



**Statement for the Record of  
Farmworker Justice**

**Hearing of the House Education and Labor Committee's  
Subcommittee on Workforce Protections**

**"Second Class Workers: Assessing H2 Visa Programs Impact on Workers"**

**July 20, 2022**

Thank you for the opportunity to submit this statement regarding the need for Congressional and administrative action to address the conditions of workers in the H-2 visa programs, particularly the H-2A visa for temporary agricultural workers.

We applaud the Subcommittee's decision to hold this hearing. Recent cases, such as the horrific trafficking of hundreds (potentially thousands) of H-2A workers in Georgia, have made clear what advocates have known for years: The H-2A program is rife with violations of workers' rights, and policymakers must not allow it to continue in its current form. As the program rapidly expands, it is critical for Congress to develop a full understanding the deep structural flaws that enable the abuse of H-2A workers. We hope that this hearing will be a step toward significant reforms that provide greater agency to H-2A visa holders and strengthen protections for H-2A and domestic farmworkers alike.

For more than forty years, Farmworker Justice has engaged in policy analysis, education, advocacy, and litigation to empower farmworkers—both H-2A and domestic—to improve their wages and working conditions, health, occupational safety, and access to justice. In our work, we have seen how immigration status plays a central role in determining farmworkers' wages, benefits, and safety in the workplace. The vast majority of the nation's 2.4 million farmworkers are Latino immigrants. Close to half of them are undocumented and an increasing number—more than 10%—come to the United States on precarious H-2A visas.<sup>1</sup>

Farmworker Justice has long criticized the H-2A program for its structure and its implementation. Because their visas are entirely dependent on their employers, H-2A workers are often reluctant to raise complaints or report violations of their rights.<sup>2</sup> They are deprived of economic bargaining power and political influence, creating a deeply unfair power imbalance between H-2A employers and the workers. In spite of having worked in the U.S. and contributed to the economy, often for many seasons, H-2A

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<sup>1</sup> DOL Bureau of Labor Statistics, *Findings from the National Agricultural Worker Survey FY 2019-2020*, Research Report No. 16 (2022), [https://wdr.doleta.gov/research/FullText\\_Documents/ETAOP2022-16\\_NAWS\\_Research\\_Report\\_16\\_508c.pdf](https://wdr.doleta.gov/research/FullText_Documents/ETAOP2022-16_NAWS_Research_Report_16_508c.pdf); DOL Employment and Training Administration, *H-2A Performance Data*, <https://www.dol.gov/agencies/eta/foreign-labor/performance>.

<sup>2</sup> See Farmworker Justice, *No Way to Treat a Guest: Why the H-2A Agricultural Visa Program Fails U.S. and Foreign Workers* (2011), <https://www.farmworkerjustice.org/resource/no-way-to-treat-a-guest-why-the-h-2a-agricultural-visa-program-fails-u-s-and-foreign-workers/>; Centro de los Derechos del Migrante, *Ripe for Reform: Abuse of Agricultural Workers in the H-2A Visa Program* (2020), <https://cdmigrante.org/wp-content/uploads/2020/04/Ripe-for-Reform.pdf>.

workers currently have no opportunity for permanent legal status or a path to citizenship.

Reform of the H-2 programs cannot wait. The Biden Administration and governments from around the region recently announced their intention to expand participation in the programs as part of the regional migration strategy at the Summit of the Americas. Expansion without reform will only put greater numbers of vulnerable migrants at risk. When this nation requires the services of citizens of foreign countries to perform agricultural work, those workers should have control over their own status, with a visa that provides employment mobility and the opportunity for citizenship. The current system in which U.S. agriculture depends primarily on workers who are either undocumented immigrants or nonimmigrant temporary foreign workers—neither of whom have a path to immigration status or citizenship—is wrong and unacceptable.

### **I. Operation Blooming Onion: A Window into the Broken H-2A System**

In late 2021, federal prosecutors announced charges against more than 24 defendants in what they referred to as Operation Blooming Onion, one of the largest human trafficking and visa fraud investigations in U.S. history.<sup>3</sup> Starting in 2015, the criminal trafficking ring at the heart of the investigation trafficked potentially *thousands* of victims holding H-2A temporary agricultural visas.

The Department of Justice described the defendants' treatment of H-2A workers as "modern-day slavery."<sup>4</sup> Upon examining the allegations detailed in their indictment, it is hard to describe the situation any other way.<sup>5</sup> The traffickers sold and traded the H-2A workers they brought into the country, forcing many to dig for onions with their bare hands for as little as 20 cents a bucket. As workers struggled in the hot Georgia summer, their employers threatened them at gunpoint to keep them in line. Workers were denied adequate water and sanitation facilities in the fields. At the end of the work day, they returned to terrible housing conditions; many workers were forced to live in camps surrounded by electric fencing, while others were housed in cramped, dilapidated trailers with raw sewage leaks. Four workers were kidnapped, one was

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<sup>3</sup> Lautaro Grinspan, "This has been happening for a long time": Modern-day slavery uncovered in South Georgia, THE ATLANTA JOURNAL-CONSTITUTION (December 3, 2021), <https://www.ajc.com/news/this-has-been-happening-for-a-long-time-modern-day-slavery-uncovered-in-ga/SHBHTDDTTBG3BCPSVCB3GO66BQ/>.

