foreign workers.<sup>36</sup> The H-2 program was created in order to help cane sugar workers travel more easily from Caribbean countries. The appalling work conditions experienced by these workers have been well documented.<sup>37</sup>

In 1986, Congress updated the H-2 program and divided visas into agricultural and non-agricultural classifications.<sup>38</sup> There are no annual numerical limits on H-2A visas but the annual limit on H-2B visas was recently increased in 2005 to allow for about 89,000 non-agricultural workers.<sup>39</sup> Conversely, only about 32,000 agricultural workers travel to the United States with an H-2A agricultural visa.<sup>40</sup> Initially, H-2A workers were afforded some protections, but it wasn't until 2008, however, that H-2B workers were provided some safeguards against abuse.<sup>41</sup>

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<sup>31</sup> NATIONAL MUSEUM OF AMERICAN HISTORY, *Opportunity or Exploitation: The Bracero Program* (last visited Dec. 19, 2016), [http://amhistory.si.edu/onthemove/themes/story\\_51\\_5.html](http://amhistory.si.edu/onthemove/themes/story_51_5.html).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> Mary Bauer, *supra* note 2, at 2.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 4.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 5.

<sup>39</sup> *Id.* at 4.

<sup>40</sup> *Id.* at 4.

<sup>41</sup> *Id.* at 7.



North Carolina has been the state that has most heavily used the H-2A program to bring in workers during the last fifteen years.<sup>42</sup> In 2010, North Carolina had 9,387 certified H-2A employees, comprising around 12 percent of the national H-2A workforce.<sup>43</sup> States that had more than 4,000 H-2A employees in 2010 included Louisiana, Georgia, Florida, Arizona, and Kentucky.<sup>44</sup> However, with approximately only 80,000 certified positions, the H-2A program represented only a small percentage of the nation's 2 to 2.5 million agricultural workers.<sup>45</sup>

The U.S. and its citizens suffer as a result of the H-2 system.<sup>46</sup> As long as employers in low-wage industries can rely on a stream of disposable immigrant workers who lack basic protections, the employers will have little to no incentive to hire U.S. citizens or residents or make jobs more appealing to domestic workers by improving wages and working conditions.<sup>47</sup> It is important that there are incentives in place to ensure that protections are afforded to immigrant workers because without those protections the market will continue to favor poor workplace conditions and fewer people will enter employment in those markets.

### III. THE RESPONSIBILITIES OF EMPLOYERS TO PROVIDE EMPLOYEES WITH NOTICE OF THEIR RIGHTS

One would think that employers would attempt to protect the workers who provide them with a steady stream of labor, however, that is not always the case. It is easy to forget that these immigrant workers arrive in this country without basic knowledge of the English language and are therefore subject to exploitation. That is why a system that actively seeks to keep

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<sup>42</sup> Etan Newman, *No Way To Treat A Guest: Why the H-2A Agricultural Visa Program Fails U.S. and Foreign Workers*, FARMWORKER JUSTICE 18 (last visited Dec. 18, 2016),

<https://www.farmworkerjustice.org/sites/default/files/documents/7.2.a.6%20No%20Way%20To%20Treat%20A%20Guest%20H-2A%20Report.pdf>.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> Mary Bauer, *supra* note 2, at 2.

<sup>47</sup> *Id.*

employers in line should be adopted. However, before such a system can be created, it is critical to know what is and is not included with the approval notice.

### *A. The Approval Notice*

Many times the H-2A petition is filed by an employer listed on the labor certification, an agent of that employer, or the association of U.S. agricultural producers named as a joint employer on the labor certification.<sup>48</sup> The petitioners must state the nationalities of all of the beneficiaries.<sup>49</sup> Because of this filing scheme, it is possible that an agricultural worker may never receive any paper notice and the papers themselves might always be in the hands of the employers. This is dangerous because it allows employers to inform their potential employees of only their basic duties while failing to disclose the employee's rights.

