



**Statement for the Record
of David J. Bier of the Cato Institute*
Submitted to Committee on the Judiciary
Markup of
H.R. 5038, the Farm Workforce Modernization Act of 2019
November 20, 2019**

Summary

The Farm Workforce Modernization Act of 2019 (H.R. 5038) would expand the liberty of Americans to employ, contract, and associate with foreign farm workers and their families. H.R. 5038 reduces costly and destabilizing government intervention into the farm labor market by easing the legal employment of foreign workers—both for those in the country already and those who wish to enter in the future. These changes will grow the U.S. economy, make America’s farmers more competitive internationally, and reduce unnecessary taxpayer-funded enforcement.

H.R. 5038 makes two important changes to immigration law. First, it provides a permanent legal status to those workers who currently assist in agricultural production without legal status, as well as their spouses and children. Without this change, farm labor would continue to operate under a pervasive black market that imposes uncertainty and instability for the industry.

Second, H.R. 5038 expands legal immigration for future foreign farm workers, making it possible for more farmers to access a reliable source of legal labor. The bill streamlines H-2A farm visas, removes duplicative bureaucratic reviews of employer applications, partially limits the broken minimum wage mandate, and alleviates the need to reapply for a new visa every year. Most importantly, the reforms would permit year-round H-2A workers and create an option for these workers to receive legal permanent residence.

H.R. 5038 is clearly a compromise. It mandates most of the flawed regulatory structure for temporary workers and imposes E-Verify’s broken employment surveillance system on all farmers and farm workers including U.S. citizens. Ultimately, however, H.R. 5038 permits more Americans and foreign workers to associate and contract freely than current law.

