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# The Farm Workforce Modernization Act and warnings from previous immigration reforms

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## Abstract

Immigrants are vital to agricultural production in the United States, and nearly half the crop workforce is unauthorized. Previous attempts to reform the immigration system have not successfully legalized the farm workforce or caused substantive rise in farmworker incomes. Current proposed legislation would legalize unauthorized farmworkers, streamline the H-2A agricultural guest worker program, and provide a pathway to citizenship for H-2A workers while simultaneously requiring agricultural employers to check the immigration status of workers using E-Verify. This paper discusses proposed farm labor legislation in the context of current farm labor market conditions, outcomes of historical farm labor and immigration policies, and ongoing immigration trends.

## KEYWORDS

farm labor, guest worker program, H-2A, immigration

## JEL CLASSIFICATION

J6, Q1, J3

Farmers have a unique interest in immigration debates because of their dependence on a seasonal, often migratory, workforce. Domestic workers in more developed countries like the United States will not typically accept jobs as hired workers on farms, so the farm sector relies

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on immigrants, many of whom are unauthorized (Taylor & Charlton, 2019; Zahniser et al., 2018). Previous immigration reforms have not successfully reduced reliance on an unauthorized workforce or raised wages or employee benefits for domestic workers (Martin, 1994; Orrenius & Zavodny, 2003, 2012). Future immigration and farm labor reforms may be susceptible to the same failures unless policymakers learn from the outcomes of previous immigration policies and carefully consider potential direct, indirect, and unintended consequences of policy change in the context of historical and current immigration trends, agricultural labor market conditions, and factors that have likely contributed to recent growth in the demand for H-2A agricultural guest workers. This paper discusses the potential effects of the recently proposed Farm Workforce Modernization Act in light of historical and current labor market and immigration conditions.

During the COVID-19 pandemic the important role of immigrants in US agricultural production became more visible. Increased restrictions were imposed on labor migration across national borders, concerns for worker safety became more acute, and the closure of restaurants and cafeterias contributed to the uncertainty surrounding food availability and prices (Beatty et al., 2020). In 2021, an estimated 4.6% of the US workforce (Passel & Krogstad, 2023), and nearly half the US crop workforce were unauthorized.<sup>1</sup> Removal of unauthorized immigrants from the agricultural sector would put upward pressure on farm wages, severely reduce US production of labor-intensive fruits and vegetables, and increase agricultural imports from countries where wages are lower (Devadoss & Luckstead, 2018; Richards, 2018). However, since immigrants and guest workers might be particularly vulnerable to exploitation (Costa et al., 2020; Farmworker Justice, 2021), policy must regulate and monitor farm employment and labor migration. Furthermore, this must be done at minimal cost to compliant farm employers, so that farmers have incentive to participate in the program.

Orrenius and Zavodny (2012) state that a successful immigration reform must effectively deter unauthorized immigration and expand guest worker programs to supply low-skilled workers to industries that depend on immigrants. The 1986 Immigration Reform and Control Act (IRCA) contained two guest worker visa programs: the H-2A visa program for seasonal agricultural workers, which does not have a cap on number of visas issued per year, and the H-2B visa program for the nonagricultural sector, which is capped and meets its quota most years (Orrenius & Zavodny, 2012). H-2A employment was minimal for about two decades following IRCA because the program was costly and cumbersome for employers to use and unauthorized workers were abundant (Martin, 1994). Nevertheless, H-2A employment grew more than sevenfold from 2005 to 2022 as the Mexican workforce transitioned out of farm work and the supply of immigrant farm workers tightened (Castillo, 2023; Charlton & Taylor, 2016). H-2A workers now constitute an estimated 15% of the full-time equivalent crop workforce,<sup>2</sup> and the H-2A share of farm workers is expected to continue growing as the rural Mexican economy grows and workers migrate to the nonfarm sector (Charlton & Taylor, 2016; Zahniser et al., 2018).

With increased H-2A migration, the failures of the H-2A program to adequately provide for the safety and well-being of guest workers, who may not know their rights or how to advocate for them, are becoming more apparent (Costa et al., 2020), and limitations of the program to fulfill agricultural labor demand are falling under increased scrutiny (Castillo et al., 2022; Charlton & Castillo, 2021; Zahniser et al., 2018). H-2A reform is likely needed to streamline the hiring process, give guest workers sufficient agency to safely advocate for their rights, and provide pathways to citizenship for guest workers who have continually worked on US farms.

The Farm Workforce Modernization Act (FWMA) was proposed in 2019 after long negotiations between farmers, labor organizations, and farm worker advocates to address the most

pressing concerns related to the H-2A program (Farmworker Justice, 2022). If passed, the FWMA would allow unauthorized immigrants employed in agriculture and their families to apply for legal immigration status and eventually citizenship,<sup>3</sup> expand the H-2A agricultural guest worker program, require farm employers to verify the immigration status of their employees using the E-Verify system, and provide a pathway to permanent legal residence for H-2A workers, among other provisions (Farmworker Justice, 2023). It received bipartisan support and was passed by the House of Representatives on March 18, 2021 with 247 votes in favor and 174 opposed. It was the first agricultural labor reform bill to pass the House of Representatives since 1986 (Lofgren, 2023). However, the Senate did not vote on it.

In December 2022, a revised version of the FWMA was brought before the Senate as the Affordable and Secure Food Act in an omnibus package (Heller, 2023). Yet the Affordable and Secure Food Act was voted down in the Senate after the American Farm Bureau Federation stated opposition to the bill, and Senator Crapo (R-Idaho) withdrew his support. He stated that the bill did not provide sufficient year-round H-2A visas, and the expansion of guest worker rights to sue their employers over workplace violations exposed family farms to exorbitant risk (Heller, 2023). Despite this failure, various versions of the FWMA are likely to continue reappearing in Congress, and in June 2023, Representatives Zoe Lofgren (D-California) and Dan Newhouse (R-Washington) reintroduced the FWMA.