In addition, while payment of the petitions by the employee to the employer is generally impermissible, that does not mean that it never happens.<sup>50</sup> Workers who are approved are tied to the employer who brought them into the U.S.<sup>51</sup> In turn, employers are hesitant to report abuse because not only do the employers provide for their wages, but the employers can freely fire, deport, or decide not to re-hire workers in a way that would affect future H-2A applications.<sup>52</sup> Furthermore, this scheme does not level the playing field between employers and first-time employees because foreign workers generally lack knowledge of the law and employment regulations. This method of filing almost guarantees that the power to control employees in a way that is not legally acceptable is completely in the hands of employers.<sup>53</sup> While U.S. citizen workers have alternatives to

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<sup>48</sup> *Publication of the Final Rules: H-2A Agricultural Temporary Worker and H-2B Nonagricultural Temporary Worker*, US. DEPARTMENT OF HOMELAND SECURITY, Office of Domestic Operations Memorandum (Jun. 24, 2009), 2009 WL 2129640 at 3.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 4.

<sup>51</sup> Etan Newman, *supra* note 42, at 17.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 19.

agricultural work and can freely change jobs, H-2A workers are not as lucky.<sup>54</sup>

Moreover, recruitment usually occurs outside of the country.<sup>55</sup> Because of this, the recruitment network is largely unregulated and likely to exploit potential workers.<sup>56</sup> And while the regulations call for the prohibition of employers receiving any type of fees to bring workers to the United States, the employers are willfully ignorant of the recruitment practices across the border.<sup>57</sup> Therefore, many H-2A workers arrive in the country with debts as high as \$11,000 for these "fees".<sup>58</sup> Others will leave behind their personal effects in order to pay the recruiter for the chance to work in the U.S.<sup>59</sup>

### *B. H-2 Protection*

29 U.S.C. §1821-72 governs the protections afforded to migrant workers.<sup>60</sup> While these provisions might create the image that Congress created a great deal of regulation to safeguard immigrant workers, the enforcement of these provisions in practical situations is very limited.<sup>61</sup> For example, each farm labor contractor which recruits any migrant agricultural worker shall disclose in writing to each worker who is recruited the place of employment, the wages they are to be paid, the period of employment, and the transportation, housing, and any other employee benefit to be provided and any costs to be charged for each of them.<sup>62</sup> There is, however, no provision that states in what language those disclosures must be made.<sup>63</sup> Even though there is a requirement that this disclosure must be posted in conspicuous places, that does not really help protect workers if they do not understand what they are reading.<sup>64</sup> In fact, most

<sup>54</sup> *Id.* at 21.

<sup>55</sup> *Id.* at 22.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 23.

<sup>59</sup> *Id.*

<sup>60</sup> *See generally* 29 U.S.C. §1821-76 (1995).

<sup>61</sup> *See Wickham, supra* note 12.

<sup>62</sup> 29 USC §1821(a).

<sup>63</sup> *See* 29 USC §1821(a).

<sup>64</sup> 29 USC §1821(a).

workers are often illiterate and Spanish may not even be their first language.<sup>65</sup> The problem lies with how the message of the protection of workers is conveyed. Without an efficient means of conveying the message, these protections might as well not even exist. A simple sign being hung up does not mean much when workers are unaware of what it says.

In essence, the United States Citizenship and Immigration Services (“USCIS”) must do more to ensure that foreign workers are not exploited. I propose in this Note that it should be required that the receipts the USCIS ships out to workers upon approval of their H-2A application have included with them these disclosures in the native language that was used to apply for the H-2A program. This would ensure, in the least, that workers who are illiterate but had help in filling out the form would have some notice as, presumably, the person who helped them file the application would also be helping them read it if they successfully applied.

