

United Farm Workers Recommendations to USDA on the Farm Labor Stabilization and Protection Pilot Program

Contents

Introduction	1
Methodology	2
Structural H-2A Challenges.....	3
Challenges and Recommendations	5
Employer Feedback.....	5
Advocacy and Labor Feedback	13
Synergies between Advocacy and Labor Feedback	10
Summary Recommendations and Conclusion.....	15

Introduction

The Farm Labor Stabilization and Protection Pilot Grant Program (FLSP) announced at the 9th Summit of the Americas represents a unique opportunity to address longstanding issues in the U.S. agricultural migration system. The new United States Department of Agriculture (USDA) grant program will focus on addressing labor shortages in agriculture, reducing irregular migration through expansion of legal temporary labor migration pathways, and improving labor protections for farm workers. The grant program will use up to \$65 million in American Rescue Plan Act funding to provide support for agricultural employers in implementing robust labor standards to promote a safe, healthy work environment for both U.S. workers and workers hired from Northern Central American countries under the seasonal H-2A visa program.

The Administration has stated that the program will advance several of its major priorities, including safeguarding American food security and our agricultural supply chain, reducing irregular migration by expanding legal migration pathways, and improving working conditions for farm workers. The United Farm Workers (UFW) has been contracted to conduct and prepare the subsequent report to help design a grant program that will further these Administration goals. The UFW believes that government, workers, and good faith employers can together create a fair, humane, and ethical food and immigration system that sustains American agriculture and protects our nation's food security, meets the legitimate desires of people in the Western Hemisphere to find economic opportunity in the United States, and respects the dignity and human rights of the workers who put food on our tables.

The recommendations detailed in the below report reflect intensive interactions by UFW with representatives of farm worker-serving organizations, labor unions, and agricultural employers. Furthermore, they are informed by UFW awareness of the Biden-Harris administration's commitment to supporting collective bargaining, as detailed in President Biden's April 26, 2021 Executive Order which committed to identify ways to "increase worker power in areas of the

country with restrictive labor laws, for marginalized workers including women and people of color, and for workers in industries that are difficult to organize and lack labor protections.”¹ The UFW believes this pilot program is one of the Biden-Harris administration’s opportunities to do so. Working together, UFW intends to address how we may begin to build an agricultural economy that, in equal parts, meets the needs of farm workers and contributes to the sustainability of the American food supply chain.

Methodology

This report is based on information collected over the course of five months (November 2022 – March 2023), in multiple meetings with 12 agricultural employers, three partnerships between agricultural employers and worker serving organizations, 17 farm worker-serving organizations, two farm worker labor unions, and six individual H-2A workers, collectively covering every region of the United States. These recommendations are also informed by the UFW’s 6-decade history of organizing, representing, and advocating for farm workers and their communities across the United States. We also note the UFW represents H-2A workers under a union contract.

The farm worker-serving organizations and labor unions we met with work with farm workers in every region of the country, including farm workers from Mexico, Guatemala, Jamaica, and other countries of origin, as well as groups that focus specifically on the needs of indigenous-origin farm workers. The agricultural employers surveyed for this report were also diverse, representing small, medium, and very large operations and among them had operations in nearly a dozen states in every region of the country; four employers also had operations in other countries. Among the interviewees, the employers harvested or raised over 80 types of fruits, vegetables, grains, and livestock. The majority of the employers interviewed came from the three regions of the country that use the largest number of H-2A workers – the Southeast, Pacific Northwest, and California. Some of the employers already use the H-2A program, while others shared a desire to meet a labor shortage but have not used the H-2A program.

To guarantee maximum candor in all meetings and report takeaways, the names and other identifying information for agricultural employers and farm worker organizations were not shared with USDA.

We will take this opportunity to articulate that there is an inherent tension in the findings of this report. While we appreciated the candor and directness of all who provided input for this report, it is impossible to avoid the fact that many of the agricultural employers’ concerns with the H-2A program relate to the obligations the program imposes, such as wage requirements and housing. At the same time, most of the concerns and recommendations shared by farm worker serving organizations and workers themselves consist of increasing, strengthening, and expanding such obligations, and increasing worker power relative to that of the employer. We found a consistent disconnect between the employers’ view of the H-2A program as a burdensome process imposing costs and workers and advocates view of H-2A workers lacking rights, protections, and resources.