<sup>4</sup> U.S. Attorney's Office, Southern District of Georgia, *Human smuggling, forced labor among allegations in south Georgia federal indictment*, U.S. DEP'T OF JUSTICE (Nov. 22, 2021), <https://www.justice.gov/usao-sdga/pr/human-smuggling-forced-labor-among-allegations-south-georgia-federal-indictment>.

<sup>5</sup> *USA v. Patricio et al, Operation Blooming Onion*, Indictment No. CR 521 -0009, S.D. Georgia, Nov. 22, 2021.

repeatedly raped, and several workers faced threats of death and violence to themselves and their family members. Two workers tragically died of heat exhaustion.

How did this happen? As with all H-2A workers, the victims in Operation Blooming Onion were entirely at the mercy of their employers. The restrictions of the visa did not allow them to change employers, and the structure of the program allowed the traffickers to insulate themselves from accountability. The defendants controlled every part of the workers' lives, from their conditions on the worksite to their housing and transportation. Although doing so is illegal, the traffickers confiscated the identity documents of workers to prevent them from escaping. And the rural Georgia locations where they operated further isolated workers, often preventing them accessing assistance from farmworker advocates and other social services.

Alarming, the criminal activity of these employers was directly enabled by the federal government and the officials responsible for protecting workers in the H-2A program. In the period from 2015 to 2021, the defendants in Operation Blooming Onion petitioned for more than 70,000 H-2A workers.<sup>6</sup> The Department of Homeland Security has not reported the number of that were ultimately granted, but public data suggests that the vast majority were approved. For example, U.S. Citizenship and Immigration Services (USCIS) approved 99% of H-2A petitions in fiscal year 2021.<sup>7</sup> The federal government continued to approve visa petitions from the defendants for years after the Operation Blooming Onion investigation began in 2018.<sup>8</sup> Georgia state government oversight was similarly compromised: one of the defendants was a Georgia state official responsible for H-2A housing inspections, and another is the sister of the Georgia official responsible for certifying H-2A positions at the state level.<sup>9</sup>

The horrific abuses of H-2A workers exposed in Operation Blooming Onion are not unique. In just the last year, similar H-2A trafficking operations have been uncovered in South Carolina and Florida.<sup>10</sup> And Polaris, the organization responsible

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<sup>6</sup> *Id.*

<sup>7</sup> H-2A Employer Data Hub, USCIS (2022) <https://www.uscis.gov/tools/reports-and-studies/h-2a-employer-data-hub>.

<sup>8</sup> U.S. Attorney's Office, Southern District of Georgia, *Human smuggling, forced labor among allegations in south Georgia federal indictment*, U.S. DEP'T OF JUSTICE (Nov. 22, 2021), <https://www.justice.gov/usao-sdga/pr/human-smuggling-forced-labor-among-allegations-south-georgia-federal-indictment>.

<sup>9</sup> Maria Perez, Drew Favakeh and Abraham Kenmore, *Farmworker advocates linked to human trafficking and forced labor in Georgia*, USA TODAY (Apr. 19, 2022), <https://sports.yahoo.com/beyond-troubling-current-former-government-090037767.html>

<sup>10</sup> Emma Ockerman, *Farm Workers Were Trafficked and Threatened With a Gun in South Carolina, Feds Say*, VICE NEWS (Jan. 21, 2022), <https://www.vice.com/en/article/m7v38x/south-carolina-balcazar-human-trafficking-farm-workers>; Office of Public Affairs, *Human smuggling, forced labor among allegations in south Georgia federal indictment*, U.S. DEP'T OF JUSTICE (Sept 22, 2021),

for the National Human Trafficking Hotline, recently reported that the H-2A program is the visa category with the highest number of reported human trafficking cases, making up more than three quarters of calls from workers holding temporary work visas.<sup>11</sup>

## II. Overview of the H-2A Visa

The flaws that we see in the H-2A program today reflect its origins in the notorious Bracero Program, a temporary agricultural labor program that Congress ended in 1964 due to widespread abuse of Mexican workers and displacement of U.S. workers.<sup>12</sup> The H-2A program was created in its current form as part of the 1986 Immigration Reform and Control Act (IRCA). The current regulations largely parallel the first regulations promulgated by the Reagan Administration, and incidents like Operation Blooming Onion make clear that they are insufficient to protect workers in the program.