Congress created the AWPA as a replacement for an earlier statute called the Federal Farm Labor Contractor Registration Act.<sup>66</sup> The AWPA places certain duties and responsibilities on agricultural employers generally, as well as farm labor contractors.<sup>67</sup> If employers were to violate these duties, the AWPA provides agricultural workers with a private right of action if they are aggrieved.<sup>68</sup> The award of damages depends on the intentional violation of AWPA, however, and courts have uniformly stated that the term “intentional” requires a “conscious or deliberate” act and does not require a specific intent to violate the law.<sup>69</sup>

Courts have applied this standard under their discretion to decide when an employer has intentionally violated AWPA as the statute does not provide an aggrieved party a constitutional right to a jury trial on the issue of statutory damages because the relief is equitable.<sup>70</sup> In addition, the courts have the discretion to

<sup>65</sup> Mary Bauer, *supra* note 2, at 10

<sup>66</sup> CLAUDIA G. CATALANO, *Construction of the Migrant and Seasonal Agricultural Worker Protection Act (AWPA)*, § 1(2) at 65 A.L.R. Fed. 2d 339.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

award statutory damages of up to \$500 per plaintiff, per violation as well as other equitable relief.<sup>71</sup> Furthermore, class actions are available to agricultural workers asserting AWPA claims.<sup>72</sup> However, courts have considered factors proven to be detrimental to a plaintiffs' full claim in litigation.<sup>73</sup> For example, if the court found that the defendant had previously tried to remedy the wrong, then the protections would not be available.<sup>74</sup> While the act of correcting a wrong might seem like a substantial step toward correcting the damages sought by the plaintiffs, the discretion afforded to the courts is too large.

Another manner in which the AWPA protects workers is by precluding any person who intimidates, threatens, restrains, coerces, blacklists, discharges, or in any manner discriminates against any migrant or seasonal agricultural worker.<sup>75</sup> Courts have yet to award any damages when there was insufficient proof of loss.<sup>76</sup> And it is easy for employers to hide proof that workers have lost wages.<sup>77</sup> In such cases, the court has deemed the plaintiffs to be without standing, which may explain why other agricultural workers are reluctant to stand up for their rights.<sup>78</sup>

While the protections afforded to immigrant agricultural workers seem substantial, the practical effect the AWPA has on worker's rights is minimal.<sup>79</sup> Courts have readily accepted an employer's information in order to assert that immigrant workers lacked standing to assert claims under the AWPA, where the employees had supposedly not set forth facts sufficient to show that they worked on the grower's farms.<sup>80</sup> The difficulty in providing enough facts for the courts likely stems from the fact that these migrant workers live with their employers, are paid by their employers (raising the issue that employers have discretion to pay in cash), and are subject to their employer's writing in

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<sup>71</sup> *See id.* at 2.

<sup>72</sup> *See id.*

<sup>73</sup> *See id.*

<sup>74</sup> *See id.*

<sup>75</sup> *See id.*

<sup>76</sup> *See id.*

<sup>77</sup> *See id.* at 3.

<sup>78</sup> *See id.*

<sup>79</sup> *See id.* at § I(3).

<sup>80</sup> *Id.*

their official bookkeeping.<sup>81</sup> This, in turn, leads to the immigrant workers having no evidence to show that they actually worked there. These practices create uneven leverage between parties, whereby employers are in an advantageous position from the beginning of litigation. Not only do employers have more money than the H-2A workers, they also possess the money that the workers depend on for a living as well. Income inequality can create a drastic difference in the quality of legal representation.

It is important to note that the AWPA, although intended specifically for agricultural workers, has protected H-2B program workers as well.<sup>82</sup> However, this protection may be due less in part to the statutory framework and more because courts have found it convincing that H-2A and H-2B served similar interests.<sup>83</sup> Nevertheless, if courts find the H-2A and H-2B visas dissimilar enough, the protections afforded to H-2A workers could not be given to H-2B workers.

#### IV. WHY THE FAIR LABOR STANDARDS ACT SHOULD APPLY

Even though the Migrant Seasonal Agricultural Worker Protection Act exists, it does not provide enough protection for immigrant workers. Instead, the Fair Labor Standards Act (“FLSA”) should apply because of the disparate treatment that these workers endure due to their national origin.

##### *A. A Comparison Between the Fair Labor Standards Act and the Migrant and Seasonal Agricultural Worker Protection Act*

The FLSA establishes minimum wage, overtime pay, recordkeeping, and youth employment standards affecting employees in the private sector and in federal, state, and local governments.<sup>84</sup> The federal minimum wage is \$7.25 per hour, and

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<sup>81</sup> *Id.* at § I(6).

