

What is “Agricultural” Anyway: A Closer Look at The H-2A and H-2B Loophole

Joseph Marin

I. BACKGROUND INTO U.S. AGRICULTURAL LABOR	101
<i>A. The H-2A Visa</i>	102
<i>B. The H-2B Visa: Its Similarities & Differences</i>	103
<i>C. So What’s The Problem?</i>	104
II. INTRODUCTION	104
<i>A. A Closer Look As To Where We Are</i>	104
1. <i>The “CAFO Boom”</i>	104
2. <i>Who’s Going to Build the CAFOs?</i>	105
3. <i>Economic Impact</i>	106
III. ANALYSIS.....	107
<i>A. The Definition of Agricultural Labor</i>	107
1. <i>The “On the Farm” Exception</i>	108
2. <i>What Is Production?</i>	108
<i>D. Workers vs. Employees</i>	109
<i>E. The Employers & Economics</i>	110
<i>F. The Department of Labor’s Database</i>	111
IV. RECOMMENDATION.....	112
<i>A. Equally Imposing Restrictions and Caps</i>	112
<i>B. The Problems With the AEWR and Fixing the Prevailing Local Wages</i> <i>Calculation</i>	113
<i>C. Ending Both H-2A and H-2B Classification and Creating a Path to</i> <i>Temporary Residency</i>	114
V. CONCLUSION	115

I. BACKGROUND INTO U.S. AGRICULTURAL LABOR

In October 2009, the United States experienced an unemployment rate of ten percent—the highest percentage since September 1982.¹ It would seem paradoxically

1. BUREAU OF LABOR STATISTICS, BLS SPOTLIGHT ON STATISTICS, THE RECESSION OF 2007-2009 (2012), https://www.bls.gov/spotlight/2012/recession/pdf/recession_bls_spotlight.pdf [hereinafter THE

difficult for the agricultural community to claim that the United States was also experiencing a labor shortage. However, this was a reality for the agricultural industry.² In times of stubbornly high unemployment, as well as in times of low unemployment, the United States agricultural labor force has relied on foreign nationals to do the work, namely through the H-2A visa.³ The H-2A visa program provides an alternative to U.S. employers to hire foreign nationals to fill labor shortages.⁴ The H-2A Visa distinction, however, did not originate on its own. The classification was established in 1986 after the Immigration Reform and Control Act (IRCA) abolished the

broad-sweeping H-2 category and created two new sub-classifications: H-2A and H-2B Visas.⁵ Currently, the Department of Labor (DOL) and the State Workforce Agency (commonly known as “SWA”) enforce and oversee the both visa programs.⁶

A. The H-2A Visa

The new H-2A Visa category was purposely designed to provide a labor solution to those employers in the agricultural business.⁷ Section 218 of the INA allows for the admission of temporary foreign workers under the H2-A visa program.⁸ This section outlines requirements that the employer must satisfy to receive labor assistance. Today, agricultural employers who satisfy these certain requirements⁹ can hire seasonal foreign workers to perform services. First, the employer must show an attempt to find U.S. workers to fill the jobs.¹⁰ Employers can accomplish this by posting the job opening online or through a local newspaper.¹¹ If the employer finds that it cannot satisfy its shortage, the employer can then petition to the USCIS to seek foreign aid.¹² Upon approval, the employer will then notify a licensed Farm Labor Contractor (FLC), and the

RECESSION].

2. See LINDA LEVINE, CONG. RESEARCH SERV., FARM LABOR SHORTAGES AND IMMIGRATION POLICY (2009), <https://nationalaglawcenter.org/wp-content/uploads/assets/crs/RL30395.pdf> (explaining the employment trends in the agricultural market are different from the nationwide domestic market).

3. See *id.*

4. *H-2A Temporary Agricultural Workers*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/working-united-states/temporary-workers/h-2a-temporary-agricultural-workers> (last visited Nov. 20, 2018).

5. Peter Rousmaniere, *Temporary Working Programs: Introduction*, WORKING IMMIGRANTS (Jan. 12, 2013, 8:32 AM), http://www.workingimmigrants.com/2013/01/temporary_worker_programs_intr.html.

6. See *H-2A Temporary Agricultural Program*, U.S. DEP’T LAB. EMP. & TRAINING ADMIN., <https://www.foreignlaborcert.doleta.gov/h-2a.cfm> (last visited Nov. 1, 2018) (explaining how the Department of Labor’s Wage and Hour Division enforces worker contracts and the State Workforce Agency (SWA) administers and processes employer applications).

7. Rousmaniere, *supra* note 5.

8. Immigration and Nationality Act of 1965 §218, 8 U.S.C. §1188 (2000).

9. See *H-2A, H-2B, and H-3 Visa*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://my.uscis.gov/exploremyoptions/h2a_h2b_h3_visa (last visited Nov. 3, 2018) (requiring that an employer must satisfy: (1) Offer a job that is of a temporary or seasonal nature (2) Demonstrate that there are not sufficient U.S. workers who are able, willing, qualified, and available to do the temporary work (3) Show that prospective employees are nationals of an H-2A-eligible country (4) Show that employing H-2A workers will not adversely affect the wages and working conditions of similarly employed U.S. workers and lastly (5) submit a valid temporary labor certification from the U.S. Department of Labor).