Despite this disconnect, exchanging candid views, and different perspectives is a productive exercise that does illuminate a handful of shared concerns and challenges. Therefore, we

¹ <https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/26/fact-sheet-executive-order-establishing-the-white-house-task-force-on-worker-organizing-and-empowerment/>

strongly recommend that coming out of this pilot program, USDA encourage and convene ongoing deeper conversations between employers, workers, and labor organizations on level and equal positions.

Structural H-2A Challenges

History of the H-2A visa program

The H-2A visa as we know it today was created as part of the Immigration Reform and Control Act of 1986, though the history of agricultural guest worker programs stretches back to the First World War. The H-2A visa program was meant to learn lessons from prior iterations of agricultural guest worker programs, most famously the Bracero program which ran from 1942 through 1964. As many policymakers assumed the stricter border control provisions of the 1986 IRCA would result in a decrease in undocumented migration, the H-2A program was designed as an alternative source for agricultural labor. Bipartisan support for the H-2A program included protections to prevent discrimination, low wages, and displacement of U.S. workers as well as a labor certification process.

There is no cap on the number of H-2A visas granted annually and Honduras, El Salvador, Guatemala, Nicaragua, Costa Rica, and Panama are all on the approved countries list (as are Argentina, Brazil, Chile, Uruguay, Colombia, Ecuador, Peru, and Paraguay, covering the vast majority of Latin America) meaning that provided employers can demonstrate a lack of available U.S.-based workers, they can recruit from any country.² In practice, the vast majority – over 90% – of H-2A workers have come from Mexico, following older established patterns of labor migration dating back to the 19th century and the development of irrigation and commercial agriculture in the U.S. Southwest in the wake of the Mexican-American War.

In recent years, use of the H-2A program has expanded massively. In some states, a majority of farm workers now use H-2A visas, while nationally the program has grown from U.S. Department of Labor (DOL) certifying 79,000 positions in 2010 to certifying close to 200,000 in 2017 to certifying over 350,000 in 2022. The number of employers using the H-2A program has also more than doubled over the same period.³ The rapid growth of the H-2A program only strengthens the urgency of ensuring that workers within it are treated fairly and that U.S.-based workers are protected from displacement. Both goals fall clearly within the pilot program's mandate of improving working conditions for farm workers.

Out-of-scope legislative concerns

Agricultural employers, labor organizations, H-2A workers, and advocates all shared concerns that would require legislative changes to existing statute to address, and thus fall beyond the scope of this pilot program or USDA's authority under current statute. They are nevertheless

² <https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-2a-temporary-agricultural-workers>

³ See <https://www.ers.usda.gov/amber-waves/2021/september/use-of-h-2a-guest-farm-worker-program-more-than-triples-in-past-decade/> and <https://www.farmworkerjustice.org/blog-post/newest-dol-data-shows-continuing-expansion-of-the-h-2a-program-in-2022/>

helpful context for developing the recommendations of this program and for understanding the current landscape of the H-2A visa program.

Labor and advocacy out-of-scope concerns

A majority of the farm worker-serving organizations surveyed for this report articulated fundamental concerns with the H-2A program, with some surveyed organizations going as far as to say they “oppose” or “do not support” the program’s existence.

First and foremost, of these objections was noting that the H-2A visa does not provide employee portability or a pathway to citizenship. As a result, some described the H-2A system as amounting, even in the best of circumstances, to “indentured servitude”.

Advocates also questioned the very idea of using the H-2A program as a “legal migration pathway” for migrants from the Northern Central America, noting that it was a poor alternative for greater refugee resettlement or an accessible asylum process, both of which would ultimately offer a pathway to citizenship and legal work authorization. Advocates also noted the H-2A system would be unable to accommodate the needs of families and children, while women have been consistently discriminated against in recruitment. Thus, the H-2A system would fail to present a viable alternative to irregular migration for these populations.