The need to address the flaws of the H-2A program has grown more pressing as the H-2A visa program has exploded in size in recent years. Unlike most visa programs, there is no cap on the number of workers who can receive H-2A visas. Over the past decade, each year has set a new record for H-2A positions certified by the Department of Labor and visas issued by the Department of State. As the chart below indicates, this growth continued unabated even as most other immigration programs shut down during the first year of the COVID-19 pandemic. Last year, the U.S. Department of Labor certified more than 317,000 positions for the H-2A program, and quarterly numbers indicate that the Department is on track to easily surpass that number in fiscal year 2022.<sup>13</sup>

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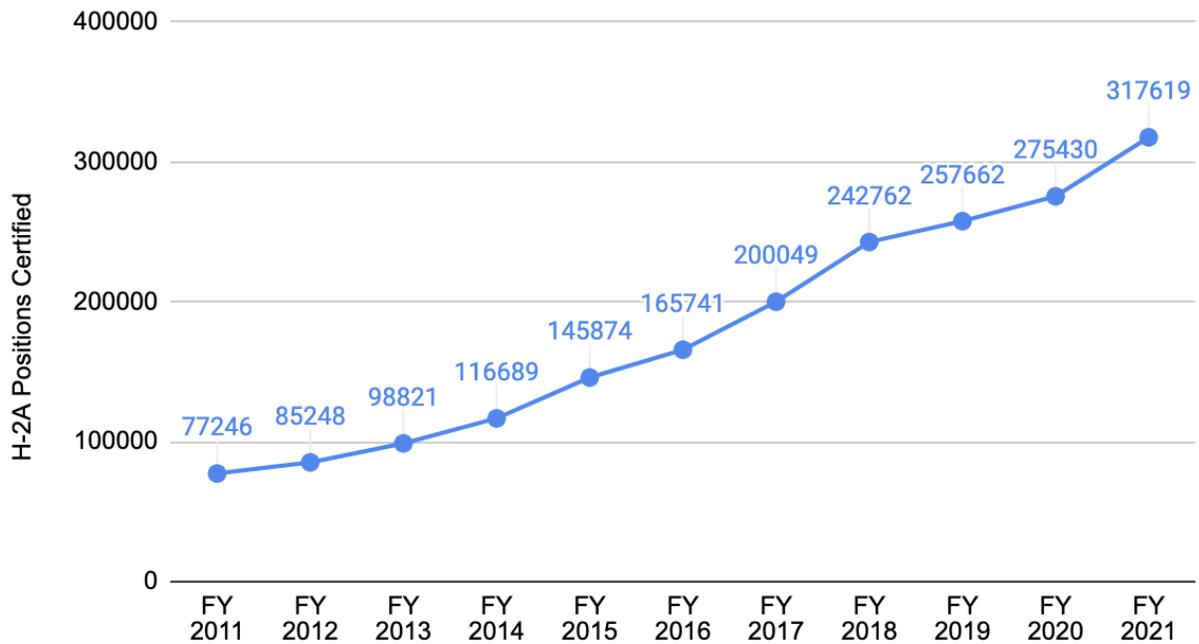
<https://www.justice.gov/opa/pr/defendants-charged-connection-multi-state-racketeering-conspiracy-involving-forced-labor>.

<sup>11</sup> *Labor Trafficking on Specific Temporary Work Visas: A Data Analysis 2018-2020*, POLARIS (Jul. 2022), <https://polarisproject.org/wp-content/uploads/2022/07/Labor-Trafficking-on-Specific-Temporary-Work-Visas-by-Polaris.pdf>.

<sup>12</sup> See Selene Rivera, *A former bracero farmworker breaks his silence, recalling abuse and exploitation*, L.A. TIMES (July 18, 2022), <https://www.latimes.com/california/story/2022-07-18/former-bracero-farmworker-breaks-silence>.

<sup>13</sup> DOL Employment and Training Administration, *H-2A Performance Data*, <https://www.dol.gov/agencies/eta/foreign-labor/performance>.

## H-2A Positions Certified By DOL



The federal government provides very little demographic data about the workers who receive H-2A visas. One of the only data points available is nationality of visa recipients: In fiscal year 2021, more than 92% of workers on H-2A visas were Mexican nationals, with South Africa, Jamaica, Peru, Guatemala as other major sending countries.<sup>14</sup> The Department of State has not published data on the gender or age of visa recipients, but Customs and Border Patrol admissions data has shown that the overwhelming majority—96.5%—of H-2A workers entering the country are male, reflecting the rampant sex discrimination in the H-2A recruitment process.<sup>15</sup>

Responsibility for the H-2A program is fragmented between multiple agencies. The Department of Labor’s Office of Foreign Labor Certification has responsibility for reviewing H-2A job offers and certifying the lack of availability of U.S. workers, and it regularly certifies more than 95% of applications.<sup>16</sup> Once DOL has certified the H-2A position, the employer then petitions DHS for permission to bring in H-2A workers. As indicated previously, 99% of those petitions are approved. Finally, the Department of State is responsible for issuing the visa to workers, though workers often rely on the

<sup>14</sup> Department of State, *FY2021 Nonimmigrant Visa Statistics*, <https://travel.state.gov/content/travel/en/legal/visa-law0/visa-statistics/nonimmigrant-visa-statistics.html>.

<sup>15</sup> U.S. Department of Homeland Security, *Nonimmigrant Admissions by Selected Classes of Admission and Sex and Age: Fiscal Year 2019 (2021)*, <https://www.dhs.gov/immigration-statistics/readingroom/NI/NonimmigrantCOAsexage>.

<sup>16</sup> DOL H-2A Performance Data, *supra* note 13.

employer's recruiters and agents to facilitate the visa process. Enforcement in the program is also spread across different enforcement agencies, including DOL's Wage and Hour Division, DHS's Immigrations and Customs Enforcement Homeland Security Investigations, and the Department of Justice.