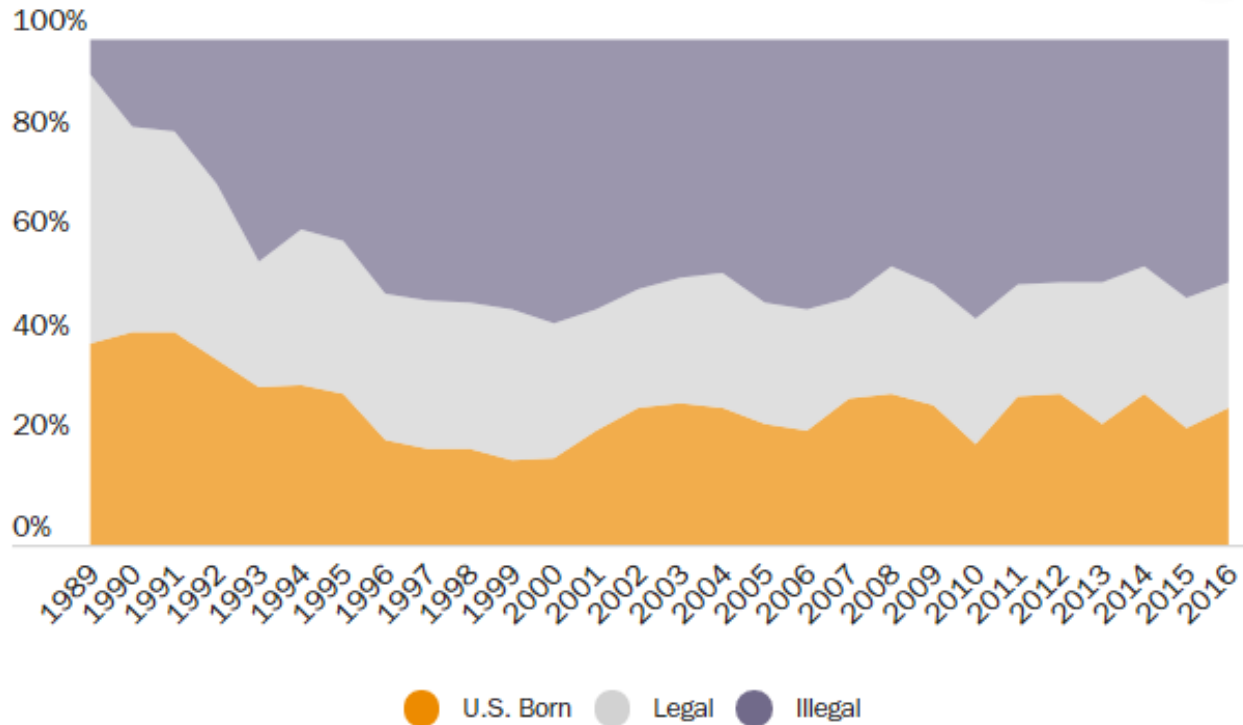
The Need for Legalization

The most significant reform in the Farm Workforce Modernization Act is its legalization provisions for farm workers without legal status. According to the National Agricultural Workers Survey, about half of farm laborers lacked authorization to live and work in the United States in

* The Cato Institute is a libertarian 501(c)(3) nonprofit think tank dedicated to the principles of free markets dedicated to the principles of individual liberty, limited government, free markets, and peace. David J. Bier is its immigration policy analyst for the Center for Global Liberty and Prosperity.

2016.¹ The same year, the Pew Research Center estimated that 325,000 workers in agriculture, forestry, and fishing had no legal status.² Despite millions of deportations and increasingly intensive worksite enforcement, this percentage has held roughly steady for two decades (Figure 1). The U.S. government cannot enforce its way to a legal farm workforce. Congress needs to legalize and start over.

Figure 1: Domestic (Non-H-2A) Farm Laborers by Legal Status, 1989-2016



Source: U.S. Department of Labor, "National Agricultural Workers Survey," 2016.

Having such a large illegal workforce has negative economic effects for the industry. Employers must always operate under the assumption that, at any moment, the government could arrest, or require them to fire, their employees. The last three administrations have increased aggressive worksite immigration enforcement.³ While worksite enforcement has produced no reduction in illegal employment in agriculture, it imposes compliance and turnover costs, which result in lower production and higher prices for U.S. consumers. The cost of replacing workers discovered to be illegal can equal their annual wage.⁴

New York dairy farm Gebarten Acres suffered an ICE audit in October 2018. "We lost 20 people, half our workforce," owner Greg Coller told a local paper. "It's just been horrible. The timing is bad, with dairy in the toilet."⁵ Some of his workers who had applied with borrowed documents and identities had worked for Coller for up to 7 years. None of the workers were arrested, and all went to other farms for work, but his farm's operations were disrupted as he lacked the labor to maintain production. Alliance Dairies Group of Florida had an I-9 audit sweep away its labor force, and the U.S. workers who replaced the ones it lost rarely lasted more than 2 weeks.⁶

There is also the risk of arrest. Kelly Raby, a vineyard owner in New York, lost her foreman who had worked for the farm for 23 years after ICE arrested him for being there illegally.⁷ Raby told the *New York Times* that she “struggled to find a foreman skilled enough to manage her vineyard,” leaving her “uncertain about the future.” A total elimination of illegal workers in agriculture would devastate the industry.