10. *Id.*

11. *Id.*

12. *Id.*

FLC will recruit viable visa recipients to fill this demand.¹³ The visa workers will then be hired by the employer and assigned to a specific work location. On average, the workers are expected to work 30-40 hours per week and their compensation will depend heavily on the Adverse Effect Wage Rate (AEWR).¹⁴ The AEWR is an economic calculation that finds an appropriate wage that will not depress wages in a specific region. For example, the federal minimum wage for H-2A workers is \$11.46 per hour, but in Iowa and Illinois, workers can expect to get paid around \$13 per hour due to the AEWR calculation.¹⁵ Its calculation is similar to a minimum wage. Overall, it is unlikely to find any workers making over \$14 per hour as an H-2A worker in the United States.¹⁶ Ultimately, the H-2A workers will provide services such as the production and harvesting of crops, as well as any service that is “agricultural” under the Immigration and Nationality Act (INA).¹⁷

B. The H-2B Visa: Its Similarities & Differences

Alternatively, some employers opt for the H-2B visa to solve their labor needs. The program is similar to the H-2A visa program, though several factors make it importantly different. First, the H-2B visa is designed to serve those employers that are “nonagricultural,”¹⁸ e.g., construction, landscapers, hotels, and amusement parks.¹⁹

Secondly, the H-2B application is approved more stringently. For example, as of 2018, the H-2B visa is statutorily capped at 66,000 workers, limiting the amount the government may issue.²⁰ This is in contrast with the H-2A visa, which is essentially unlimited. Furthermore, the demand for H-2B visas has grown exponentially over the years.²¹ Its issuance is similar to a lottery system.²² Businesses fight for foreign workers

13. *Id.*

14. The Adverse Effect Wage Rate (AEWR) is a wage rate that is calculated by the Department of Labor to ensure that Foreign workers will not adversely affect the wages of U.S. workers. The determined wage focuses on the particular occupation and geographical location in which it is performed, *see generally* Rowland v. Marshall, 650 F.2d 28 (4th Cir. 1981).

15. *Labor Certification Process for the Temporary Employment of Aliens in Agriculture in the United States*, 82 Fed. Reg. 60628 (Dec. 21, 2017), <https://www.federalregister.gov/documents/2017/12/21/2017-27528/labor-certification-process-for-the-temporary-employment-of-aliens-in-agriculture-in-the-united> (explaining that Iowa’s wage rate is \$13.42 an hour and Illinois is \$12.93 an hour—the varying wage rates are attributable to the locality).

16. *Id.*

17. Immigration and Nationality Act of 1965 § 218, 8 U.S.C. § 1188 (2013).

18. However, both H-2A and H-2B workers are classified as low-skilled laborers. *H-2B Temporary Non-Agricultural Workers*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/working-united-states/temporary-workers/h-2b-temporary-non-agricultural-workers> (Last Updated Aug. 19, 2019).

19. Kim Slowey, *Truly No Better Option’: H-2B Visas for Construction Workers Spark Industry Controversy*, CONSTRUCTION DIVE (June 21, 2016), <https://www.constructiondive.com/news/truly-no-better-option-h-2b-visas-for-construction-workers-spark-industr/421224/> (discussing the benefits and detriments on the U.S. economy of using H-2B workers for nonagricultural work, for example, construction).

20. The 66,000 cap is evenly split between the two working seasons (summer and winter) and at times has been increased due to popular demand. In 2018, the Department of Homeland Security decided to issue and additional 15,000 H-2B visas to demanding industries. Since 2013, the number of H-2B certifications have almost doubled and the industry most served is “landscaping and groundskeeping”. Patricia Cohen, *With Jobs To Fill, Businesses Play the Visa Lottery*, N.Y. TIMES (June 27, 2018), <https://www.nytimes.com/2018/06/27/business/economy/visas-usa-foreign-labor.html?searchResultPosition=1>.

21. *Id.*

22. *See id.* (discussing the transition from a first come, first served system to a lottery system due to the number of applications the government was receiving. Some places, like Colorado with a 2.5% unemployment

and intense competition follows. Even the United State's highest elected official, President Donald J. Trump, has used the H-2B visa to his benefit.²³

Lastly, the H-2B visa is more expensive to employers. Although the DOL requires pay to reflect its adverse wage effects, H-2B wage is primarily determined by the "highest prevailing wage" for that locality. For example, if a worker were to work in construction in Illinois or Iowa under the H-2B visa, his or her pay would reflect the prevailing hourly wage of \$20 to \$30 for construction workers.²⁴ To that end, the H-2B also requires employers to pay their visa workers overtime, social security, and Medicaid, all of which are *not* required for those on H-2A visas.²⁵

C. So What's The Problem?

The question then becomes: what happens when the work demanded is nonagricultural (construction), but its purpose is to further agricultural industry? Or phrased differently, what is "agricultural" anyways?

II. INTRODUCTION

A. A Closer Look As To Where We Are

As of late, there is a growing trend in the farming industry for employers to use H-2A workers to build Confined Animal Feeding Operations (CAFOs).²⁶ CAFO's, which are hog confinements, are typically constructed and developed by farming construction companies.²⁷ These confinements require construction laborers to "'layout building', 'level earth', 'tie-rebar,'" and "'position aluminum wall frames,'"²⁸ all requiring some basic knowledge of construction.

1. The "CAFO Boom"

The exponential increase in H-2A workers being employed to build CAFOs is largely in response to the so-called "CAFO Boom" which is being experienced throughout the United States agricultural community, especially in Iowa, Illinois, and Minnesota.²⁹ The "boom" is due to the increasing demand for slaughtered hogs throughout China and Hong Kong. In 2016, pork exports to China and Hong Kong

rate, are more in need of labor than in other places).

23. Alexia Fernández Campbell, *The One Place Trump Wants More Foreign Workers: Mar-a-Lago*, VOX (July 9, 2018, 3:40 PM) <https://www.vox.com/policy-and-politics/2018/7/9/17548776/trump-h-2b-guest-workers> (reporting President Trump's Mar-a-Lago resort hired 61 H-2B visa holders to fill labor shortages in food and beverage positions).

24. Stephen Franklin et al., *The Visa Loophole That Big Ag Construction Firms Love To Exploit*, IN THESE TIMES (Apr. 30, 2018), http://inthesetimes.com/features/farm_industry_migrant_workers_h2a_visa_exploitation.html [hereinafter Franklin].

25. *Id.*

26. *Id.*

27. See CARRIE HRIBAR, NAT'L ASS'N OF LOCAL BDS. OF HEALTH, UNDERSTANDING CONCENTRATED ANIMAL FEEDING OPERATIONS AND THEIR IMPACT ON COMMUNITIES 1 (2010), https://www.cdc.gov/nceh/ehs/docs/understanding_cafos_nalboh.pdf (discussing the differences between CAFO's and AFO's).