Because there is no centralized authority that is accountable for ensuring protection of U.S. and foreign farmworkers involved in the H-2A program, workers and their advocates often have difficulty identifying and connecting with government officials who can fully address and remedy violations of workers' rights. The fragmentation also exacerbates employers' control over the visa process. It is the employer who submits certification applications to DOL and visa petitions to USCIS, and in most cases, the employer does not even have to identify workers in their H-2A petitions.<sup>17</sup> The State Department is typically the only U.S. government agency to regularly interact with H-2A workers themselves, yet even that interaction is often controlled by recruiters and agents who work for the U.S. employer. The federal government must do more to overcome this fragmentation, protect workers, and provide them agency in the H-2A process.

### **III. The Exploitation of H-2A Workers Begins Abroad**

The violations of H-2A workers' rights often begin before they have even left their home country. Many workers seeking H-2A jobs live in rural areas where employment opportunities are limited. H-2A jobs are attractive to workers because the pay rate is typically significantly higher than what they could earn in their home country. These workers are especially vulnerable to exploitation because they often have limited resources and low levels of education, leading them to rely entirely on recruiters and agents who work for U.S. employers. Rather than assisting any interested worker, these recruiters become gatekeepers; it is incredibly challenging for workers to identify H-2A opportunities, connect with employers, and get hired without these intermediaries.

As numerous reports and news stories have demonstrated, the recruitment process is rife with abuse. Recruiters often charge workers illegal recruitment fees or otherwise require them to provide some sort of collateral. One survey of recently returned H-2A workers in Mexico found that 58% of workers interviewed reported

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<sup>17</sup> See 8 C.F.R. 214.2(h)(5)(v)(ii).

paying recruitment fees.<sup>18</sup> Another investigative report uncovered a Honduran recruiter who admitted charging fees as high as US\$10,000 to connect workers with H-2 job opportunities.<sup>19</sup> Many workers go into debt to pay these fees, which in turn decreases their willingness to raise workplace complaints for fear of losing their job and the ability to pay back their debts. Other workers are disincentivized from vindicating their rights because they face breach fees or other threats from recruiters—such as blacklisting—if they leave their U.S. employment before the scheduled end of the contract.

The federal agencies responsible for the H-2A program have done woefully little to address the unregulated recruitment process. Recent guidance from the Department of Labor and other agencies encourages governments involved in temporary labor programs to “design measures, such as public registration, licensing or certification of recruiters, and systems that permit workers and other interested parties to verify the legitimacy of recruitment agencies and placement offers.”<sup>20</sup> Yet the United States government itself does not have any of these protections in place. U.S. authorities do not provide any avenue for workers abroad to verify that they are interacting with legitimate recruiters who will comply with the law and are actually connected with the job opportunities that are posted. Unlike in the H-2B program, the federal government does not post information that H-2A employers submit about the recruiters they rely on to find workers abroad.

For those workers who are connected to job opportunities and apply for H-2A visas from the State Department, vulnerabilities remain. The majority of workers rely on the employers’ recruiters and agents to provide them information about the job contract and coordinate logistics for the visa application. Although consular officers often ask during the workers’ in-person consular interview about whether the worker was forced to pay recruitment fees, workers are unlikely to report it because it could result in revocation of the employers H-2A petition and therefore loss of the job opportunity.<sup>21</sup> And the COVID-19 pandemic led to cancellation of visa interviews at many consulates, which meant that workers did not receive critical rights information, such as the Wilberforce pamphlet, that is typically delivered at the interview.

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<sup>18</sup> Centro de los Derechos del Migrante, Inc. *Recruitment revealed: Fundamental flaws in the H-2 temporary worker program and recommendations for change* (2018), [http://www.cdmigrante.org/wp-content/uploads/2018/02/Recruitment\\_Revealed.pdf](http://www.cdmigrante.org/wp-content/uploads/2018/02/Recruitment_Revealed.pdf).

<sup>19</sup> El Heraldo, *Visas de trabajo en Estados Unidos por L 250 mil ofrece red clandestina* (Jan. 18, 2022), <https://www.elheraldo.hn/elheraldoplus/investigaciones/visas-trabajo-estados-unidos-red-clandestina-honduras-facebook-JYEH1509617>

<sup>20</sup> Department of Labor et al., *Guidance on Fair Recruitment Practices for Temporary Migrant Workers* (June 2022), <https://www.dol.gov/sites/dolgov/files/OPA/newsreleases/2022/06/ILAB20220565.pdf>

<sup>21</sup> 8 C.F.R. 214.2(h)(5)(v)(xi)(A).

Most workers also incur fees and debt to pay for visa fees and transportation to the United States. Although many of these fees are required to be reimbursed by the employer under the H-2A regulations, the upfront payment creates risks for workers. When workers are required to pay upfront fees in order to obtain their H-2A visa, they often take out loans—and are sometimes forced to pay usurious interest rates or even provide the deed to their home as collateral—to cover the costs. One recent survey of returned H-2A workers in Mexico found that 62% of workers surveyed had taken out loans to cover the costs of getting their visa and traveling to the U.S.<sup>22</sup>

#### **IV. Arriving H-2A Farmworkers Face a History of Injustice and Agricultural Exceptionalism in the U.S.**

When H-2A workers arrive in the United States, they join an already vulnerable U.S. farm workforce. Farmworkers have long been treated as second-class workers in the United States, the product of a long history of slavery, exploitation, and racism in the agricultural industry.