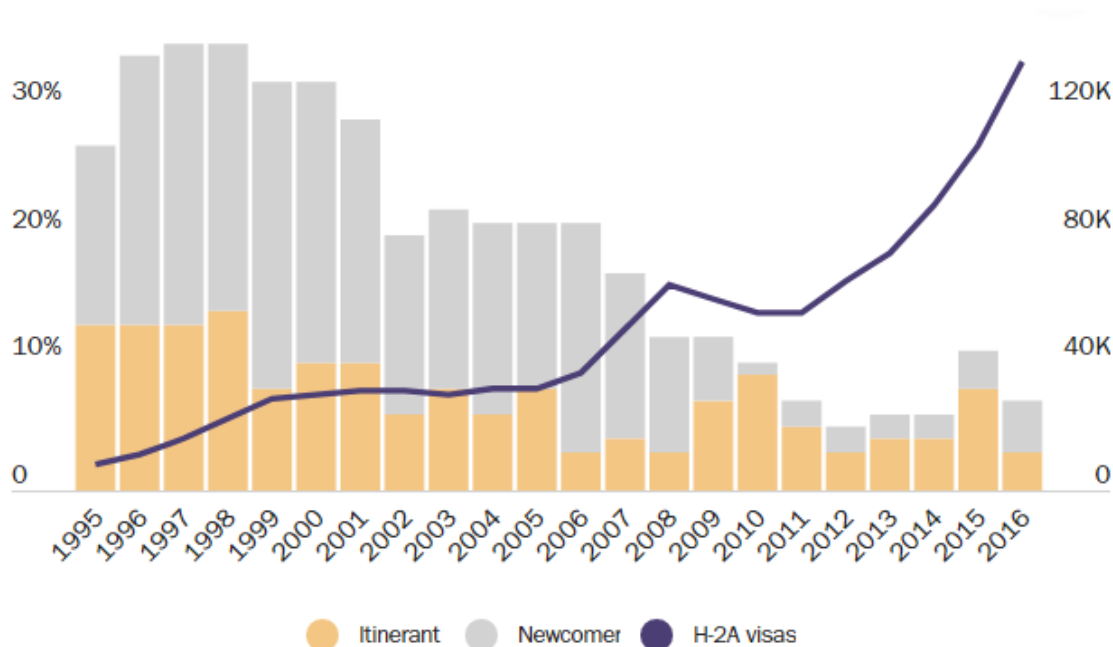
The legislation allows illegal immigrants with at least a half a year of agricultural employment to receive a 5-year indefinitely renewable legal status for as long as they remain in agriculture. The voluntary option to pay \$1,000 fine and adjust to legal permanent resident status, lacking any restrictions, would occur after either 4 or 8 years depending on whether the immigrant had worked for greater or fewer than 10 years in agriculture before the date of enactment. This provision is important because it will gradually allow the farmers to hire new workers to replace the legalized workers who will likely seek employment outside of agriculture after a few years.

A team of economists at the U.S. Department of Agriculture has estimated that a 15-year effort to remove a net 5.8 million illegal immigrants would cause farm production to fall up to 2 percent in some sectors and exports would fall by up to 6 percent in some sectors, relative to the status quo. Overall, a mass deportation effort would yield a 1 percent contraction in gross national product accruing to U.S. workers and employers.⁸ U.S. farmers and Americans would be worse off if the government removed, rather than legalized, illegal workers.

The Need for H-2A Visa Reforms

While legalization provides a partial solution, Figure 1 shows how quickly illegal employment came to again dominate the farm industry following the legalization of 1986. Farmers need to be