Details of the FWMA and any proposed immigration policy should be considered within the context of historical impacts of immigration reforms, current labor market conditions and trends, and available resources to enforce immigration and labor laws. Immigration reform bills in the United States have historically contained numerous components to satisfy a diverse set of interest groups (Martin, 1994). This often results in misaligned incentives for unauthorized migration. Effective immigration policies in the future must successfully deter hiring of unauthorized workers, so that employers do not undermine the guest worker program by hiring workers at lower cost who do not receive adequate pay, benefits, or legal protections (Orrenius & Zavodny, 2012). Furthermore, the costs for employers to apply for guest worker positions and to abide by program regulations must be sufficiently low so that employers have incentive to comply with the program's provisions for guest worker rights and safety.

This paper proceeds as follows. The next section describes the historical role of immigration in US agriculture. Next, the paper discusses current farm labor trends. Then it describes the H-2A program and reviews factors that likely contributed to recent growth in H-2A employment. Next, it discusses previous immigration policies and some of the reasons that previous immigration reforms have neither successfully deterred unauthorized immigration, nor increased wages or improved employee benefits. It then describes the key provisions of the FWMA, discusses the potential impacts of the proposed legislation, and lastly concludes.

## **HISTORICAL ROLE OF IMMIGRATION IN US AGRICULTURE AND FARM WORKER BARGAINING POWER**

Numerous policies have been negotiated to help protect or improve farmers' access to immigrant workers throughout US history. Some of these policies have provided the means for immigrants to take advantage of better opportunities in a new nation while simultaneously benefiting US agricultural producers. However, some policies severely diminished workers' rights or deterred agricultural technology adoption. Table 1 is a timeline of several key historical events that impacted immigration and farm labor markets.

TABLE 1 Timeline of major immigration and farm labor policies.

1869	Completion of the transcontinental railroad
1882	Chinese Exclusion Act
1917	Beginning of Bracero I
1921	End of Bracero I
1942	Beginning of Bracero II
1964	End of Bracero II
1975	Agricultural Labor Relations Act passed in California
1986	Immigration Reform and Control Act (IRCA) passed
2005	First 287(g) policy implemented
2007	First state-level E-Verify mandate implemented

Since its colonial days, the United States gained its status as a major agricultural exporter by importing African slaves laborers. Following emancipation, institutions were created to keep former slaves employed on farms at relatively low wages. For example, White planters often retained Black workers by using their political influence to protect workers in their employment from White violence (Hornbeck & Naidu, 2014). Following the Great Mississippi Flood of 1927, Black plantation workers were displaced and their ties to landowners loosened. Many former slaves migrated, often to the North, and labor scarcity prompted the agricultural sector to modernize. In the years following the Great Mississippi Flood, farms in the flood region invested in more capital-intensive techniques to compensate for the loss of low-wage workers (Hornbeck & Naidu, 2014).

During US settlement of the American West, domestic farm labor was relatively scarce and land abundant. The completion of the transcontinental railroad in 1869 gave growers in California access to consumer markets in the Midwest and East Coast. California had an ideal climate for fruit production and rich soil, and Chinese workers who had formerly been employed building the railroad could easily be employed for doing labor-intensive, seasonal tasks on orchards (Martin, 2003). The Chinese work crews were known for their hard work, skill in orchard care, and disappearance when seasonal labor demand was low (Arax & Wartzma, 2005; Martin, 2003). By 1899, California accounted for 21.5% of the fruit production in the United States (Powell, 1910).

Chinese workers were removed from California in 1882 after passage of the Chinese Exclusion Act. However, farm employers avoided labor shortages by recruiting workers from Japan, and, over the course of the next several decades, from India, Pakistan, the Philippines, Armenia, and Mexico (Martin, 2003). From 1917 to 1921, the United States and Mexico entered into a guest worker agreement called the Bracero program, which allowed for the legal migration of Mexican workers to US farms. Mexican workers did not earn enough on US farms to bring home substantial remittances, and Mexico let the program expire (Taylor & Charlton, 2019).

During World War II, the United States negotiated a second Bracero program with Mexico. US farmers contended that there were insufficient workers to sustain agricultural production since many young men were overseas fighting in the war. The Bracero program continued many years after the war ended, and Bracero employment peaked in the mid-1950s at about 450,000 workers per year (Martin & Rutledge, 2021). The Bracero program was suddenly

terminated in 1964 following a fatal collision between a train and a truck carrying Bracero workers home from the fields, exposing some of the unsafe working conditions that Braceros endured (Taylor & Charlton, 2019). The termination of the Bracero program in 1964 was one of the largest-scale workforce reduction policies intended to promote wages and worker benefits in the United States (Clemens et al., 2018). The stated reason for terminating the program was that the Bracero program depressed wages of native-born workers in agriculture (Borjas & Katz, 2007). However, rigorous analysis of wage and employment data to support this claim was lacking (Clemens et al., 2018).

Following termination of the Bracero program, farmers were concerned that they would face critical labor shortages, but this never occurred. Farms with access to more advanced capital-intensive technologies mechanized, and the acreage of crops that were more difficult to mechanize declined (Clemens et al., 2018). Finally, termination of the Bracero program caused no discernible change in farm wages in locations more dependent on Bracero workers prior to program termination compared to locations that were not (Clemens et al., 2018). These findings support the view that domestic workers' reservation wage for working on farms is sufficiently high that, even in 1964, farms would invest in labor-saving technologies or transition to less labor-intensive crops before offering a wage that would attract sufficient domestic workers.

In addition to increasing the adoption of labor-saving technologies on farms, there were two other important legacies of the Bracero program and its termination: (1) the Bracero program created long-lasting migration networks that facilitated ongoing unauthorized immigration, and (2) its termination gave rise to labor associations that improved farm labor market efficiency, helped advocate for better worker wages, and stabilized labor costs (Taylor & Charlton, 2019). Farm workers are notoriously difficult to organize because of their high labor turnover rates (Martin, 2012). Nevertheless, following the Bracero program's termination, there was a brief period when farm labor supply was more stable.