28. Franklin, *supra* note 24.

29. *Id.*

reached a milestone and totaled one billion dollars.³⁰ According to the North American Meat Institute, not only have exports increased, but so have profits.³¹ For example, some estimates have claimed “between 2015 and 2016, the profits pork packers earned per head of hog almost doubled.”³² With an opportunity to capitalize on new profits, it is unsurprising to find the number of CAFOs in the United States has reached approximately 20,000.³³ This is a 7.6% increase in the last seven years.³⁴ Iowa, being the biggest contributor to this increase, has more than quadrupled its CAFO number since the early 2000s.³⁵

As a relentless appetite for pork continues abroad and an opportunity for hog producers to seize profits grows, the agricultural market is clearly beginning to rethink its investments.

2. Who’s Going to Build the CAFOs?

The idea of using H-2A workers for CAFO development has recently become an attractive alternative for many employers.³⁶ Absent any legal ramifications, it appears advantageous for hog producers to explore this option. Take, for example, Alewelt Concrete Inc. (Alewelt), a concrete contractor located in Hardin County, Iowa. Alewelt, despite being a construction company, made it on the DOL’s list for the top H-2A employers in the country.³⁷ In other words, one of the biggest recipients of this “agricultural visa” is a construction company. In 2016, Alewelt received 1,343 workers under the agricultural H-2A visa.³⁸ Needless to say, Alewelt is not the only one of its kind. A brief search on the DOL’s Labor Certification database provides a number of companies with “construction” or “concrete” in their name as recipients of the H-2A visa.³⁹

30. JAMES MERCHANT & DAVID OSTERBERG, IOWA POLICY PROJECT, THE EXPLOSION OF CAFOs IN IOWA AND ITS IMPACT ON WATER QUALITY AND PUBLIC HEALTH (2018), <https://www.iowapolicyproject.org/2018docs/180125-CAFO.pdf> (discussing the increasing number of slaughtered hogs throughout the world. In 2016, pork exports from Iowa reached six billion dollars and experts are expecting the increase to continue).

31. Franklin, *supra* note 24.

32. *Id.*

33. MERCHANT & OSTERBERG, *supra* note 30 *passim* (discussing the increasing number of CAFOs in Iowa since 2001). Currently, by federal definition, Iowa has approximately 10,000 permitted CAFOs in operation. This is in contrast to the 722 in operation in 2001. Furthermore, the size of CAFOs are increasing as well. Some small-scale surveying has found a higher percentage of medium to larger CAFOs than was reported in the past, despite the lack of data to definitively say. *Id.*

34. *Id.*

35. Kristen Guess, *Demands for CAFO Regulation Increasing*, THE COURIER (July 29, 2018), https://wcfcourier.com/news/local/govt-and-politics/demands-for-cafo-regulation-increasing/article_57d53625-ff6b-5c94-ae82-be3b990c1081.html (estimating that Iowa, in fact, has over 13,000 CAFOs).

36. Franklin, *supra* note 24.

37. *Id.*

38. *Id.*

39. This is database accessible via the public for information regarding H-2A and H-2B employers. At the Public Registry page, select the case type “H-2A” and enter employer’s name. You may search for a specific employer or type generic terms, such as “construction” or “concrete” to receive an exhaustive list of all employers who have those terms in their name. Over the years, the number of employers who primarily offer services in construction have overwhelmingly been recipients of H-2A agricultural laborers. *Labor Certification Registry*, U.S. DEP’T LAB. EMP. & TRAINING ADMIN. <https://icert.doleta.gov/index.cfm?event=ehLCJRExternal.dspLCRLanding> (last visited Oct 22, 2018)[hereinafter *Labor Certification Registry*].

Whether construction on a farm counts as “agricultural” for H-2A purposes has largely gone unaddressed by the DOL.⁴⁰ The DOL’s inaction to solve this issue has also spurred concern among those construction companies who have *not* used H-2A workers to their advantage. This is not to suggest the DOL is unaware of this ongoing problem. In 2008, before making the DOL’s top H-2A employer list, Alewelt attempted to hire workers via the H-2A visa to do concrete work, but the DOL responded by refusing to authorize the job order.⁴¹ Two years later, in frustration with the DOL, Alewelt switched its workers’ status from H-2B to H-2A.⁴² In other words, Alewelt hired workers under the H-2B visa, but paid them the H-2A rate.⁴³ The DOL discovered this discrepancy and all parties involved decided to settle and sign a non-disclosure agreement.⁴⁴ More recently, the DOL has received approximately ten cases involving this issue, each of which has been settled outside of court.⁴⁵ Most companies, without hesitation, agree to a settlement in fear that if a court decided this issue, it would likely render this scheme as an abuse of the H-2A visa. One attorney claiming, “Even if it doesn’t violate the letter of the law, it at least violates the spirit.”⁴⁶

3. Economic Impact

Both the H-2A and H-2B Visa programs offer benefits and detriments to the economy. Study after study has shown that immigrants working in the United States help the agricultural economy.⁴⁷ A closer analysis of the economic impact is beyond this discussion; however, that is not to suggest that some regional economies go unaffected by this program. For example, the construction industry has experienced a strong increase in labor force throughout the United States. However, in states that have a large H-2A presence, the increase is not as convincing. Take Illinois, a state with one of the highest unemployment rates for construction workers at 12.7%.⁴⁸ Between 2003 and 2011, Illinois alone lost about one-third of its construction labor force.⁴⁹ In Iowa, where construction unemployment has been rising steadily, there has been an adverse wage

40. See Franklin, *supra* note 24 (addressing the inconsistency in the DOL’s treatment of farm construction).

41. *Id.*

42. *Id.* (including an accusation for failing to pay workers, reimbursing them for traveling costs and recruiting fees, as well as sending injured workers back to Mexico without medical care. Alewelt resolved the matter in a settlement).