Figure 2: Share of Non-H-2A Farmworkers Who Are Itinerant or New to Farming

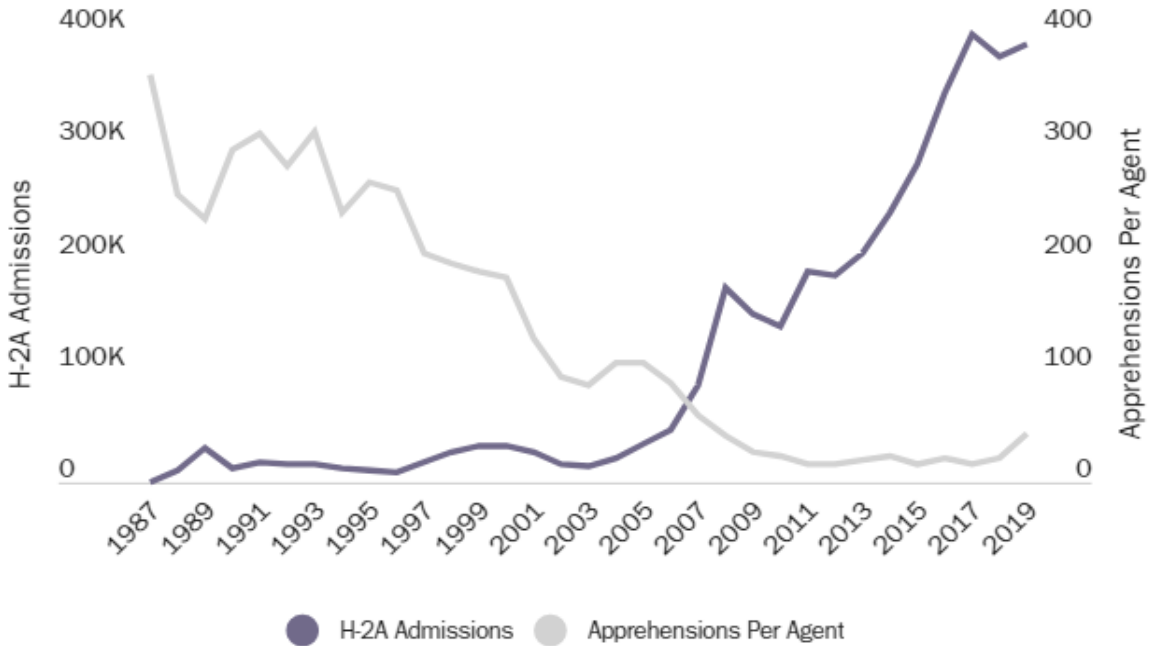


Sources: Department of Labor, “National Agricultural Workers Survey”; U.S. Department of State, “Nonimmigrant Visa Statistics”

able to hire new foreign workers legally. Unfortunately, the number of new domestic hires entering the labor force is quickly deteriorating. At the same time, the share of workers travelling through the United States from farm to farm has disappeared. Figure 2 illustrates the declining share of new domestic farm workers as well as the disappearance of the domestic itinerant laborer who travels between farms for work. Workers simply aren't joining agriculture anymore, and the labor force is growing older. U.S. farmers need a legal option to hire migrant labor.

The H-2A temporary worker program provides many farmers a legal alternative to hiring illegally. As Figure 3 illustrates, fewer illegal immigrants have been apprehended crossing illegally in recent years (controlling for enforcement) as more H-2A workers were admitted legally. The availability of H-2A visas has changed the perspective of would-be illegal workers in Mexico. As one told the *Washington Post* in April, "Most of my friends go with visas or they don't go at all."⁹ He said that he personally failed to receive a visa this year, but his prior experience with the H-2A visa gave him a reason to wait.

Figure 3: H-2A Admissions and Border Patrol Apprehensions Per Agent, 1987-2019



Sources: Department of Homeland Security, "Yearbooks"; Department of State, "Nonimmigrant Visa Statistics," 2019, Customs and Border Protection, "Enforcement Actions"; Border Patrol, "Apprehensions"; Border Patrol, "Staffing"; TRAC, "Agents".
 Note: Admissions in 2019 estimated using 2019 visa issuances based on ratio of visas to admissions in 2018; Admissions were interpolated 1997 and 2005.

Unfortunately, the H-2A program is so extremely bureaucratic that it supplies only about 10 percent of farm labor, despite the high numbers of illegal foreign workers. The H-2A program has well over 200 unique requirements for employers and workers.¹⁰ The Farm Workforce Modernization Act would streamline some of the application procedures and requirements, making the program less bureaucratic and easier for employers to use.

Specifically, the process to receive a job approval requires three separate submissions and reviews by the State Workforce Agency (SWA), the Department of Labor (DOL), and the Department of Homeland Security (DHS). H.R. 5038 would alleviate these concerns by creating a single online application for all three approvals and requiring each aspect of the application to be reviewed only a single time (p. 48). This would alleviate uncertainty in the approval process and expedite processing of applications—14 percent of which DOL failed to process in timely manner in 2019, the worst rate since 2013.¹¹ Delays in processing can cost farmers millions in lost crops whose time sensitive nature demand prompt approvals.

H.R. 5038 would also lessen the effect of the H-2A minimum wage, known as the Adverse Effect Wage Rate (AEWR). No other immigration program has a minimum wage requirement mythologically similar to the AEWR, which is a statewide average based on a survey that fails to account for skills, experience, or the city of the worker. It is higher than every state's minimum wage, exceeding them by 53 percent on average.¹²

Moreover, the AEWR's methodology builds in automatic increases year-after-year because it includes overtime, holiday bonuses, and performance incentives from the prior year in the *base* hourly rate for the current year.¹³ This inflated average base rate then applies to both H-2A and U.S. workers, which prices out all workers who were below the average. The process then repeats itself the following year and the year after. AEWR's growth rate has doubled the rate of growth of general inflation since 2001.¹⁴ It is also subject to high volatility with some states seeing AEWR rate increases of 23 percent in 2019.¹⁵ It is impossible to plan with such wild change in the price of labor.