The United Farm Workers (UFW), led by César Chavez, helped bring about improvements in farm working conditions during the "golden age of farm labor organization" from the late 1960s through the 1970s (Taylor & Charlton, 2019). The UFW garnered consumer support for a national table grape boycott demanding higher farm worker wages; it led marches the capitol of California to support farm worker rights; and it led labor strikes (Martin, 2003). Notable legacies of the UFW's influence include the passage of the 1975 Agricultural Labor Relations Act (ALRA) in California, which ensured farm workers the right to organize, and the creation of the Agricultural Labor Relations Board (ALRB), which oversees and protects this right (Taylor & Charlton, 2019). These were landmark provisions for farm workers in California since the 1935 National Labor Relations Act, which guarantees workers the right to collective bargaining, extends only to workers in the non-farm sector. Therefore national law does not protect agricultural workers' rights to collective bargaining,<sup>4</sup> and 27 have "right to work" laws that permit workers to choose whether they want to be part of a union and prohibit employers from refusing to hire union members (National Agricultural Law Center, 2023).

The UFW did not initially support unauthorized immigration because the constant stream of new immigrants reduced stability in the farm workforce and made it more difficult to organize and negotiate higher wages (Martin, 2012; Taylor & Charlton, 2019). Decline in UFW membership has been attributed to four major factors: poor union leadership; political appointments to the California ALRB who interfered with farm labor organization efforts; the sale of farms belonging to conglomerates with name brands that were vulnerable to consumer boycotts to growers who often hired workers through farm labor contractors and other intermediaries; and the rise in unauthorized immigration from the mid-1960s through the late 1980s

(Martin, 2003, 2012; Taylor & Charlton, 2019). Even though farm labor union membership has fallen dramatically since the 1960s, the threat that workers might join a union still helps workers to gain bargaining power and advocate for better wages and working conditions (Martin, 2012).

US production of labor-intensive fruits and vegetables continued to expand throughout the end of the twentieth century without substantive rise in farm wages because immigration from Mexico to US farms continued at a high rate (Martin, 2003, 2012). One of the most contentious issues in determining immigration policy is whether large supplies of immigrants prevent the increase of wages for domestic workers. While Borjas (2017) finds evidence that an exogenous increase in low-skilled immigrants from Cuba to Florida in 1980 impeded wage growth for native workers of similar education levels, Peri and Yasenov (2019) find no effect and show that Borjas's (2017) findings could be due to measurement error when using a short pretreatment period. Actual effects of low-skilled immigration on wages and employment of native workers might vary across time and location. While immigrants likely compete for the same jobs that native workers perform, thus putting downward pressure on wages, immigrants are also consumers in the local economy, thus increasing demand for local goods and services and putting upward pressure on wages. The net effects on native employment and wages are difficult to disentangle.

Although there is a sizeable wage gap between native-born and Mexican workers in the United States, nearly the entire wage gap can be explained by educational attainment and age (Borjas & Katz, 2007). This suggests that Mexican immigrants typically fill job openings requiring low education levels that native workers leave vacant. Few native-born US workers are employed in agriculture. Farm work is physically demanding and often seasonal. Whether domestic workers would take jobs on farms when the supply of immigrants is restricted depends on how high domestic workers' reservation wage is, the cost to employers of other inputs that can substitute for labor, and consumer willingness to pay for input costs that are passed through the value chain.

A second and related concern is whether unauthorized immigrant workers can advocate for fair wages and working conditions. Analysis of the National Agricultural Workers Survey (NAWS) data from 2000 to 2006 shows that unauthorized immigrants are paid less than farm workers with legal status on average and are less likely to receive other nonwage benefits, even after accounting for other farm worker characteristics (Kandilov & Kandilov, 2010). Furthermore, farm work is associated with high levels of emotional stress and depression (Hiott et al., 2008; Kim-Godwin & Bechtel, 2004). Labor violations occur frequently, particularly among farm labor contractors (FLCs) (Costa et al., 2020).<sup>5</sup> Although it appears that there are relatively few employers who have committed labor violations, violators are difficult to find, prosecute, and prevent from committing repeated labor abuses (Costa et al., 2020).

Future immigration and farm labor policies must take into account potential impacts on native wages and employment, farm workers' bargaining power, and feasibility of farm labor regulation. Since farms are geographically spread, they are difficult to monitor (Taylor & Charlton, 2019). Employers must have sufficient incentives or risk of inspection to comply with farm labor laws.

## FARM LABOR SCARCITY

Real US farm wages rose steadily from 1990 to 2022 at an average rate of 1.1% per year, and the average annual growth accelerated from 2017 to 2022 to a rate of 1.8% per year (Castillo &

Simnitt, 2023). Household survey data from Mexico show that Mexicans are transitioning out of farm work as the Mexican economy develops (Charlton & Taylor, 2016). As employment opportunities in Mexico improve and rural education rises, US farms will have to continue raising wages and seek out other ways to attract Mexican workers (Charlton et al., 2019; Martin & Taylor, 2013; Zahniser et al., 2018).

Although farmers have discussed for decades the threat of farm labor shortages, new workers continued to pour into the United States throughout the 1990s (Boucher et al., 2007). During the 1990s, the Mexican-born population living in the United States increased by an estimated 5 million (Card & Lewis, 2007; Orrenius & Zavodny, 2003). Farm labor shortages are typically temporary in nature as workers migrate from farm to farm (Fisher & Knutson, 2013). Nevertheless, labor scarcity increases the incidence and risk of farm labor shortages. From 1980 to 2010, rural Mexicans migrated out of agricultural work, whether in Mexico or the United States, at a rate of about 1% per year (Charlton & Taylor, 2016). Furthermore, the share of farm workers in the United States who migrates has declined sharply since 1999 (Fan et al., 2015), which diminishes the labor market's ability to quickly adjust to seasonal changes in farm labor demand. Farm labor shortages are becoming more frequent (Hertz & Zahniser, 2013) and, in California, are now persistent (Richards, 2018).

Since farms compete in global commodity markets they cannot easily pass high input costs onto consumers. Elimination of unauthorized immigrants from the California farm workforce would cause farm wages to rise by an estimated 42% and many farms to go out of business (Richards, 2018). Increased strawberry production in Mexico is already increasing competition for US growers (Hee Suh et al., 2017), and if unauthorized workers were removed, US imports of fresh fruits and vegetables would be expected to increase dramatically (Devadoss & Luckstead, 2018).