43. *Id.*

44. *Id.*

45. Franklin, *supra* note 24.

46. *Id.* (quoting Daniel Costa from the Economic Policy Institute).

47. Victoria Bouloubasis, *New Farmworker Report Studies Economic Impact, Yet Neglects Important Details, Advocates Say*, INDY WEEK (May 22, 2013, 1:59 PM), <https://indyweek.com/food-and-drink/news/new-farmworker-report-studies-economic-impact-yet-neglects-important-details-advocates-say/>.

48. *Construction Unemployment Rates Down in All 50 States*, FOR CONSTRUCTION PROS (Mar. 21, 2018), <https://www.forconstructionpros.com/latest-news/press-release/20997425/associated-builders-and-contractors-inc-abc-construction-unemployment-rates-down-in-all-50-states> [hereinafter *Construction Unemployment Rates*].

49. Franklin, *supra* note 24 (noting the effect of H-2A workers on the construction industry). Compare NAT’L CONFERENCE OF STATE LEGISLATURES, U.S. IMMIGRATION A PRIMER FOR STATE POLICY MAKERS (JUNE 2018) (giving statistics regarding the states receiving the most H-2A and H-2B workers) with *Construction Unemployment Rates*, *supra* note 48.

effect due to this H-2A loophole.⁵⁰ The going rate for a construction worker in Iowa is currently \$17.32 per hour, yet current H-2A workers make about \$13 per hour doing the same job.⁵¹ Needless to say, abusing the H-2A visa may not cause permanent damage, but industries can suffer short term consequences. The purpose of the visa program is to fill shortages, not for agricultural businesses to substitute labor with cheaper labor.

III. ANALYSIS

Employers using H-2A workers to build CAFOs for agricultural purposes creates a new realm of problems within statutory framework of Section 218 of the INA . Not only does it violate the spirit of the law, but it also violates the letter of the law. This Note’s argument is two-fold: first, the construction of CAFOs does not fall under the legal definition of agricultural

labor for H-2A purposes, and second, if construction labor is permitted under that definition, it would still violate the requirement that foreign employment cannot adversely affect local wages.

A. The Definition of Agricultural Labor

The Federal Labor Standards Act (FLSA) defines “agriculture” labor as:

the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities . . . the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.⁵²

The Internal Revenue Service (IRS) also defines “agricultural labor” for tax purposes, and the language mirrors the FLSA.⁵³ Generally, any service performed on a farm by an employee constitutes agricultural labor if the activities include cultivating soil, raising and managing livestock, and raising agricultural commodities.⁵⁴ The IRS regulation, however, draws an important distinction between what constitutes a “farm” and what constitutes “agricultural labor.”⁵⁵ The IRS maintains that the two are mutually exclusive.⁵⁶ Some activities that do not appear to be “agricultural labor” can actually be deemed as such. For example, the operation and maintenance of a hatchery (fish nursery) by itself would not constitute agricultural labor, but if it is performed on a “farm,” it will be deemed as agricultural labor. The same requirement applies to the production of maple syrup and mushrooms. It will only be deemed “agricultural labor” if “such services are

50. Franklin, *supra* note 24.

51. *Id.*

52. Fair Labor Standards Act of 1938, 29 U.S.C. § 203(f) (2018).

53. 26 C.F.R. § 31.3121(g)-1 (1954).

54. *Id.*

55. *Id.*

56. *See id.* at (a) (1), (2). (explaining the relationship between “agricultural labor” and “farm” for employment purposes). *See also id.* at (b) (tying the two terms together and further explains the requirement for a connection between the performance and being on a farm).

performed on a farm.”⁵⁷ This IRS definition has unearthed, what I call, the “on the farm” exception.

1. The “On the Farm” Exception

This “on the farm” exception would lend support for why employers are using H-2A workers to build CAFOs. If the CAFO is being built on the farm *and* for the farm, then by the IRS’s definition, this should qualify as agricultural labor. A brief search on the DOL’s database will show that many employers are catching on. Many employers who are using H-2A workers to do construction begin their job description with “On farm, . . .”⁵⁸ The consistent use of this language by employers suggests that employers have picked up on this loophole.⁵⁹ By starting their job descriptions as “On the farm,” the employer circumvents any potential liability that this work may not be deemed “agricultural labor.”

2. What Is Production?

Assuming this “On the farm” language is qualifying, a separate analysis would have to be in place to validate this practice of using H-2A workers for construction work. Both the FLSA and the IRS distinguish between two types of performances.⁶⁰ There can be performances in livestock *or* performances in agricultural commodities.⁶¹ Although performances in both categories can qualify as “agricultural labor” if conducted on a farm, they still have to be within the work descriptions. Take, for example, the description of work in agricultural and horticultural commodities. Here, an employee’s performances may include harvesting, raising, *producing*, growing, and cultivating.⁶² However, in the work description under livestock, the type of work is different.⁶³ Here, an employee’s performance may include feeding, operating, caring for, raising, and managing livestock.⁶⁴ The distinction in language is important because the word “producing” (which is often synonymous with construction) only appears under the work description for agricultural or horticultural commodities.⁶⁵ “Producing” is nowhere in the work

57. *Id.* at 31.3121(g)-1 (b)(2).

58. Searching the iCERT Portal is publicly accessible. Most, if not all, companies that provide services in concrete and construction start their job description with the language “On farm”. First, click on a specific state to search the database. Once you have picked a state, narrow your search to H-2A certifications by choosing H-2A in the “Case Type” tab. Next, enter “construction” or “concrete” in the Employer Name search box to find employers who are primarily offering services in construction. Lastly, enter the Start and End date range (for the best results, enter in a wide range, e.g., 2016 to 2018). Once that is complete, click the search tab and a list of employers should appear. Choose an employer and open up their Job Certification via the PDF link. Each job certification form has multiple pages, however, find the page with the “Job Description” and notice the language that the “job duties” start with. Compare those results with those employers who are purely agricultural, i.e. non-construction. Those employers, generally, do not use the same “on the farm” language as their construction counterparts do. *Labor Certification Registry*, *supra* note 39.