H.R. 5038 partially addresses this problem by freezing the AEWR in 2019 and capping increases at 3.25 percent going forward for the next 10 years (p. 59). After 10 years, the Secretaries of Labor and Agriculture would need to create a new system for calculating the minimum wage (p. 65). Overall, these reforms would reduce wage uncertainty and lower costs, increasing production for U.S. farmers.

H.R. 5038 also replaces the requirement that workers apply to receive a new visa every year with once every three years, reducing costs for both workers and employers and lowering the likelihood that a worker may get waylaid at a consulate abroad. It also creates a new H-2A pilot program for up to 10,000 workers who could freely transfer between H-2A employers without the employer needing to file a petition for them. This would create a secondary market for workers whose employers could hire on a more streamlined basis.

An expanded H-2A program would increase farm production and make America more competitive internationally.

Farmers reduce planted acreage when they cannot hire as many workers as they would like to. As the immigration attorney for one farm put it in March 2017, "You're either reducing your acreage or you're going for H-2A."¹⁶ Farmers who miscalculate end up having crops rot in the field. One study found that California fruit and vegetable farmers had to plow under \$13 million worth of produce in 2016, a threefold increase since 2011, due to unexpected labor scarcity.¹⁷

The U.S. Department of Agriculture economist team estimated that a guest worker program that boosted the number of total temporary workers by 156,000 over 15 years would raise production by up to 2 percent annually in certain labor-intensive subsectors, as well as increase exports.¹⁸ An expanded H-2A program would increase farm production and make America more competitive internationally.

The Need for Year-Round Workers

Since the elimination of the Bracero program in the 1960s, most farmers have had no way to hire guest workers for year-round positions.¹⁹ Only sheep and goat herders could obtain year-round workers under the H-2A program, and the Trump administration has announced plans to end this exemption in June 2020.²⁰ As a consequence, animal farming constitutes 31 percent of farm employment, but only receives 4 percent of H-2A jobs. Illegal workers have filled the void for everyone else and will likely replace the banned H-2A sheep herders as well. In particular, dairy farms likely have the highest rates of illegal employment of any industry in America.²¹

Fortunately, the Farm Workforce Modernization Act would address this failing in the program by allowing employers with year-round needs to obtain H-2A visas. While this program has an extremely low cap of 20,000 visas, this is better than current law. Moreover, it has an “emergency” cap exemption available. The bill also allows farmers to petition for these workers to receive legal permanent residence and exempt them from the 3-year time limit on H-2A visas if the cap is filled, making them effectively indefinite. Workers themselves could apply directly after 10 years in H-2A employment. Ultimately, the program, including green card holders, could grow to rival the size of the existing H-2A program.²²

The utility of this program is difficult to gauge because the bill applies all of the existing H-2A regulations to it, which has not historically been the case for the only year-round H-2A jobs in sheep and goat herding. The committee should strongly consider building in the discretion for the Secretaries of Agriculture and Labor to establish alternative requirements for the year-round workers if the quota for them is not filled or falls.

U.S. Workers Would Not Suffer

U.S. workers only make a small percentage of hired farm laborers (Figure 1). But farmers do not discriminate against U.S. workers. U.S. workers discriminate against agricultural employment. DOL has increased the AEWL at double the rate of inflation since 2001, yet economists at the Department of Agriculture have concluded that “farm labor supply in the United States is not very responsive to wage changes.”²³