Martin (2017) proposes four strategies for farmers to respond to labor scarcity (each beginning with the letter s): satisfy, stretch, substitute, and supplement. There is evidence that farms are engaging all these strategies to maintain production as labor becomes scarcer. Over the past two decades, farms have raised wages and offered better benefits to *satisfy* and retain workers (Bampasidou & Salassi, 2019; Castillo & Simnitt, 2023; Charlton et al., 2019). Farmers have *stretched* their workforce through investments in mechanical worker aids, such as conveyor belts that transport filled trays to the ends of rows and hydraulic platforms that eliminate the need to climb up and down ladders. There are numerous examples of farmers *substituting* capital-intensive technology for workers following an inward shift in labor supply (Charlton & Kostandini, 2020; Clemens et al., 2018; Hornbeck & Naidu, 2014; Ifft & Jodlowski, 2022). As agricultural technologies become more advanced, demand for workers with more technical skills might also evolve (Martin & Taylor, 2013). The final strategy to respond to farm labor shortages is to *supplement* the workforce with foreign guest workers and to recruit workers from countries that have not typically supplied workers to US farms in the past.

Although the farm industry responds to labor scarcity, in part, through increased mechanization, development of labor-saving technologies is typically slow and may have myriad impacts on the agricultural industry and labor markets. For example, plant breeder Jack Hanna and engineer Coby Lorenzen came together in the mid-1950s to create a machine that could harvest tomatoes mechanically. They made several failed prototypes, and their efforts were severely criticized for over a decade (Filmer, 2015). Eventually, they successfully engineered a mechanical tomato harvester and bred a tomato variety that was tough enough to withstand machine harvest, ripened uniformly, and easily detached from its stem. Within 5 years of the termination of the Bracero program, 99.9% of processing tomato growers were using the newly developed

mechanical harvester (Filmer, 2015; Taylor & Charlton, 2019). The harvester saved an estimated 91 labor hours per acre, which amounted to over 19 million man hours displaced on tomato farms by 1973 (Schmitz & Seckler, 1970). Many small growers who lacked economies of scale were put out of business, and it is impossible to determine the cost to workers of finding new employment. In 1979, a multimillion-dollar lawsuit was issued against the University of California for using government dollars to fund research that hurt small growers and displaced workers. The University of California eventually won the lawsuit, but it was still costly, and labor-saving technological innovations in the agricultural sector stagnated (Taylor & Charlton, 2019).

New technological advances in agriculture are not expected to eliminate farm labor demand since workers perform complementary tasks. For example, following more than 10 years of research and development, robots are currently in use on a few commercial strawberry farms. These robots require operators, technicians, and a small crew to pick remaining strawberries that the robot misses. Growers who adopt the harvester have to amend their payment schemes since no one wants to be paid piece rate to pick the sparse berries behind a robot.<sup>6</sup> Workers, many of whom could be immigrants or guest workers, benefit from technology adoption if they have the opportunity to learn new skills and if using the machines increases their marginal value product, or if the machines reduce the physical strain of tasks performed by hand.

## H-2A GROWTH IN THE TWENTY-FIRST CENTURY

Even as researchers and industry leaders invest in the development of new technologies, efforts to supplement the workforce with H-2A workers are also rising. The H2 guest worker visa was first created in 1952 through the Immigration and Nationality Act. In its initial years, it employed fewer than 10,000 workers per year, mostly to harvest sugarcane in Florida (Martin & Rutledge, 2021). In 1986, it was split into the H-2A program for agricultural and H-2B for non-agricultural jobs. H-2A employment did not experience notable growth until the twenty-first century. In fiscal year 2022, 370,000 H-2A positions were certified, more than seven times the number certified in 2005 and twice the number certified in 2016 (Castillo, 2023). Recent demand for H-2A workers has largely been attributed to fewer arrivals of immigrants seeking farm jobs and subsequent farm labor scarcity (Castillo et al., 2022; Luckstead & Devadoss, 2019; Zahniser et al., 2018). Policymakers must examine the current guest worker program, its strengths and limitations, and determine whether and how to reform the H-2A program to better address the current and anticipated needs of farm employers and guest workers.

Hiring H-2A workers is relatively costly and entails a high administrative burden. When unauthorized immigrants are abundant, there is little incentive to hire guest workers through the H-2A program. However, unauthorized immigration peaked at 12.2 million in 2007 (Passel & Krogstad, 2023), and following the Great Recession, Mexico-United States migration declined to zero or less (Passel et al., 2012). H-2A employment has risen steadily since (Castillo & Charlton, 2022).

Employers must meet three major criteria to hire H-2A workers: 1) They must try to recruit US workers for a seasonal farm job and demonstrate that no workers were willing or able to perform the job; 2) They must offer approved housing free of charge to H-2A workers and, as long as the farm employs H-2A workers, they must offer this benefit to US workers seeking employment as well and provide transport from the worker's home country and return; and 3) They must pay at least the Adverse Effect Wage Rate (AEWR), which is the minimum wage rate

for H-2A workers set by the Department of Labor, or other prevailing wage if it applies (Castillo et al., 2022; Martin & Rutledge, 2021). To show that employment of H-2A does not adversely affect domestic worker wages, the H-2A employer must pay at least the maximum of four possible wage rates: 1) the AEWR, which is set for each state based on wages reported in the USDA's Farm Labor Survey; 2) the federal or state minimum wage; 3) the prevailing wage of US domestic workers (hourly or piece-rate wage determined by the local State Workforce Agency); or 4) the wage determined by a collective bargaining agreement (CBA) if it exists. Fewer than 2% of H-2A jobs offer a wage higher than the AEWR (Castillo et al., 2022).

The H-2A program is complex and difficult for employers to navigate. Figure 1 shows the United States Department of Labor's H-2A application process flowchart for employers, updated February 2023. According to the chart, filing for H-2A certified positions requires employers to take a minimum of four steps with numerous caveats throughout the process if any discrepancies are found. Employers must file the job order 75–60 days prior to the first date of work when weather and yields are still uncertain. Grower groups frequently contend that the application process is difficult and time-consuming (Onel & Farnsworth, 2016), thus deterring take-up of the program.