59. *Id.*

60. See §218, 8 U.S.C. §1188 (2000) (explaining admission of temporary H-2A workers); 26 C.F.R. § 31.3121(g)-1 (1964) (Treasury Regulation of agricultural labor).

61. *See id.*

62. 26 C.F.R. § 31.3121(g)-1 (1964).

63. *Id.*

64. *Id.*

65. *Production*, DICTIONARY.COM, <https://www.dictionary.com/browse/production> (last visited Oct. 7, 2018).

description for livestock.⁶⁶ In other words, because both regulations describe performances in both agriculture and livestock, and the word “produce” is not found under the livestock performance description, it must mean the production of a CAFO would not be permissible, regardless if it was done “on the farm” or not. The word “producing” is, however, found under agricultural performances. Applying it to performances in livestock would be an inaccurate interpretation. Legislation provided two different work descriptions because the work in livestock is vastly different than work in agricultural commodities. If “producing” was a description of livestock performances, and a worker produced a CAFO on a farm, then this production would be allowed under the law. But that is not the case.⁶⁷ Although currently, the performance (i.e. building CAFOs) is done on a farm, it is not a performance that is permitted or allowed under the FLSA or IRS, this making is altogether unlawful. Using this legal framework to allow CAFOs to be built on a farm would not only violate the letter of the law, but also the purpose of the H-2A visa.⁶⁸ Additionally, the IRS uses similar language in their examples as well:

Services performed in connection with the production or harvesting of maple sap, or in connection with the raising or harvesting of mushrooms Thus, services performed in connection with the operation of a hatchery, if not operated as part of a poultry or other farm, do not constitute agricultural labor.⁶⁹

D. Workers vs. Employees

Lastly, it is no doubt that agricultural labor can extend beyond the hands-on maintenance of agriculture or livestock.⁷⁰ That is not the discussion. A farm, like many businesses, has support services such as bookkeepers, mechanics, engineers, and supervisors. The IRS recognizes this business structure and expressly notes “agricultural labor” can encompass a myriad of other services. If these employees are hired by the farm operator (owner) and the majority of their services are performed on the farm, then their work will be deemed “agricultural labor.”⁷¹ However, this rule has limiting language. Under the IRS regulation, the term “agricultural labor” will not be applied to those skilled positions if the work is contracted out.⁷² For example, if a farm operator employs his own irrigation engineer and he performs the majority of his work on the farm, his work will be “agricultural labor.”⁷³ Rather, if the farm operator opts to hire an engineering company to render the same engineering services, this will not be deemed “agricultural labor.”⁷⁴

However, an H-2A employee functions more similarly to a contract employee rather

66. 26 CFR § 31.3121(g)-1(b)(2) (1964).

67. *See id.* (defining agricultural labor involving hatching of poultry as work on a farm. If not on a farm, then the work is not agricultural labor).

68. Franklin, *supra* note 24.

69. § 31.3121(g)-1 (b)(2).

70. *Id.* at (c)(1)(i).

71. *Id.* at (c)(2), (3).

72. *Id.*

73. *Id.*

74. 26 CFR § 31.3121 (c)(2), (3).

than a permanent employee, thus failing to make any skilled work performed by an H-2A worker “agricultural labor.” H-2A workers are limited to seasonal and temporary employment, and they are not hired by the farm operator. Rather, they are recruited through a Farm Labor Contractor (FLC).⁷⁵ The FLC, which operates identically to a staffing agency, registers with the DOL and recruits employees for specific farming needs.⁷⁶ Once the FLC recruits enough H-2A workers, he begins negotiating with farms on how to solve their labor shortages.⁷⁷ The terms of the employment are negotiated between the farmer and the FLC, and the farm operator must comply with all DOL standards.⁷⁸ Once the worker completes his temporary assignment, his employment is terminated and he returns to his native country of origin. Evidentially, an H-2A worker is not a permanent employee for the purpose of his work constituting “agricultural labor.” The bargaining power does not rest with the employer and the scope of employment is limited to ten months or less.⁷⁹

E. The Employers & Economics

Employers using H-2A workers to fill the demands of construction labor also violate other provisions of INA Section 218. The INA conditions all H-2A approvals on the requirement that foreign workers do not adversely affect the wages and working conditions of other U.S. workers.⁸⁰ The AEWR, which was first established under the 1964 Bracero Program, is an economic methodology intended to prevent artificial labor shortages.⁸¹ The methodology requires employers to pay guest workers an amount that does not depress local wages and deter U.S. workers from applying.⁸² Although the AEWR has faced endless criticism, the H-2A program relies on its calculations.⁸³ Moreover, employers using construction workers under the H-2A visa would adversely affect the wages of U.S. construction workers because the H-2B construction wage rate relies on a different calculation. Under the H-2B program, the wage rate is “the highest of the Federal, State, or local minimum wage or the prevailing wage rate.”⁸⁴ Although no formal calculations by economists have been found, reports suggest it is hurting the economy.⁸⁵ In Iowa, where construction unemployment has been steady, yet falling behind the national average, the disparity in domestic pay versus H-2A pay is alarming.⁸⁶

75. *Fact Sheet #26: Section H-2A of the Immigration and Nationality Act (INA)*, U.S. DEP’T LAB. (Feb. 2010), <https://www.dol.gov/whd/regs/compliance/whdfs26.htm>.

76. *Id.*

77. *Id.*

78. *d.*

79. H-2A PROGRAM FOR TEMPORARY AGRICULTURAL WORKERS, CTR. FOR GLOB. DEV., https://www.cgdev.org/doc/migration/H-2A_Fact_Sheet8.6.pdf (last visited Oct 7, 2018).