<sup>82</sup> *De Leon-Granados v. Eller & Sons Trees, Inc.*, 581 F. Supp. 2d 1295, 1312 (N. GA 2008) (wherein the court held for the plaintiffs using the reasoning found in an H2-A case that used the AWPA standards).

<sup>83</sup> *Id.*

<sup>84</sup> WAGE AND HOUR DIVISION, U.S. DEPT OF LABOR, *Compliance Assistance—Wages and the Fair Labor Standards Act (FLSA)* (last visited Dec. 16, 2016), <http://www.dol.gov/whd/flsa/>.

where the employee is subject to both state and federal minimum wage, the employee is entitled to the higher minimum wage.<sup>85</sup> The FLSA also establishes overtime pay and the required number of hours that consist of “ordinary hours worked”.<sup>86</sup> Similar to the AWPAs, the FLSA requires employers to display these requirements in conspicuous and open places.<sup>87</sup> However, neither the FLSA nor the AWPAs mention anything about what language these requirements have to be in.<sup>88</sup> The protection is afforded to employees who are citizens, residents, or otherwise legally working in the United States and in the private sector.<sup>89</sup>

While the AWPAs have certain similar requirements to the FLSA, the USCIS has not posted any of these provisions on their website.<sup>90</sup> It is difficult to believe that an immigrant with partial understanding of the English language and probably limited computer skills would look up a federal statute. The USCIS should be held responsible for their treatment of foreign nationals because they are guests in our country. Guest workers should be treated with the same amount of respect and protections that citizen workers have. Otherwise, they will become a separate and distinct class of citizens.

Instead, the USCIS only states that the employer may not demand that a worker show specific documents on account of the worker’s national origin, ethnicity, immigration, or citizenship status, among other things.<sup>91</sup> An employer cannot refuse to accept a worker because they have an unfounded suspicion that the document is fraudulent.<sup>92</sup> For example, an employer cannot refuse a U.S. passport simply because of the limited language skills a worker may have.<sup>93</sup> In fact, an employer must provide the application form and include instructions for completing the

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> WAGE AND HOUR DIVISION, *supra* note 84; 29 U.S.C. §1821.

<sup>89</sup> *See* WAGE AND HOUR DIVISION, *supra* note 68.

<sup>90</sup> U.S. CITIZENSHIP AND IMMIGRATION SERVICES, *Employee Rights* (last visited Nov. 18, 2016), <http://www.uscis.gov/i-9-central/employee-rights-discrimination/employee-rights>.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

form.<sup>94</sup> The employer must also accept documentation if it appears to be genuine and actually relates to the worker.<sup>95</sup> In addition, the USCIS clearly states that an employer cannot retaliate against an employee for seeking counsel or for filing a complaint.<sup>96</sup> While those provisions are well thought out, it hardly seems to indicate that the employees will receive any notice of these protections.

The one phrase requiring the employer to “give instructions” does not even indicate that those instructions must be in the native language of the applicant worker.<sup>97</sup> This makes it difficult for the applicant to understand the process, let alone the protections afforded to him by the USCIS or even the AWP. The USCIS should be held accountable for these, as a simple slip printed in the worker’s language should be sufficient to provide important protections. The USCIS could argue that it would be too expensive to send personalized instructions to each and every one of their applicants. But there are many other brochures that have been translated into numerous languages, and a universal booklet should present only minimal costs.