Organizations that specialize in learning the appropriate paperwork and filing process frequently apply for H-2A positions on behalf of growers (Charlton & Castillo, 2021). In 2020, 45% of all H-2A jobs were filed by a third-party agent, 21% by a growers' association, 19% by a lawyer, and 15% by farmers or their employees (Castillo et al., 2022). Given the high up-front cost of applying for H-2A, the majority of H-2A positions are concentrated in few states and among few employers. In fiscal year 2022, five states accounted for 51% of H-2A certifications, and 44% of H-2A employers were farm labor contractors (FLCs) (Castillo, 2023).

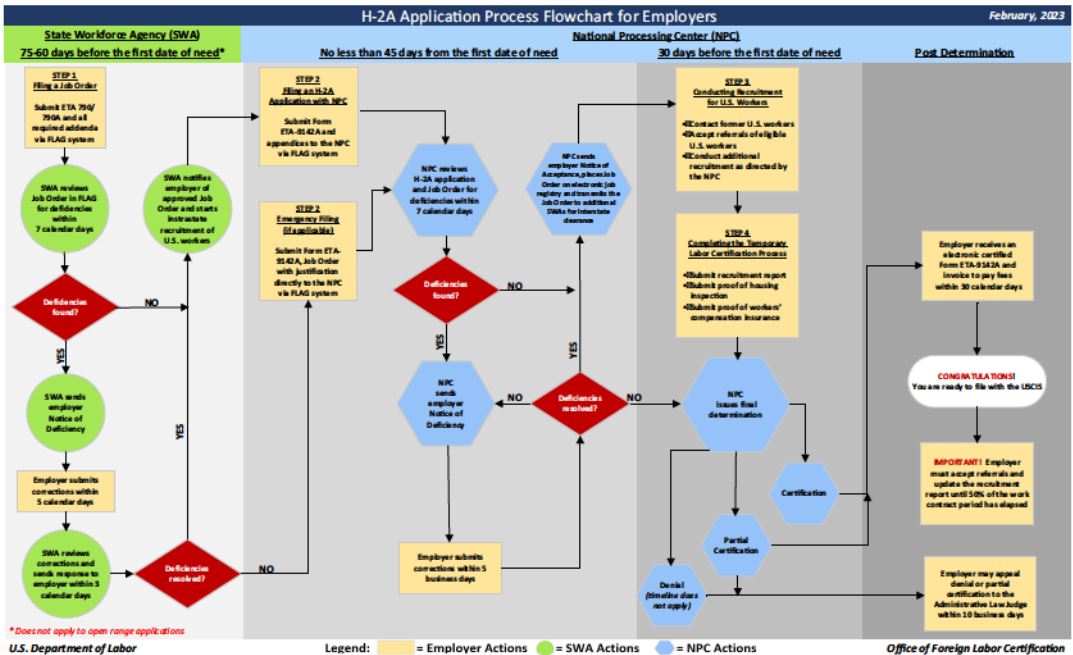


FIGURE 1 Employer process to apply for H-2A positions.

There are relatively few studies that rigorously identify factors that impact the demand for H-2A workers. Simnitt et al. (2018) show evidence that farmers are more likely to adopt H-2A employment if other farmers in their network employ H-2A workers. Charlton and Castillo (2021) show that the unemployment rate is inversely related to changes in H-2A employment within states, which is consistent with the notion that H-2A workers help fill farm jobs when local labor markets tighten. Furthermore, H-2A employment grew more rapidly within commuting zones that were experiencing a housing boom and declined to a lesser extent during housing busts from 2001 to 2017 (Castillo & Charlton, 2022). Rising labor demand in nonfarm sectors during housing booms likely draws workers from agriculture, and farmers respond by contracting H-2A workers to replace them (Castillo & Charlton, 2022).

A first major concern of the H-2A program is that guest workers might take jobs from domestic workers and suppress wages. However, few domestic workers took available farm jobs during the Great Recession even though unemployment rates were high (Corbett, 2020). Econometric analysis of data supports only a very small negative impact of H-2A on employment of domestic workers (Clemens, 2022). Furthermore, stricter minimum wage restrictions for H-2A workers are believed to raise market wages of farm workers throughout the local economy (Castillo et al., 2022).

A second concern is that H-2A workers might be particularly vulnerable to labor abuses. H-2A workers might be reticent to report labor abuses for fear that if they do so, they will not be able to find employment in the United States in the future (Farmworker Justice, 2022). Furthermore, guest workers may not be aware of their rights or how to file complaints. The Department of Labor has limited resources to investigate violations of H-2A labor standards, and there is only a 1.1% probability that an H-2A employer will be investigated by the Department of Labor Wage and Hour Division in any given year (Costa et al., 2020).

Despite employer frustration with the H-2A program and repeated violations of fair labor standards, there have been no substantive changes in H-2A guest worker policy since 1986. All previous efforts to reform the H-2A program were defeated in Congress. Grower representatives and worker advocates reached a compromise in 2000 with the Agricultural Job Opportunity, Benefits and Security Act (AgJOBS) (Onel & Farnsworth, 2016). It sought to legalize current unauthorized farm workers and make it easier to hire legal guest workers. AgJOBS provided the framework for a bipartisan bill proposed in the 106th Congress, but it was not enacted. Subsequent immigration reform bills included AgJOBS titles, but none were enacted (Onel & Farnsworth, 2016).

In 2013, the Senate passed S.744, the Border Security Economic Opportunity, and Immigration Modernization Act, which took a more comprehensive approach to agricultural guest worker reform. It proposed to replace the H-2A program with a W-3 visa for contract agricultural workers and a W-4 visa for at-will agricultural workers (Onel & Farnsworth, 2016). It proposed moving administration of the guest worker program from the Department of Labor to the Department of Agriculture, which received criticism. It also proposed providing a pathway to citizenship for unauthorized immigrants currently in the United States, streamlining the visa system, mandating that employers use the E-Verify system, and increasing the budget for border security. The bill was not passed in the House of Representatives and discussions of the bill ceased. Nevertheless, this comprehensive approach to farm worker legalization and guest worker reform will likely be the model for future policy (Onel & Farnsworth, 2016).