80. Immigration and Nationality Act of 1965 §8, U.S.C. §1188(a)(1)(B) (2013).

81. *See Adverse Effect Wage Rate Rule*, FARMWORKER JUSTICE, <https://www.farmworkerjustice.org/sites/default/files/AEWR%20Fact%20Sheet.pdf> (last visited Oct. 8, 2018) [hereinafter FARMWORKER JUSTICE] (giving facts on wage rates in agricultural).

82. *See id.* (“If an employer recruits workers at such low wage levels that U.S. workers refuse to apply for jobs, the employer could create an artificial ‘labor shortage.’”).

83. *Id.*

84. ANDORRA BRUNO, H-2A AND H-2B TEMPORARY WORKER VISAS: POLICY AND RELATED ISSUES (2017), <https://fas.org/sgp/crs/homesec/R44849.pdf>

85. *See id.* (“The prevailing wage is almost always lower than the Adverse Effect Wage Rate.”).

86. Franklin, *supra* note 24.

The going rate for a construction worker in Iowa is currently \$17.82 per hour, yet current H-2A workers make \$13.42 per hour. Similarly, in Missouri, the going rate for a construction worker is \$20.51 per hour, but H-2A workers require a rate of \$12.26 per hour—60% below market value.⁸⁷ The transition of replacing domestic workers with foreign workers is a relatively new endeavor for big farming companies. This is largely due to a considerable shift in the farming industry.⁸⁸ In recent years, the shift from small, family farms to big farming enterprises has grown exponentially.⁸⁹ Large enterprises are dominating the vast majority of agricultural production,⁹⁰ making it unlikely to find hard evidence of adverse wage effects. Due to how recent this shift has been, its implications may be dormant. But it is sure to affect industries in the long run.

F. The Department of Labor’s Database

The DOL’s database provides insight into how many H-2A employers have the word “construction” or “concrete” in their name.⁹¹ The ability to change your search to any year makes it easier to notice the growing trend. Hundreds of job orders describe their work as “building and repairing livestock buildings . . . [p]lacing concrete for walls and sidewalks, [or] building and repairing damaged walls and trusses” In 2015, around 1600 H-2A workers were involved in the construction of livestock buildings (CAFOs).⁹² Since 2011, Alewelt, one of the largest recipients of H2-A workers, has used over 750 agricultural workers to work on 36 major concrete projects in both Iowa and Illinois.⁹³ This is in contrast to a decade ago where no construction companies used migrant workers.⁹⁴ Altogether, these agricultural workers are payed approximately \$12 per hour, a wage far below the prevailing local rate for construction workers.⁹⁵ Abusing the H-2A visa may not cause permanent damages now, but industries may suffer long term economic consequences later. The purpose of the visa program is to fill labor shortages, not substitute domestic labor with cheaper, foreign labor.⁹⁶ By filling construction jobs with H-2A workers, the employer is not only creating stagnant and depressed wages, but the employer is making it impossible for construction labor unions

87. Public Job Registry, U.S. DEP’T LAB. EMP. & TRAINING ADMIN., <https://lcr-pjr.doleta.gov/index.cfm?event=ehLCJRExternal.dspQuickJobOrderSearch> (last visited Oct. 15, 2018). Take for example, R&R Christo Construction LLC (Nebraska).

88. Andrew Soergel, *Family Farms Pushed to Get Big or Go Bust*, U.S. NEWS & WORLD REP. (Apr. 4, 2018) <https://www.usnews.com/news/best-states/articles/2018-04-04/family-farms-pushed-to-get-big-or-go-bust>.

89. *Id.*

90. *Id.* (“51 percent of the total value of American farm production in 2015 was generated by large farms with at least \$1 million in sales each year. In 1991, that number sat at 31 percent.”).

91. For example, if you adjust the date range for one continuous year (8/21/2017) and (9/29/2018), filter your search results for employers with “concrete” or “construction” in their name, and change the number of entries per page to 30, approximately 10 pages of employers will appear. *Public Job Registry*, U.S. DEP’T LAB. EMP. & TRAINING ADMIN., <https://lcrpjr.doleta.gov/index.cfm?event=ehLCJRExternal.dspQuickJobOrderSearch> (last visited Oct. 15, 2018) [hereinafter *Public Job Registry*].

92. Franklin, *supra* note 24.

93. *Id.*

94. *Public Job Registry*, *supra* note 91 (showing if you enter dates from a decade ago, there are no construction-type employers receiving H-2A workers).

95. *Id.*

96. Immigration and Nationality Act of 1965 § 218, 8 U.S.C. §1188 (2013).

to compete. H2-A workers have no negotiating power.⁹⁷ To remain in the U.S. and be asked to return the following year, H-2A workers must satisfy the demands of their employer. H-2A workers will not ask for a pay increase to avoid risk, they will seldom resist the labor demands, and they are not allowed to receive overtime pay.⁹⁸ It would be a futile exercise for any U.S. labor union to negotiate on such terms.

IV. RECOMMENDATION

Unanimously, the sentiment among farmers is that the guest worker program is unnecessarily complex.⁹⁹ The program has the potential to be less ideological and more pragmatic, but this cannot be accomplished without modification. Despite the numerous propositions on how to reform the program, there are three practical solutions that can overcome the H-2A loophole. First, both the H-2A and H-2B visa applications should not be restricted. There is no rational basis for the DOL to cap one labor shortage (H-2B) and keep another unlimited (H-2A).¹⁰⁰ The restriction of one creates an opportunity for abuse of the other.¹⁰¹ Second, the wage rate for both H-2B and H-2A workers should substantially surpass locality pay. Paying equal or less than the prevailing local wage creates an opportunity for agribusiness firms to cut overhead costs. Lastly and more far-reaching, is the legalization of foreign labor workers by granting permanent residence status. By and large, the origin of exploitation comes from these workers' temporary status.¹⁰² The workers, by the nature of their contract and visa, will leave the country upon the completion of the work assignment. Their return is conditioned on good behavior, i.e., the absence of conflict or complaints with their employer.¹⁰³

A. Equally Imposing Restrictions and Caps

If the purpose of the H-2A and H-2B visa is to fix a labor shortage, then let the shortage fill. Under current law, the annual H-2B visa is capped at 66,000.¹⁰⁴ Meanwhile,

97. FARMWORKER JUSTICE, *supra* note 81 (explaining the Farm Labor Contractor is allowed to negotiate the amount of workers, however, the workers themselves have no bargaining power).