For example, most farmworkers are excluded from the labor protections afforded to workers in other sectors of the economy. These exclusions resulted in large part from concessions made to Southern legislators in New Deal-era labor legislation when agricultural workers were predominantly African-Americans.<sup>23</sup> They continue today, when the vast majority of farmworkers are people of color and an estimated four out of every five farmworkers are Hispanic/Latino.<sup>24</sup> Federal law deprives farmworkers of the right to join a union free from retaliation and denies them overtime pay.<sup>25</sup> Occupational safety standards that exist for most other workers are denied to many farmworkers.<sup>26</sup>

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<sup>22</sup> *Ripe for Reform*, *supra* note 2.

<sup>23</sup> Sean Farhang and Ira Katznelson, "The Southern Imposition: Congress and Labor in the New Deal and Fair Deal," *Studies in American Political Development*, vol. 19 (Spring 2005), p. 14 (quoting Florida Congressman James Mark Wilcox's comments in the debate over FLSA: "[T]here is another matter of great importance in the South, and that is the problem of our Negro labor. There has always been a difference in the wage scale of white and colored labor. . . . You cannot put the Negro and the white man on the same basis and get away with it.").

<sup>24</sup> U.S. Dep't of Labor, *Research Report No. 13, Findings from the National Agricultural Workers Survey (NAWS) 2015-2016: A Demographic and Employment Profile of United States Farmworkers* (2018), p. 2, [https://www.dol.gov/sites/dolgov/files/ETA/naws/pdfs/NAWS\\_Research\\_Report\\_13.pdf](https://www.dol.gov/sites/dolgov/files/ETA/naws/pdfs/NAWS_Research_Report_13.pdf).

<sup>25</sup> 29 U.S.C. § 213(b)(12) (FLSA exemption); 29 U.S.C. § 152(3) (NLRA exemption).

<sup>26</sup> *See, e.g.*, *Walking-Working Surfaces and Personal Protective Equipment (Fall Protection System)*, 81 Fed. Reg. 82,494, at 82,504 (Nov. 18, 2016) (declining to extend walking-working surface standards to agricultural operations).

Most state laws are similarly restrictive,<sup>27</sup> although California, the most productive agricultural state, has extended most labor protections to agricultural workers.<sup>28</sup> Even when labor protections exist, there are still widespread violations of farmworkers' rights.

Amid this lack of labor protections, farmworkers have faced disproportionate harms from COVID-19 and climate change. As the virus spread, workers were often forced to continue working, shoulder to shoulder, without proper personal protective gear or access to sufficient handwashing stations. Many suffered serious health consequences as a result.<sup>29</sup> There continue to be challenges reaching farmworkers with vaccines. Farmworkers are also on the frontlines of exposure to extreme temperatures and wildfires. As smoke fills the air and temperatures increasingly exceed 100 degrees in the West and the Plains, calls from state and local officials to stay indoors stand in sharp contrast with the reality of farmworkers, who must continue their strenuous work in the field to earn a living.<sup>30</sup> Yet there are no national occupational safety standards requiring agricultural workplace protections against injury and death from heat or wildfires.

## V. The H-2A Program Robs Workers of Agency and Creates a Captive Workforce

In addition their increased vulnerability as farmworkers excluded from federal labor law, H-2A workers in the U.S. face the further harm of a visa status that enables their exploitation. The structure of the H-2A visa distorts ordinary labor relations by tying workers to a single employer, leaving them unable to quickly move to another job to escape abuse or seek better wages or working conditions. For the vast majority of H-2A workers, independently connecting with another employer who will submit a transfer petition on their behalf is simply unrealistic. Indeed, a recent survey of Mexican

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<sup>27</sup> Farmworker Justice, Farmworkers' Rights Under State Employment Laws: An Interactive Map, <https://www.farmworkerjustice.org/general-map/>.

<sup>28</sup> Cal. Dep't. of Industrial Relations, *Overtime for Agricultural Workers* (January 2019), <https://www.dir.ca.gov/dlse/Overtime-for-Agricultural-Workers.html>.

<sup>29</sup> Jayson L. Lusk, Ranveer Chandra, *Purdue Food and Agriculture Vulnerability Index*, Purdue University, College of Agriculture, <https://ag.purdue.edu/agecon/Pages/FoodandAgVulnerabilityIndex.aspx> (reporting more than 1 million agricultural worker COVID-19 cases as of July 19, 2022); Yea-Hung Chen et al., *Excess Mortality Associated with the COVID-19 Pandemic Among Californians 18-65 Years of Age, by Occupational Sector and Occupation* (2021), <https://www.medrxiv.org/content/10.1101/2021.01.21.21250266v1.full.pdf> (finding that food and agriculture workers in California have experienced the highest "excess mortality" during the pandemic).