Any efforts to reform the H-2A program must account for the unique needs of guest workers along with the costs and seasonal labor demands of agricultural employers. The FWMA has numerous components that are similar to S.744 (Martin & Rutledge, 2021). It contains

provisions for unauthorized farm workers currently in the United States to apply for permanent legal residence, a pathway to permanent legal residence through the H-2A program, streamlining of the H-2A application process, and requirements that farm employers use E-Verify. Careful examination of key components of the bill should be considered within the context of previous immigration reforms as well.

## UNINTENDED CONSEQUENCES OF PREVIOUS IMMIGRATION REFORMS

As policymakers, agricultural representatives, and worker advocates negotiate new farm labor and immigration reforms, it is imperative that they consider what factors might have prevented former immigration reforms from accomplishing their intended goals. Recent proposals to reform the H-2A program contain numerous components that resemble the 1986 Immigration Reform and Control Act (IRCA), which legalized nearly 2.7 million people. It was one of the largest amnesty programs in US history, but unauthorized immigration continued unabated in the years that followed (Orrenius & Zavodny, 2012). Smaller-scale immigration policies implemented at county- and state-jurisdiction levels in the twenty-first century, including 287 (g) immigration enforcement policies and E-Verify mandates, can inform on the potential effects of future immigration reform.

IRCA contained two legalization programs, which might have encouraged workers in Mexico to consider migrating to the United States post-IRCA in anticipation of one day receiving amnesty. The general I-687 program granted legal status to illegal aliens who had continuously resided in the United States since 1982, and the Special Agricultural Workers (SAW) program (I-700) granted legal status to illegal aliens who had worked in agriculture at least 90 days from 1985 to 1986. It was easier to gain legal status through the SAW program because many farmers paid their workers in cash. Thus, many workers who lacked proof of employment in agriculture submitted letters from employers and other evidence that was difficult to verify (Martin, 1994). The United States Department of Agriculture (USDA) estimated that there were 350,000 illegal aliens working in agriculture at the time IRCA was implemented, but 1.3 million workers applied for SAW status. This was 3/4 the number of workers who applied for the general I-687 legalization status, though it is estimated that only 15%–20% of illegal workers were employed in agriculture (Martin, 1994).

IRCA had three major provisions to ensure that agricultural producers had access to a sufficiently large immigrant workforce: (1) it deferred sanctions and search warrants for farm employers until December 1, 1988; (2) it legalized farm workers through the SAW program; and (3) it created the H-2A and Replenishment Agricultural Worker (RAW) guest worker programs. While the H-2A program allowed farmers to request guest workers if there were insufficient workers available domestically, the RAW program admitted guest workers based on the Secretaries of Labor and Agriculture's national calculations of farm labor supply and demand. Farm labor shortages were not realized in the years following IRCA's implementation and the RAW program was allowed to expire on September 30, 1993 (Martin, 1994).

The conflicting policy measures contained within IRCA contributed to its unpredictable outcomes. Agriculture was the only sector that received preferential treatment in IRCA (Martin, 1994). There were an estimated 800,000 farm employers in the United States at the time, which constituted about 13% of all US employers. There were an estimated 3 million farm workers, who constituted about 2% of all US employees (Thompson & Martin, 1991). US

manufacturing declined following IRCA because it faced increased import competition from countries with more abundant labor, but production of labor-intensive agricultural goods grew (Martin, 1994). Farmers had little incentive to raise wages or improve working conditions to attract and retain legalized SAWs (Martin & Taylor, 1990), and seasonal turnover in the farm workforce rose while farm worker wages and benefits did not (Martin & Taylor, 1990).

One of the legacies of IRCA was to increase farm employment through labor contractors. In California, the use of FLCs rose from one-third to one-half of job matches in the years immediately following IRCA (Martin & Taylor, 1990). Although FLCs can theoretically help stabilize the farm workforce, they were also adept at evading law enforcement (Thilmany, 1996). One of their greatest comparative advantages was to recruit new unauthorized immigrants, as they bore the risk of getting caught by immigration enforcement on behalf of growers (Taylor & Thilmany, 1993; Thilmany, 1996). FLCs frequently extracted additional rents from the workers in the form of overcharging workers for housing, transportation, or other services (Polopolus & Emerson, 1991; Thilmany, 1996).

IRCA had at least two intended effects: to create a legal farm workforce and to promote improved wages (Martin, 1994). However, legal family-based immigration rose in the years immediately following IRCA, strong migration networks between Mexico and the United States facilitated continued unauthorized immigration, and legalization under IRCA sent the message to potential immigrants that the United States might grant them amnesty after they migrated (Orrenius & Zavodny, 2012). Migration from rural Mexico to US farms rose in the years following IRCA (Boucher et al., 2007), and farm wages remained low (Martin & Taylor, 1990). IRCA failed to legalize and stabilize the farm workforce (Martin & Taylor, 1990). The question remains whether new policies in the current labor market climate might achieve some of the objectives that IRCA did not.

Implementation of county-level 287(g) policies that permitted local law enforcement to carry out some of the duties of Immigration Customs and Enforcement (ICE) to detect and detain unauthorized immigrants beginning in 2005 caused vegetable acreage within counties to decline (Kostandini et al., 2014), farms to become more capital-intensive (Ifft & Jodlowski, 2022), and dairies to be more likely to use labor-saving technologies (Charlton & Kostandini, 2020). Although 287(g) caused farms to become more capital-intensive on average, technological investments were insufficient to offset losses from reduced labor supply. County-level milk production decreased by over 40 percentage points in 287(g) counties from 2005 to 2012, and the number of dairies in operation decreased by more than 25 percentage points (Charlton & Kostandini, 2020). Following the 2008 Legal Arizona Workers Act (LAWA), which was one of the strictest statewide immigration policies, farm family members were more likely to work in an agricultural occupation (Luo et al., 2018). States that implemented strict E-Verify mandates, requiring private employers of any size to check the immigration status of all new workers, experienced a decrease in number of farm workers and total agricultural acres in operation (Luo et al., 2022).

New immigration reform measures must take into account the impacts of these and previous immigration policies. Federal immigration policies might have different effects than local policies since workers cannot migrate out of the jurisdiction implementing the policy without leaving the country. Nevertheless, findings are suggestive that policies that limit immigration will negatively impact agricultural production. The success of farm labor associations and unions in the years immediately following termination of the Bracero program suggests that labor scarcity plays an important role in promoting improved labor outcomes. Tightening farm

labor supply in the twenty-first century could provide the appropriate backdrop for well-managed immigration and labor policies to help stabilize the farm workforce.