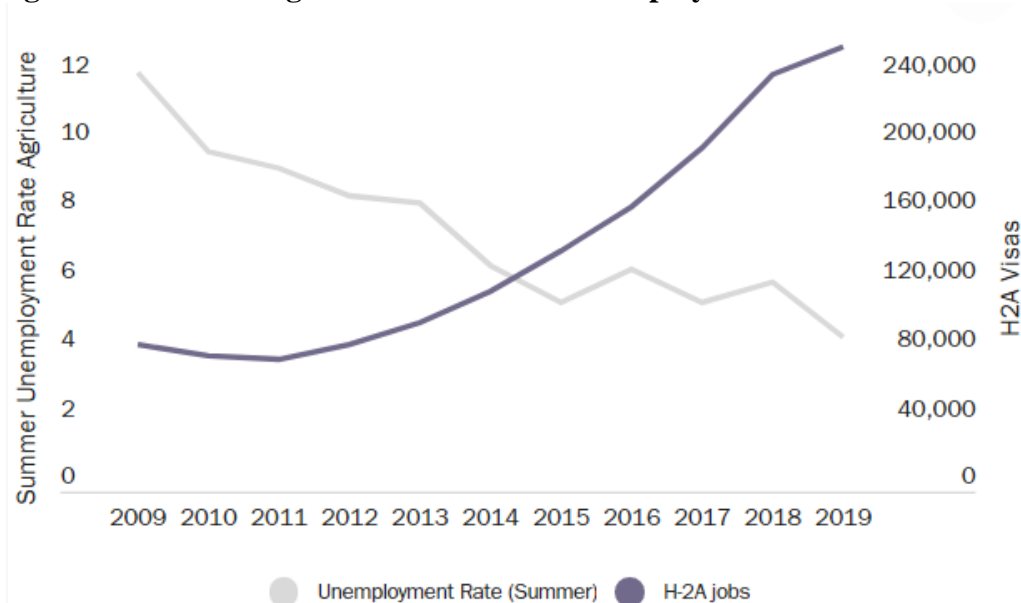
One study found that from 2007 to 2010, only about 50 out of the 290,000 increase in the absolute number of unemployed North Carolinians chose H-2A agricultural jobs that the farmers had to offer them under the program rules.²⁴ The North Carolina Growers Association sought to fill 7,008 jobs through the H-2A program in 2012, and just 143 U.S. workers—2 percent of those demanded—applied for and showed up for the

Domestic farm workers have seen their employment increase alongside the H-2A hiring surge.

job, and only 10 completed the growing season.²⁵ The Department of Labor has concluded similarly. It found that over a three-year period, just fewer than 6 percent of H-2A jobs were filled by U.S. workers, and 28 percent of those workers showed up after the date of need.²⁶

Moreover, contrary to public perceptions, domestic farm workers have seen their employment increase alongside the hiring of H-2A workers in recent years. Figure 4 illustrates how much the summer unemployment rate during the peak agricultural season has fallen, even as the number of H-2A hires has exploded. This relationship may not be causal, but it indicates that employers have no interest in replacing U.S. workers with H-2A workers.

Figure 4: Domestic Agricultural Summer Unemployment Rate and H-2A Jobs



Source: Office of Foreign Labor Certification, "Performance Reports"/"H-2A Selected Statistics" (2019 annualized based on 9 months); Bureau of Labor Statistics, "Table A-14. Unemployed persons by industry and class of worker, not seasonally adjusted."

Conclusion

U.S. immigration law should not prevent farmers from hiring foreign workers legally. The Farm Workforce Modernization Act increases their freedom to do so. While it is a compromise that fails to fully solve the farm labor problem, it would substantially reduce the illegal market for labor and increase agricultural production, without harming U.S. workers.

¹ U.S. Department of Labor, "National Agricultural Workers Survey," 2016.

² Jeffrey S. Passel and D'Vera Cohn, "U.S. Unauthorized Immigrant Total Dips to Lowest Level in a Decade," Pew Research Center, November 27, 2018.

³ Alex Nowrasteh, "Worksite Administrative Arrests as a Percent of All ICE Administrative Arrests," Cato Institute, December 14, 2018.

⁴ David Bier, "Ending DACA Will Impose Billions in Employer Compliance Costs," Cato Institute, September 1, 2017.