### *B. Why the Fair Labor Standards Act Affords More Protection*

Employers prefer H-2A workers because those workers are generally more ignorant of the law.<sup>98</sup> Employers can save money by hiring guest workers because they do not have to pay certain taxes on their wages, while citizen workers require payment of all applicable wage taxes.<sup>99</sup> As a result, employers have resorted to methods of denying lawfully qualified U.S. workers jobs in favor of H-2A workers.<sup>100</sup> There have been accounts of several questionable activities by employers going to great lengths in order to dissuade American workers from applying or returning to work on farms.<sup>101</sup> Some of the examples include scheduling

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<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> Etan Newman, *supra* note 42, at 21.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *See id.*



interviews at inconvenient times or locations; hiring too early in the season leading workers believe there is work to be done when, in fact, there is none; limiting working hours for domestic workers in order for them to be discouraged in continuing employment; negotiating employment contracts with unconscionable terms; and handing out impossible work quotas.<sup>102</sup>

By using these techniques, employers dissuade willing American workers from continuing work on their farms. This just highlights how the H-2A program is flawed. Unfortunately, American workers believe that the temporary H-2A workers, not the employers, are to blame.<sup>103</sup> Thus, foreign workers' "temporary" status as employees has sometimes been defined, "not a[s] a temporary replacement but [a] permanent workforce".<sup>104</sup>

### *C. The Elephant in the Room: Should Undocumented Immigrants be in the Equation?*

Current research concerning these visa programs cannot be completed without coming across several sources concerning undocumented immigrants. Undoubtedly, undocumented immigration has been at the forefront of political and social discussion for the last few decades. Hence, a recurring issue in the modern immigration reform debate is how undocumented immigration effects wages due to that immigration providing a readily available supply of workers and how this effect may or may not be good for the country.<sup>105</sup> Some employers prefer immigrants to native-born (possibly even documented) workers because their undocumented status leads employers to believe that they can pay them below-market wages.<sup>106</sup>

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<sup>102</sup> *Id.*

<sup>103</sup> *See id.*

<sup>104</sup> *Id.*

<sup>105</sup> *See* TIMOTHY P. GLYNN ET AL., EMPLOYMENT LAW: PRIVATE ORDERING AND ITS LIMITATIONS 47 (3rd ed. 2015).

<sup>106</sup> *See* Harry J. Holzer, *Economic Impacts of Immigration, Testimony of Harry J. Holzer to the Committee on Education and the Workforce*, U.S. House of Representatives, Nov. 16, 2006, available at <http://www.urban.org/url.cfm?ID=900908>, 3.

As a result, this can have some positive effects on the U.S. economy by making home produced items such as food, clothing, and housing cheaper due to the cheaper wages that the employers pay their employees.<sup>107</sup> The importance of supporting immigration is clear because the need for low prices in consumer products plays an important role in the economy.<sup>108</sup> For these reasons, it is vital to dedicate a portion of this Note to undocumented immigrants and their protections in the labor market, since their wages can also dictate how H-2 workers and citizen workers are paid.

Those who receive the most economic benefits to employing undocumented immigrants are agricultural businesses.<sup>109</sup> Much like their ability to exploit H-2 workers, these employers have even greater incentives to exploit undocumented immigrants.<sup>110</sup> As a group, undocumented immigrants comprise a significant amount of the workforce whose compensation levels are at or near minimum wage, and, therefore, they are vulnerable to work and wage abuses.<sup>111</sup> While many view undocumented workers not worthy of the protections, it is important to remember that these workers are human beings who should be as protected as everyone else legally qualified to work in the United States is.

The question of whether undocumented workers may take advantage of the FLSA remains in dispute.<sup>112</sup> For example, the Supreme Court has held that the federal immigration policy banned the National Labor Relations Board from awarding back pay to an undocumented immigrant after an employer terminated the immigrant for engaging in union activities.<sup>113</sup>

Despite this, recent decisions have generally held that undocumented workers are entitled to protections under the

<sup>107</sup> *See id.*

<sup>108</sup> *See id.* at 4.

<sup>109</sup> Arian Campo-Flores, *Why Americans Think (Wrongly) That Illegal Immigrants Hurt the Economy*, NEWSWEEK, May 14, 2010.

<sup>110</sup> *See Holzer, supra* note 106, at 3.

<sup>111</sup> GLYNN, SULLIVAN, ARNOW-RICHMAN, *supra* note 105, at 47.

<sup>112</sup> *Id.*

<sup>113</sup> *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002).