98. It is possible for an H-2A worker to receive overtime pay if the work they do is non-agricultural. For example, if they were hired to detassel corn but spent several weeks deconstructing a building, those hours are subject to overtime pay. However, this would have to be an adjustment done by the employer on their own volition. Rarely would an H-2A worker be aware of this exception, let alone demand overtime pay from their employer. *See H-2A Contract: Wage Issues*, PINE TREE LEGAL ASSISTANCE, <https://ptla.org/h-2a-contract-wage-issues> (last visited Sept. 17, 2018).

99. For an online company that was purposely created to help farmers navigate the process of acquiring H-2A workers, see *H-2A Program Requirements*, AGWORKS H2, <https://agworksh2.com/h2a/requirements/> (last visited Nov. 22, 2018).

100. Roy Maurer, *H-2B Visa Demand Again Far Surpasses Annual Cap*, SOC'Y FOR HUM. RESOURCE MGMT. (Jan. 11, 2018), <https://www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/h2b-visa-demand-far-surpasses-annual-cap.aspx>.

101. *See id.*

102. *H-2A Workers Recruitment: A System Ripe for Exploitation*, FARMWORKER UNIT (Mar. 21, 2018), <http://www.farmworkerlanc.org/h-2a-workers-recruitment-a-system-ripe-for-exploitation/>.

103. *See id.* (emphasizing the power dynamic between the employer and the employee). Coming from an impoverished third world country, most of these H-2A workers will do just about anything to receive a paycheck. By extension, they will seldom report any employer abuse.

104. Cohen, *supra* note 20.

the H-2A visa is unlimited.¹⁰⁵ One reason why employers abuse the H-2A visa is because of the annual cap put on H-2B visas.¹⁰⁶ With only 66,000 permitted H-2B visas and a demand far exceeding that amount, it is no wonder why employers are finding the loophole in “agricultural work” in H-2A visas. Even with a strong economy and low unemployment rates across the nation, the demand for unskilled positions by American workers is at an all-time low.¹⁰⁷ Young Americans are not growing up yearning to be landscapers.¹⁰⁸ The work is laboriously taxing and the pay does not reflect the risk. To that end, the jobs needed are seasonal—not full time—making it doubly unattractive to domestic job-seekers. Moreover, some employers have coined the H-2B visa as “businesses play[ing] the visa lottery.”¹⁰⁹ Employers fight for an opportunity to get a piece of the allotted 66,000 visas, and businesses that miss out run the risk of short profits & limited work.

B. The Problems With the AEW and Fixing the Prevailing Local Wages Calculation

Some critics claim that the labor shortage is not a result of natural changes in the workforce, but rather an “artificial labor shortage” created by low wages.¹¹⁰ The thrust behind domestic workers avoiding unskilled labor occupations is the lack of wages, not the workers’ disinterest in the work.¹¹¹ The wages H-2A and H-2B workers receive are calculated among three factors: the federal or state minimum wage, the regional “prevailing wage,” and the AEW.¹¹² This trifecta approach appears to protect workers, but it has only kept wages at historic lows.¹¹³ There are three obvious reasons why this system keeps wages low. First, the AEW is based on last year’s wage rate and does not consider inflation. Second, the prevailing wage rate does not provide an accurate representation of the going wage rate in a specific region because it accounts for undocumented workers.¹¹⁴ Undocumented workers can depress wages because they will accept minimal pay for similar work.¹¹⁵ Including undocumented wage rates into the “prevailing wage” rate will inevitably create artificially low averages for pay. Lastly, visa

105. *Id.*

106. *See Id.* (discussing the annual cap on H-2B visas).

107. *Id.*

108. *Id.*

109. Cohen, *supra* note 20.

110. FARMWORKER JUSTICE. *supra* note 81 (noting how employers create a labor shortage through paying H-2A workers below the local or prevailing wage); *see also The Farm Worker Shortage*, WALL ST. J. (June 5, 2013), <https://www.wsj.com/articles/SB10001424127887324866904578513510141995612> (noting how legislation and visa caps may be contributing to the artificial labor gap).

111. *See generally* Cohen, *supra* note 20 (quoting a business owner: “With the economy as good as it is, I don’t know many families who are telling their kids to become landscape laborers”).

112. FARMWORKER JUSTICE *supra* note 81.

113. *Id.*

114. Including undocumented workers in the prevailing wage rate hurts the validity of AEW, primarily because undocumented workers will work for wages far less than federal minimum wage. Deepa Fernandes, *Undocumented Workers Fight for Wages Under the Threat of Deportation*, PRI (Mar. 20, 2018), <https://www.pri.org/stories/2018-03-20/undocumented-workers-fight-wages-under-threat-deportation>.

115. This is not to suggest that undocumented immigrants hurt the overall economy. To the contrary, undocumented immigrants help the agricultural community and pay billions in federal taxes. *See* Alexia Fernández Campbell, *Trump Says Undocumented Immigrants are an Economic Burden. They Pay Billions in Taxes.*, VOX (Oct. 25, 2018, 2:15 PM), <https://www.vox.com/2018/4/13/17229018/undocumented-immigrants-pay-taxes#content>.

workers will work through unbearable conditions. The AEWB does not factor work productivity into its wage rates, so employers can “impos[e] very high productivity standards that desperate foreign workers will accept but that would cause U.S. workers to insist on higher wages.”¹¹⁶

Stagnant low wages contributes to the H-2A loophole. Even though H-2B workers require higher pay, when the DOL caps its visa allowance, employers turn to the H-2A as an alternative. To the employer’s benefit, this option is also cheaper. Thus, employers who use the H-2A visa to satisfy their labor shortage in concrete construction create an artificial depressed wage for that industry.