<sup>30</sup> Brian Osgood, 'What choice do we have?' US farm workers battle deadly heatwave, ALJAZEERA (July 15, 2021), <https://www.aljazeera.com/economy/2021/7/15/what-choice-do-we-have-us-farm-workers-battle-deadly-heat-wave>.

guestworkers found that more than half of those recruited to the United States did not feel free to leave their employment if they felt unsafe or if the terms and conditions of their contract were not being met.<sup>31</sup>

Because employers control their employees' visa status while in the United States, H-2A workers have a strong incentive to never complain about workplace mistreatment. If they are fired, they will fall out of status and be forced to leave the country, leaving them with no way to pay back their debt. This creates an environment in which bad-faith employers can wield deportation as a threat, allowing them to act with impunity.<sup>32</sup> A recent survey of returned H-2A workers in Mexico found that "every single worker interviewed experienced at least one serious legal violation [while working on H-2A contracts], and the overwhelming majority experienced multiple serious legal violations."<sup>33</sup>

The threat of immigration consequences for H-2A workers is compounded by U.S. government policies regarding workers' visa status. H-2A workers and their advocates face a major lack of transparency from the U.S. government. U.S. Citizenship and Immigration Services does not recognize a visa beneficiary's independent interests in an employer's visa petition, and the agency therefore refuses to provide information directly to H-2A workers about the visas that they hold. Both Congress and the USCIS Ombudsman have asked USCIS to change this policy, recognizing that this lack of information poses a threat to workers and can leave them subject to immigration enforcement due solely to actions and omissions of their employers.<sup>34</sup>

Widespread employer threats of blacklisting also prevent workers from coming forward. Many H-2A workers return to the same employer year after year, in part because of the challenges that foreign workers encounter in attempting to find and connect with U.S. farm employers. This makes the fear of blacklisting particularly potent, as many workers understand that they will have enormous difficulty obtaining

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<sup>31</sup> Equitable Food Initiative et al., *The IRÉ Project: How Mexican Workers Define Ideal Recruitment and Recruitment Priorities* (2021).

<sup>32</sup> For example, an Idaho farm recently threatened to deport H-2A workers if they did not accept wages that fell well below the legal requirements and, at the same time, underpaid more than 60 domestic farmworker employees. Grace Dean, *An Idaho potato farm threatened to fire foreign workers and deport them to Mexico if they didn't accept wages below the legal limit, the DOL says*, BUSINESS INSIDER (Feb. 23, 2022), <https://www.businessinsider.com/idaho-farm-fire-deport-workers-illegal-wages-department-labor-h2a-2022-2>.

<sup>33</sup> *Ripe for Reform*, *supra* note 2, at 18.

<sup>34</sup> USCIS Ombudsman, *CIS Ombudsman's Recommendations to U.S. Citizenship and Immigration Services 2022*, [https://www.dhs.gov/sites/default/files/2022-03/CIS%20OMBUDSMAN\\_I-129\\_BENEFICIARY\\_RECOMMENDATION\\_fm1\\_03-2022\\_508.pdf](https://www.dhs.gov/sites/default/files/2022-03/CIS%20OMBUDSMAN_I-129_BENEFICIARY_RECOMMENDATION_fm1_03-2022_508.pdf).

future H-2A positions. One recent survey of Mexican guestworkers posed the following question to the workers: “Workers have told us that sometimes employers can threaten them if they don't do this or do that, and that they could be sent home early, could get less pay or not be invited back next season. Do you think this happens often?” 70% of workers responded yes.<sup>35</sup>

## **VI. H-2A Workers Face Barriers to Holding Unscrupulous Employers Accountable**

The recent trafficking cases that we have seen in Georgia, Florida, South Carolina, and other states are grave, but they are far from the only violations that that workers and their advocates encounter. H-2A workers routinely face other violations of their limited rights, such as wage theft, unsafe housing, and dangerous working conditions. For example, a group of H-2A workers in Louisiana recorded the farmer they worked for threatening them at gunpoint after they requested access to adequate drinking water in the field.<sup>36</sup> On one Georgia farm, 19 H-2A workers were forced to live in dilapidated housing that was infested with roaches and had no heat, hot water, or working toilets.<sup>37</sup> In several states, H-2A workers have reported to our partners that their employers have failed to reimburse them for their travel and visa fees, as required by the H-2A regulations. And countless stories never come to light because workers determine that the risks of pursuing a claim—potential loss of employment and future blacklisting—outweigh the potential benefits.

Workers who do want to raise complaints face significant barriers. Many lack opportunities to learn about their workplace rights or communicate with advocates who can assist them. When they come to the United States, H-2A workers usually find themselves isolated in rural locations, unable to access resources and assistance due to both distance and language ability. Most do not speak English, and there are many who have difficulty communicating even in Spanish. One survey of 100 recently returned H-2A workers in Mexico found that nearly 20% of them spoke an indigenous language, and none had ever received workplace information in that language.<sup>38</sup> Limited availability of legal aid and other social services in these locations further exacerbates the problem. And H-2A workers have fewer avenues to bring legal claims because they

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<sup>35</sup> *The IRÉ Project*, *supra* note 31, at 20

<sup>36</sup> Ariel Salk and Jacque Porter, *VIDEO: Louisiana farmer shouts profanities, points guns at employees*, WJHL (Dec. 20, 2021), <https://www.wjhl.com/news/crime/video-louisiana-farmer-shouts-profanities-points-guns-at-employees>.