-
- ⁵ [Susan Mende, "Farms lose immigrant help," *Northern New York Newspapers*, October 2, 2018.](#)
- ⁶ [Wyatt Bechtel, "Changing the Work Culture with Human Resources," *Dairy Herd*, June 11, 2018.](#)
- ⁷ [Christina Goldbaum, "Trump Crackdown Unnerves Immigrants, and the Farmers Who Rely on Them," *New York Times*, March 18, 2019.](#)
- ⁸ [Steven Zahniser, Tom Hertz, Peter Dixon, and Maureen Rimmer, "The Potential Impact of Changes in Immigration Policy on U.S. Agriculture and the Market for Hired Farm Labor: A Simulation Analysis," U.S. Department of Agriculture, Economic Research Service, Economic Research Report Number 135, May 2012.](#)
- ⁹ [Kevin Sieff, "Why Is Mexican Migration Slowing While Guatemalan and Honduran Migration Is Surging?" *Washington Post*, April 29, 2019.](#)
- ¹⁰ [Found mainly here: 20 CFR Subpart B - Labor Certification Process for Temporary Agricultural Employment in the United States \(H-2A Workers\), 29 CFR § 1910.142 - Temporary labor camps, 8 CFR Part 214 - NONIMMIGRANT CLASSES](#)
- ¹¹ [Office of Foreign Labor Certification, "H-2A Temporary Agricultural Labor Certification Program - Selected Statistics, FY 2019."](#)
- ¹² [American Farm Bureau Federation, "H-2A and the AEWR We Were," March 15, 2019.](#)
- ¹³ [United Fresh Produce Association, "In re: DOL Docket No. ETA-2019-0007, RIN 1205-AB89 Temporary Agricultural Employment of H-2A Nonimmigrants in the United States \[Federal Register 84:144, p.36168ff\]," September 24, 2019.](#)
- ¹⁴ [David Bier, "H-2A Farmers Will Benefit From House Reform Bill," Cato Institute, November 5, 2019.](#)
- ¹⁵ [David Bier, "H-2A Farmers Will Benefit From House Reform Bill," Cato Institute, November 5, 2019.](#)
- Data from: [William G. Whittaker, "Farm Labor: The Adverse Effect Wage Rate," Congressional Research Service, March 26, 2008, pp. 7-8.](#) Office of Foreign Labor Certification, "Adverse Effect Wage Rate Trends" (2009-12; 2013-2019)
- ¹⁶ [Geoffrey Mohan, "To keep crops from rotting in the field, farmers say they need Trump to let in more temporary workers," *Los Angeles Times*, May 25, 2017.](#)
- ¹⁷ [Kelsey Brugger, "Labor Shortage Leaves \\$13 Million in Crops to Rot in Fields," *Independent*, June 22, 2017.](#)
- ¹⁸ [Steven Zahniser, Tom Hertz, Peter Dixon, and Maureen Rimmer, "The Potential Impact of Changes in Immigration Policy on U.S. Agriculture and the Market for Hired Farm Labor: A Simulation Analysis," U.S. Department of Agriculture, Economic Research Service, Economic Research Report Number 135, May 2012.](#)
- ¹⁹ [Glenn E. Garret, "Mexican Farm Labor Program Consultants Report," Department of Labor, October, 1959, p. 5.](#)
- ²⁰ [David Bier, "New Policy Banning H-2A Shepherders Shows Need for Congress to Act," Cato Institute, November 15, 2019.](#)
- ²¹ [Carly Fox, Rebecca Fuentes, Fabiola Ortiz Valdez, Gretchen Purser, Kathleen Sexsmith, "Milked: Immigrant Dairy Farmworkers in New York State," Workers' Center of Central New York and the Worker Justice Center of New York.](#)
- ²² [David Bier, "Bipartisan Bill Increases Legal Migration & Legalizes Farmworkers," Cato Institute, October 30, 2019.](#)
- ²³ [Steven Zahniser, J. Edward Taylor, Thomas Hertz, and Diane Charlton, "Farm Labor Markets in the United States and Mexico Pose Challenges for U.S. Agriculture," Economic Research Service, U.S. Department of Agriculture, Economic Information Bulletin, No. 201, November 2018, p. 2.](#)
- ²⁴ [Clemens, p. 19.](#)
- ²⁵ [Michael Clemens, "The Effect of Occupational Visas on Native Employment: Evidence from Labor Supply to Farm Jobs in the Great Recession," IZA DP No. 10492, January 2017.](#)
- ²⁶ [Department of Labor, "Temporary Agricultural Employment of H-2A Nonimmigrants in the United States," Federal Register Volume 84, Number 144, July 26, 2019, p. 36207.](#)