FLSA.<sup>114</sup> Even though some courts have extended protections to undocumented immigrants in theory, however, these individuals often cannot take advantage of them.<sup>115</sup> One obvious reason as to why they cannot generally take advantage of these protections is because the undocumented immigrants can face deportation threats from their employers if they speak out about their working conditions.<sup>116</sup> So while undocumented immigrants can argue for FLSA protections, guest workers that are here on government visas cannot. That seems rather illogical, and guest workers should be afforded full protections of the FLSA as well as protections in the form of notice to them in their native tongue if they are to fully benefit from the protections they actually have.

## V. CONCLUSION

The historical weakness of the old Bracero program persists to this day.<sup>117</sup> There are still instances of guest workers that are exploited, and even though they take their chance in court, they have to be subjected to discrimination and lowly workforce conditions in the first place in order to have standing in the legal system.<sup>118</sup> The agricultural labor market, and, as a result, the agricultural sector as whole depends on better economic conditions for these H-2A workers in order to ensure legally permitted workers are ensured protections. While the adoption of the H-2 program was meant to safeguard against the horrendous conditions of the Bracero program, there still needs to be more reform in order to protect those that are more susceptible to exploitation.

The importance of notice should not be undermined. It is critical that workers receive notice in their approval receipt of their authorized work permit. Without a notice of their rights, guest workers will blindly come into the United States without any idea of what protections are afforded to them. Without notice,

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<sup>114</sup> See GLYNN, *supra* note 105, at 47 (citing Zavala v. Wal-Mart Stores, Inc., 393 F. Supp. 2d 295 (D.N.J. 2005)).

<sup>115</sup> *See id.*

<sup>116</sup> *See id.*

<sup>117</sup> *See generally* Mary Bauer, *supra* note 2.

<sup>118</sup> *See* De Leon-Granados v. Eller & Sons Trees, Inc., 581 F. Supp. 2d 1295, 1312 (N. GA 2008).

guest workers are often placed in intolerable living and/or working conditions until the workers believe that their employer has gone too far. By that time, the damage will have been done, and the only fitting recourse would be to file a lawsuit against an employer. The USCIS should step in before that stage and provide a simple pamphlet with languages directed at the specific geographic location in which the employer is picking up the employees. The counterargument would probably be that it is too expensive to have translators from specific areas to translate all of the materials, but it would probably be much cheaper than a lawsuit. Public policy should play a role in this, and it is important that the USCIS understand how protections afforded to guest workers affect society at large.

The Fair Labor Standards Act should apply to H-2 workers as it already applies to undocumented immigrants in some states.<sup>119</sup> It is inconceivable to think that the FLSA applies to undocumented workers, but workers that have received proper documentation receive a lesser amount of protection through the Agricultural Worker Protection Act. In addition, having uniform regulations for workers will enable courts to reach better decisions as they will not have to plow through a different set of criteria for a particular set of employees.

In sum, the economic hardships that documented workers have to endure are the same or sometimes worse than those who are undocumented. If undocumented workers receive FLSA protections but documented workers receive an inferior form of protection, the incentive to cross this country's border legally is also diminished. Of course, that is assuming that they know their rights to begin with. The USCIS should and can help with that in a way that is economically feasible by way of simple translation documents that go along with approval notices. The USCIS is the governing body that ultimately decides whether or not a worker can be used by an employer and therefore has the means to reach every single worker who crosses the border legally.

In order for the labor market to be fair to all of those in it, including citizen and non-citizen workers, employers should be held to a high level of responsibility. Society as a whole must

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<sup>119</sup> See GLYNN, *supra* note 105, at 47.

realize that the workers who work for less or are being systematically abused are not to blame, but the employers who exploit certain people are. Inevitably, because society dictates policy, there might never be the appropriate immigration reform that is needed to ensure a healthy economy. It is difficult to arrive at a solution for all of the problems in the immigration system, but a simple pamphlet might go a long way to help guest workers. The importance of the word "guest" should not be taken lightly. These are workers who were invited by employers in the United States and by the federal government to help the labor market shortages. The least the government and employers could do is notify them of their rights in their native language.