## THE PROPOSED FARM WORKFORCE MODERNIZATION ACT (FWMA)

The FWMA was the result of many months of negotiation between interest groups that included the United Farm Workers, UFW Foundation, Farmworker Justice, and agribusiness representatives (Farmworker Justice, 2021). Similar to IRCA, it contains provisions for unauthorized workers currently residing in the United States to apply for permanent legal residence, but it also contains newer methods to deter unauthorized immigration and has been proposed in an era when Mexican-United States immigration is on the decline. Net impacts of the proposed legislation are difficult to predict, but experiences from previous immigration policies likely contain important insights. Key components of the FWMA are summarized in the Appendix A.<sup>7</sup>

Firstly, the FWMA seeks to provide for the legal work authorization of undocumented farm workers in the United States at the time the bill is introduced and would mandate that agricultural employers use the E-Verify system. It would allow undocumented workers who have been employed in US agriculture for at least 180 days in the 2 years prior to the bill's introduction to apply for Certified Agricultural Worker (CAW) status, which would permit workers to legally work in any sector of employment. CAW status would last 5.5 years with the option to renew indefinitely or apply for a green card if workers continued to work in agriculture at least 100 days per year while they had CAW status. CAWs can travel outside of the United States and return, and their spouses and children are eligible for CAW dependent status with the same protections. By requiring agricultural employers to use the federal E-Verify system, the bill might maintain a legal farm workforce. However, the success of E-Verify to maintain a legal workforce likely depends on employer compliance and ability of authorities to enforce the use of E-Verify.

Secondly, FWMA includes numerous revisions to the H-2A program. Key components of these revisions help streamline H-2A applications for employers, protect the rights and agency of guest workers, and provide a pathway to immigration for guest workers. It would bring H-2A workers under the coverage of the Migrant and Seasonal Agricultural Worker Protection Act (AWPA) for the first time, which gives workers the right to file a lawsuit in federal courts to enforce their terms of employment, and it regulates growers' use of FLCs. It would include protections to prevent heat stress; it would allow workers to obtain H-2A visas for up to 3 years with the option to seek new H-2A employment at the end of contracts; it would require foreign labor contractors to register with the US government; and it would create a pilot portable H-2A visa that allows workers to move between multiple registered agricultural employers on the same visa; it would streamline the H-2A application process for employers, allowing employers to apply for positions through an electronic system at lower cost; and it would allow for a limited number of year-round H-2A visas (currently year-round agricultural jobs are not eligible for H-2A).

Third, the FWMA proposes to freeze the AEW for a year and then allow it to increase by no more than 3.25% per year for the next 9 years.<sup>8</sup> Furthermore, the AEW would be set by job title, so farm-related jobs in construction, driving truck, or other semi-skilled jobs would not put upward pressure on the wages for more manual tasks. The expected impacts of separating

AEWR by job would be to decrease the required wages for crop workers and increase required wages for nonfarm jobs such as construction and truck driver. Freezing the AEWR would save employers an estimated \$140 million a year in wages paid directly to H-2A workers and \$29 million a year in wages paid to more than 50,000 domestic workers employed on farms with H-2A workers (Castillo et al., 2022). Impacts could be even larger if freezing the H-2A has longer term impacts on market wages and trends for domestic workers.

## DISCUSSION: POLICY, LABOR SCARCITY, AND WORKER AGENCY

Many components of the FWMA resemble previous immigration reforms. In particular, the provisions for farm workforce legalization resemble key features of IRCA, which had some unintended consequences. If unauthorized workers continue migrating to US farms after the legislation is passed, it could undermine efforts to improve wages and working conditions for farm workers, and providing amnesty to farm workers might encourage new migration as IRCA did (Boucher et al., 2007; Orrenius & Zavodny, 2003, 2012). However, since migration to US farms slowed considerably in the twenty-first century, these impacts might be of little consequence. A few fundamental features of the FWMA also differ from IRCA. For example, the FWMA requires all farm employers to use the E-Verify system to ensure that the workforce is and remains legal. This could be an improvement over IRCA's laws that made employers legally liable for checking the legal paperwork of their workers, which was easy for workers to falsify (Martin, 1994). Although research shows that states that mandated private employers to use E-Verify experienced reductions in the unauthorized population (Bohn et al., 2014) and number of farm workers and farm acreage (Luo et al., 2022), it is still unknown whether E-Verify policies can adequately be enforced.

One of the primary criticisms of the H-2A program is that it creates large power imbalances between workers and their employers. Cases brought against farm employers for exploitation of H-2A workers include wage theft and deportation, threats at gunpoint, unsafe housing, coercion to support employer demands in public hearing, and forcing Black citizens to train their H-2A replacements (Farmworker Justice, 2022). The vast majority of labor violations against H-2A workers that the Department of Labor has detected were committed by few employers (Costa et al., 2020). Increased resources to investigate H-2A employers and harsher punishment for violations might be necessary to protect the rights of guest workers (Costa et al., 2020). Furthermore, guest worker policies that prohibit workers from migrating away from their employer could exacerbate exploitative situations since workers are not guaranteed future employment under the H-2A program and might be dependent on the job for financial or other reasons. Proposed policy reforms within the FWMA that permit H-2A workers to more easily migrate across employers could be vital for preventing labor abuses. Nevertheless, policies must still create reasonable incentives for employers to pay for guest workers' transportation and housing expenses. The visa program will fail if workers frequently leave the farms that invest in the up-front hiring and related transportation costs.

If immigration or guest worker policy reforms are implemented, it is imperative to collect and analyze data on a variety of outcomes, including employment of H-2A and domestic farm workers, wages, nonwage worker benefits, length of employment per worker, hours of work per week, and labor shares of farm operating costs, among others. Although legalization of workers and pathways to permanent legal residence could greatly improve worker agency and well-being, immigration reform measures could also have unanticipated effects on labor migration,

wages, and employment. Policies must be evaluated and monitored over time, and policy adjustments should be considered as needed.