<sup>37</sup> Suzy Khimm and Daniella Silva, *Lured to America – then trapped*, NBC NEWS (July 29, 2020), <https://www.nbcnews.com/specials/h2a-visa-program-for-farmworkers-surg-ing-under-trump-and-labor-violations>.

<sup>38</sup> *Ripe for Reform*, *supra* note 2, at 31.

are categorically excluded from the Migrant and Seasonal Agricultural Workers Protection Act, the primary federal protection for farmworkers.<sup>39</sup>

Another barrier to seeking accountability is the growing role of farm labor contractors in the H-2A program. Unlike in the H-2B program, DOL and DHS permit H-2A labor contractors (H-2ALCs) to apply for H-2A workers without any underlying fixed site employer. The increase in farm labor contracting in the H-2A program is a cause for concern given the long history of abuses associated with growers' use of labor contractors. A recent EPI study analyzing data from the DOL's Wage and Hour Division determined that farmworkers who are employed through labor contractors are more likely to suffer wage and hour violations than those who are hired directly by farms.<sup>40</sup> The fixed site employers that utilize the services of these H-2ALCs are able to avoid any responsibility for violations that occur on their farms. In fact, only two of the 24 defendants in Operation Blooming Onion were associated with fixed-site employers. The vast majority were involved with H-2ALCs. The division between fixed-site employees and H-2ALC employees can create confusion for workers as to seeking to identify parties responsible for violations, and even when workers win lawsuits against H-2ALCs, they are often unable to recover any lost wages or obtain damages because the H-2ALCs are poorly capitalized.

Finally, the agencies responsible for implementing the H-2A regulations lack adequate resources and staffing to effectively monitor the program. On the front end, OFLC and state workforce agencies are responsible for ensuring that certification applications comply with regulatory standards on issues including housing inspections, wage rates, and job qualifications listed in job orders. Yet OFLC approves more than 95% of certification applications each year, and advocates regularly identify noncompliant provisions in certified job orders. On the back end, DOL's Wage and Hour Division is responsible for enforcement of the H-2A regulations. However, there is a very low probability—just 1.1%—that any farm employer will be investigated by WHD in any given year, and the number of agricultural investigations has decreased significantly over the last decade.<sup>41</sup>

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<sup>39</sup> 29 U.S. Code § 1802(10)(B)(iii).

<sup>40</sup> Daniel Costa et al., *Federal labor standards enforcement in agriculture*, ECONOMIC POLICY INSTITUTE (2020), <https://www.epi.org/publication/federal-labor-standards-enforcement-in-agriculture-data-reveal-the-biggest-violators-and-raise-new-questions-about-how-to-improve-and-target-efforts-to-protect-farmworkers>.

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

## VII. The H-2A Program Enables Discrimination Against U.S. Farmworkers

H-2A workers are not the only victims of the flawed H-2A program. When creating the program, Congress recognized that an uncapped agricultural visa program could pose a significant threat to the livelihood and wellbeing of U.S. farmworkers and thus imposed a statutory mandate to prevent adverse effects for those workers.<sup>42</sup> Unfortunately, the federal government has fallen short in complying with this critical statutory requirement. Domestic farmworkers compete with an H-2A workforce that is completely subject to the control of the employer and that is therefore often forced to endure working conditions and abuses that U.S. workers will not accept or tolerate. Moreover, H-2A workers, overwhelmingly young men, are almost always here in the U.S. without their families and have no outside responsibilities that may take them away from working whenever the employer desires. And employers do not have to pay federal unemployment and social security taxes on H-2A worker wages, unlike their U.S. farmworker counterparts. As advocates, we have seen how this dynamic creates tremendous incentives for employers to displace U.S. farmworkers and replace them with H-2A workers.<sup>43</sup>

The regulatory protections in place to prevent discrimination against U.S. farmworkers are ineffective. Employers routinely find ways to discourage U.S. workers from applying for open positions, and current regulatory requirements requiring employers to spend the same amount of resources on additional domestic recruitment as they do on H-2A worker recruitment are rarely enforced.<sup>44</sup> One way they do this is by including restrictive experience requirements, lifting requirements, and productivity standards in job orders.<sup>45</sup> They also include other vague, overreaching requirements that, if violated, may result in termination.<sup>46</sup> These terms often violate the regulatory standards that any job requirement be “normal and accepted” in the area of work. They deter U.S. workers from applying for open positions, and because of the lack of

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<sup>42</sup> 8 U.S.C. § 1188(a)(1).

<sup>43</sup> See, e.g., Miriam Jordan, *Black Farmworkers Say They Lost Jobs to Foreigners Who Were Paid More*, N.Y. TIMES, (Nov. 12, 2021), <https://www.nytimes.com/2021/11/12/us/black-farmworkers-mississippi-lawsuit.html>.

<sup>44</sup> See 20 C.F.R. § 655.154(b).

<sup>45</sup> The requirements can be simultaneously specific and broad. We have seen requirements such as: lifting ability of 75 pounds or more, the ability to operate agricultural equipment “with or without direction,” understanding and operating GPS systems, the ability to work on holidays, the ability to work in 100+ degree temperatures “with or without reasonable accommodations.”