To reverse this domino effect, the DOL needs to demand higher wages and require a stricter wage evaluation. At a rudimentary level, this is supply and demand. To make domestic workers interested in unskilled labor, there needs to be a monetary incentive. And if there truly are no workers interested, then the pay should reflect that scarcity in labor. However, by making pay equal, if not less than the prevailing wage, the DOL is creating an advantageous cost-cutting incentive for agribusiness firms. The wages for unwanted, unskilled labor should be beyond the inaccurate prevailing rate. The economy may be strong, but high wages will always attract and retain workers, regardless of occupation.

C. Ending Both H-2A and H-2B Classification and Creating a Path to Temporary Residency

The labor issues behind the H-2A and H-2B visas could be solved by ending the distinction altogether and providing workers with one temporary resident status.¹¹⁷ By allowing foreign workers to hold temporary resident status, the economy circumvents the issues that plague the program.¹¹⁸ For example, under current law, H-2A workers are not entitled to overtime pay because they are not protected by the Agricultural Workers Protection Act (AWPA).¹¹⁹ This law is limited to those agricultural workers who hold residency status—also known as domestic migrant workers. Alternatively, H-2B workers, who hold the same immigration status as H-2A workers, receive overtime pay from their employers.¹²⁰ The reason for the discrepancy between the two programs is unclear, yet it has also contributed to the H-2A loophole.

Nevertheless, the power dynamic between employers and foreign workers could be solved by granting visa workers temporary residency status. Exploitation arises because these workers are desperate and hungry for work.¹²¹ As mentioned earlier, the AEWB is

116. FARMWORKER JUSTICE, *supra* note 81, at 2.

117. Tim Worstall, *Illegal Immigrants Depress Wages: So, Make Them Legal Immigrants*, FORBES (Mar. 24, 2016), <https://www.forbes.com/sites/timworstall/2016/03/24/illegal-immigrants-depress-wages-so-make-them-legal-immigrants/>.

118. *Id.*

119. Joseph Berger, *Long Days in the Fields, Without Earning Overtime*, N.Y. TIMES (Aug. 7, 2014), <https://www.nytimes.com/2014/08/08/nyregion/in-harvest-season-endless-hours-with-no-overtime-for-new-york-farmworkers.html> (explaining how “The lack of overtime pay, as well as the absence of rights to disability insurance and collective bargaining, are artifacts of the exclusions of agricultural work from the federal wage, hour and labor relations acts of the 1930s that were adopted by most states and have seldom been changed”).

120. *Fact Sheet #78C*, U.S. DEP’T LAB. (Apr. 2015) <https://www.dol.gov/whd/regs/compliance/whdfs78c.htm>.

121. *See* Berger, *supra* note 119 (reporting the widespread exploitation and lack of safeguards for

flawed directly because of the low wages of undocumented workers. Foreign workers are in dire need of compensation to live on, regardless of whether they are undocumented or here on a temporary visa.¹²² Moreover, they have no bargaining power due to their legal status, the worker protections laws do not always apply to them, and they are not entitled to overtime pay.¹²³ This unlevelled playing field creates an unmatched advantage for foreign workers over domestic workers. To that end, their return to the U.S. for next season’s work is conditioned on good behavior, achieved only absent any demands for more breaks, more pay, or reasonable working conditions. If a foreign worker retaliates against his or her employer, he or she runs the risk of not being asked to return next year by the employer (or being reported to immigration). Yet, a domestic worker is entitled to all the protections that foreign workers are not, despite doing the exact same work.

To fix this problem, the reasonable approach is to eliminate the discrepancy between domestic and nondomestic workers. Instinctively, employers are aware of the legal differences between these two classifications of workers. The abolishment of the guest worker program would not be entirely catastrophic. Workers hired on H-2A or H-2B visas pay both state and federal taxes,¹²⁴ they fill out W-2 forms, and they reside in the United States for a majority of the year.¹²⁵ Their employment is nothing short of a domestic employee. Labeling H-2A and H-2B workers as non-resident workers creates a hierarchal system of vulnerable, inferior laborers. Establishing a temporary resident status for foreign workers will not only mitigate worker exploitation, but also maintain the purpose of solving labor shortages. Providing legitimate wages, fair work conditions, and preventing displaced domestic workers should be a priority. Furthermore, with temporary residency, employers would not be incentivized to create loopholes to accommodate their needs. The employees would reside in the United States and there would be no lottery to secure a foreign workforce.¹²⁶

V. CONCLUSION

Despite these recommendations, it is unlikely that the DOL will dramatically alter the program to grant temporary residencies to foreign workers. The number of foreign workers has dramatically increased in the last several years, and it would be administratively unfeasible for

the DOL to grant such a broad sweeping change.¹²⁷ However, a thorough review of the guest worker program is long over-due. Congress should make it a priority to combat this issue due to both sides demanding it, i.e., the organizations protecting workers and the employers themselves. Although foreign agricultural workers make up a small percentage of the workforce, their importance will exponentially increase in the years to

immigrant agricultural workers in America).

122. *See id.* (describing the low wages and lack of overtime statutorily permitted for agricultural workers).

123. *Id.*

124. *See id.* (Most workers remain in the United States for six to nine months.).

125. *Id.*

126. Cohen, *supra* note 20.

127. Dan Charles, *Government Confirms A Surge in Foreign Guest Workers on U.S. Farms*, NAT’L PUB. RADIO (May 18, 2017, 2:59 PM), <https://www.npr.org/sections/thesalt/2017/05/18/528948143/government-confirms-a-surge-in-foreign-guest-workers-on-u-s-farms> (noting a 36% increase in approved applications by the Department of Labor from 2016 to 2017 and the years prior have also seen sharp increases, some ranging from 10–20%).

come.¹²⁸ It is of equal importance for the DOL to find a resolution to the H-2A loophole.

128. *See id.* (discussing the increase of foreign agricultural workers in the years to come).