## CONCLUSION

Considerations for policy reform must account for changes in the farm labor supply and immigration conditions. Mexicans are migrating out of agricultural work as the Mexican economy develops (Charlton & Taylor, 2016). The rural Mexican birth rate declined from one of the highest rates in the world in 1960 to a rate similar to the United States, children are getting more education than in generations past, and nonfarm opportunities in the Mexican economy are expanding (Charlton & Taylor, 2016). This has important direct implications for US agriculture and agrifood systems. The agricultural sector is investing in robotic and other labor-saving technologies, but research and development of new technologies is not immediate, adoption of new technologies might be slow as firms weigh the risks of large up-front investments, and most technologies require complementary labor.

Immigration policy reform is necessary if the United States is to continue producing labor-intensive fresh fruits and vegetables for domestic and export markets. Furthermore, better policies can and should promote the well-being of agricultural workers, including immigrants and guest workers. The FWMA is the result of negotiations between policymakers and numerous agribusiness and farm worker interest groups. Some components of the FWMA will result in conflicting incentives for future migration. However, in the present context of diminishing farm labor supply, it might have greater success than IRCA or other previous immigration policies to stabilize the farm workforce and improve agricultural working conditions and worker benefits on farms. Effective enforcement of fair labor laws that also successfully deter employment of unauthorized workers at lower cost will be necessary for immigration reform to succeed in the long term.

The structure of farm employment in the United States is changing, and immigration and guest worker policy must reflect evolving labor demands. Martin (2001) illustrated agricultural labor retention as a pyramid with a wide base and short sides. There was little upward mobility. Currently, as farm labor supply shrinks, the base of this pyramid is becoming smaller. Well-managed immigration policies could help to slow the rate of decline in the pyramid's base, and policies that improve guest worker benefits, including pathways to legal permanent residence and provision of educational and training opportunities, would increase the height of the pyramid. These kinds of policies also promote some of the economy wide benefits frequently associated with immigration since farm workers and their families can more easily settle in the United States and integrated into the local economy. However, to achieve these benefits, appropriate educational and skill development opportunities must also accompany immigration reform.

## ENDNOTES

<sup>1</sup> Based on author's estimates using the National Agricultural Workers Survey (NAWS).

<sup>2</sup> Based on estimates from the Department of Labor H-2A Disclosure Data.

<sup>3</sup> To qualify for Certified Agricultural Worker (CAW) status, and later apply for permanent resident status and eventually citizenship, farm workers must be able to prove that they worked in US agriculture at least 180 work days during the 2 years prior to the bill's introduction. Applicants must be undocumented and in the United States when the bill is introduced, be continuously in the United States from the date of the bill's introduction until they receive CAW status, pass security and law enforcement background check, and pay an application fee, and must not be disqualified due to certain criminal bars or specific waivers embedded in the bill (Farmworker Justice, 2021).

- <sup>4</sup> Arizona, California, Colorado, Hawaii, Kansas, Kentucky, Louisiana, Massachusetts, Nebraska, New Jersey, New York, Oregon, Washington, and Wisconsin allow farmworkers to engage in collective bargaining (National Agricultural Law Center, 2023).
- <sup>5</sup> The United States Department of Labor specifically defines FLCs as intermediaries who, for a fee, recruit, solicit, hire, employ, furnish or transport migrant and/or seasonal agricultural workers, or provide housing for seasonal agricultural workers. Source: United States Department of Labor Wage and Hour Division. "Fact Sheet #49: The Migrant and Seasonal Agricultural Worker Protection Act" <https://www.dol.gov/agencies/whd/fact-sheets/49-mspa>. Accessed July 31, 2023.
- <sup>6</sup> Based on conversations with business managers and engineers at Advanced Farms (Davis, CA) in 2023.
- <sup>7</sup> For a more detailed description of FWMA, see Farmworker Justice (2021).
- <sup>8</sup> The AEWWR grew by an average of 4% per year over the past 10 years (Castillo et al., 2022).

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## APPENDIX A

Box A1 summarizes key components of the Farm Workforce Modernization Act (FWMA). Key components of the FWMA are summarized in Box A1.

### Box A1 Key components of the FWMA

#### *Provisions for the legalization of the farm workforce*

- Workers who were employed in agriculture at least 180 days in the 2 years prior to the bill's introduction are eligible for Certified Agricultural Worker (CAW) status
- Workers can apply for CAW status within 18 months of the bill's publication
- To qualify, workers must be undocumented and present in the United States when the bill is introduced, and they must be continuously in the United States from the bill's introduction until they receive CAW status. Eligible workers must have no criminal bars, pass security and law enforcement background checks, and must pay an application fee
- CAW benefits:
  - Authorization for employment in any industry
  - Ability to travel out of the United States and return without losing CAW status
  - Option to renew CAW status every 5.5 years or apply for a green card. Workers must work in agriculture at least 100 days per year to qualify for renewal
  - Spouse and children are eligible to apply for CAW dependent status with the same benefits

#### *Provisions to Improve Guest Worker Protections*

- Maintains many of the same protections in the current H-2A visa program, but it moves many regulations to statutes so that protections cannot be easily removed
- Covers H-2A by the Migrant and Seasonal Agricultural Worker Protection Act (AWPA), which gives workers the right to file a lawsuit in federal court to enforce the terms of their contracts and regulates growers' use of farm labor contractors
- Provides for protections against heat stress
- Provides path to immigration and citizenship for a limited number of H-2A workers. A total of 40,000 green cards would be available each year.
- Increases visa flexibility to allow guest workers to stay up to 3 years with the option to seek new H-2A employment at the end of a contract and access information on their visa status from the Department of Homeland Security directly without accessing this information through their employer
- Requires foreign labor contractors to register with the US government to reduce risk of human trafficking
- Pilots a portable H-2A visa that would allow workers to move between multiple registered employers on the same visa

*Provisions to Streamline the H-2A Program and Other Employer Benefits*

- Streamlines the employer application process using an online system
- Allows for a limited number of year-round contracts each year
- Makes rural housing provisions (intended to benefit workers and employers)
- Freezes the Adverse Effect Wage Rate (AEWR) for 1 year and limits growth over the next 9 years, which could reduce employer wage costs but also decrease H-2A and US worker earnings
- Allows for different AEWRs by job title