<sup>46</sup> See, e.g., ETA-790A, H-2A Case Number: H-300-22031-866773, Certification Determination Date: March 1, 2022 (including requirements such as “Workers assigned to bunk beds in employer-provided housing may not separate bunk beds” and “Workers may not leave paper, cans, bottles and other trash in fields, work areas, or on housing premises.”).

transparency in foreign recruitment, there is no mechanism for the government to ensure that the requirements are being applied equally in the hiring of foreign workers. We have also heard reports from U.S. farmworkers whose employers assigned them less desirable or less productive roles than their H-2A counterparts, with the aim of pressuring the U.S. worker to leave.

## **VIII. Congress Must Act to Reform the H-2A System**

Congress must act to address the rampant violations of workers' rights in the H-2A program. It has clear legislative options to do so.

The clearest avenue for H-2A reform is the Farm Workforce Modernization Act (FWMA). The FWMA passed the House with strong bipartisan support on March 18, 2021, and negotiations on a Senate companion bill are underway. The bill would make two major changes to address the availability of agricultural workers in the U.S. First, it would provide an earned path to legal status and the opportunity to apply for a green card for farmworkers who are already in the U.S. Second, would also make significant modifications to the H-2A visa program, responding to both grower and worker concerns. These reforms include a dedicated number of green cards for foreign agricultural workers and the ability for long-serving H-2A workers to self-petition for legal permanent residency. The bill also incorporates provisions that would strengthen the regulation of the foreign recruitment system and would bring H-2A workers under the protection of the Migrant and Seasonal Agricultural Worker Protection Act. The bill builds on previous efforts—including AgJobs and other proposals in previous Congresses—that had the support of members from both parties.

Farmworker Justice was extensively involved in the difficult negotiations that resulted in the Farm Workforce Modernization Act (FWMA) during 2019. Compromise was necessary to achieve a bill that has advanced further than any agricultural immigration reform effort in more than three decades. The FWMA has passed in one chamber and has the support of Senate leadership. The President has already said he will sign it. We support this bill because, despite the difficult concessions made by farmworker advocates and Members of Congress, it is a reasonable and realistic approach that benefits both farmworkers and employers, and it has been delayed for far too long.

Congress should also reject bills that expand the H-2A program without addressing the fundamental flaws that stack the deck against H-2A workers. These harmful efforts include attempts to amend the definition of agriculture under the H-2A visa to new industries, as well as removing the requirement that jobs be temporary or

seasonal in nature. Expansion of the program in its current form will harm both U.S. and H-2A workers.

In addition to reforming the H-2A program, Congress must act to address the injustices and structural racism that plague the agricultural sector. Agricultural workers do not deserve to be treated as second class workers, and they should not be excluded from federal labor protections. The Fairness for Farm Workers Act would take a step toward leveling the playing field by ending the discriminatory exclusion of agricultural workers from overtime pay and minimum wage protections in the Fair Labor Standards Act. It would phase in overtime pay over a 4-year period, and small employers would have additional time to comply with the law's requirements.

Congress should also act to address the increasing threat of heat stress that farmworkers face. The victims in Operation Blooming Onion suffered a range of abuses, but it was ultimately the dangerous heat that led to the deaths of two H-2A workers. Currently, there is no federal heat standard that ensures the safety and health of workers who are exposed to dangerous heat conditions in the workplace. That will change if Congress passes the Asunción Valdivia Heat Illness and Fatality Prevention Act. The Act would require the Occupational Health and Safety Administration to quickly promulgate rules, already underway, that would set standards for training on heat stress and impose workplace limits that would ensure workers are not forced to work in extreme heat without protective measures.

Finally, Congress should push the Administration to publish and implement stronger protections for workers in the H-2A regulations. The Department of Labor will soon finalize a rule amending the current H-2A regulations, and it has already announced further rulemaking to strengthen worker voice and worker protections in the H-2 programs. Similarly, DHS has announced rulemaking to protect H-2 workers. These rulemakings must provide meaningful reforms that address the fundamental flaws of the H-2A programs outlined in this statement and provide avenues for accountability.

The Administration can take a number of actions to improve the circumstances of H-2A workers. The agencies can align with the Administration's own guidance on recruitment by implementing stronger and more effective recruitment and anti-trafficking protections. DOL and DHS should also limit the risks from farm labor contractors by requiring them to file jointly with the fixed site employers who benefit from the labor of H-2A workers. The Administration can also encourage worker-led accountability by supporting workers' freedom of association and protecting those workers who seek collective bargaining at H-2A workplaces. The requirements for H-

H-2A employers should also be expanded to include training and standards related to heat stress, as the long hours worked by H-2A visa holders increase their susceptibility to extreme heat.

Farmworkers, including H-2A workers, are essential workers. They drive the success of the American agricultural sector and protect our nation's food security. We cannot turn a blind eye toward the injustices that they suffer. As the testimony at this hearing makes clear, the H-2A system is broken and Congress must act now to protect workers from exploitation and abuse.

Thank you for the opportunity to submit our views. For more information, including fact sheets on pending legislation and information on farmworkers, the pandemic and immigration policy, please visit [www.farmworkerjustice.org](http://www.farmworkerjustice.org).

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