While this pilot program will not be able to address the existing statute for the H-2A program, meaning long-term advocate and labor goals like creating a pathway to citizenship through the H-2A program are out of scope, we nevertheless recommend USDA ensure that the pilot do its best to address the systemic concerns of workers, labor unions, and advocates. This calls for increased resources for enforcement of the existing rules and regulations of the H-2A program, for example, through higher audit requirements for H-2A employers to ensure they abide by the H-2A program’s existing requirements.

Employer out-of-scope concerns

Employers shared multiple concerns that would require legislative changes to address. These include employers’ desire to have year-round H-2A visas, for a lower Adverse Effect Wage Rate (AEWR) rule to be able to pay H-2A workers less money in wages, and to be rid of some legal obligations towards H-2A workers currently required under the program, such as providing housing and transportation. The general theme of these concerns was lowering the costs and requirements on employers for using the H-2A program and expanding the industries in which H2-A workers could be used.

Prospect for legislative change

Over the past 20 years, Members of Congress from both political parties have introduced multiple bills to address various structural concerns with the H-2A program voiced by workers and employers. There have also been significant bipartisan efforts built around compromises between the farm employer and farm worker positions that have passed the House or the Senate. While these efforts have had majority support in both the House and Senate at various points over the past 15 years, these bipartisan efforts have fallen short of final passage by Congress.

Labor organizations and advocates strongly oppose most of the hypothetical legislative changes that include efforts to lower the wages required for H-2A workers and to create year-round, non-

seasonal versions of the H-2A visa. However, the UFW and some other farm worker advocates have supported compromise measures that include some of these employer-proposed reforms as part of larger legislative packages that also include other pro-worker reforms to the agricultural labor and immigration systems, including pathways to citizenship for agricultural workers and increased legal protections for H-2A workers, that are priorities for workers.

Challenges and Recommendations

Employer Feedback

Employers shared a variety of challenges related to their use of the H-2A program, the common thread of which is a desire to reduce their costs and administrative burdens while ensuring easy access and convenient access to a skilled on-demand workforce.

1. **Housing.** Agricultural employers identified the H-2A program's housing requirements as one of their most significant concerns with the program. During UFW meetings with agricultural employers conducted for the purposes of this report, different employers, in turn, described housing as "a limitation," "the number one issue," "a big issue," "the biggest bottleneck," and the "biggest challenge," with many specifically mentioning that the cost of providing housing represents a significant barrier to expanding their use of H-2A workers. One employer reported that "every time [they] wanted to bring more people, they either had to buy, construct, or rent housing." One employer added that by USDA providing the housing directly, the quality of housing for workers would improve since they assumed inspections would be more rigorous. The same employer also added that one of their concerns would be the prospect of making a significant investment in housing for H-2A workers, but then not be able to participate in the program either because the program becomes unaffordable or administrative processing leaves them without the needed number of workers. Several employers said that if they had access to more housing, they would be willing to bring women workers through the H-2A program, but as it stands, they are only hiring men. Other employers who do not currently use the H-2A program stated that if the cost of housing was reduced or eliminated, they would be significantly more willing to participate in the H-2A program.

Employer recommendations on housing: Both small and large agricultural employers suggested that USDA cover the financial costs of constructing housing for H-2A workers. Many employers recommended that USDA provide employers with a "discount" or subsidy for housing construction. One employer specifically said they wouldn't want USDA to "give" them the money to build housing, but that they would welcome USDA providing a no- or low-interest loan to finance housing expansion or new construction for H-2A workers "without a heavy burden on their balance sheet." Other employers shared this sentiment and agreed that they would benefit from low interest loans. Another employer suggested USDA directly build additional housing for H-2A workers to use, though it was left unclear on whose property such housing would reside.

2. **Northern Central America recruitment.** Multiple employers expressed concerns regarding whether workers recruited from Northern Central America would have the necessary skill level for U.S. Agriculture. Several employers noted that several crops require a specific skill set that takes years to develop. One employer noted the

difference between having experience as a small-scale subsistence farmer versus as a worker in large-scale commercial agriculture. Other employers expressed concerns with recruiters not vetting workers sufficiently or being able to guarantee a level of work skill. Employers are hesitant to bring workers from Northern Central America unless they can be assured that the worker already possesses the necessary skills, or they would be reimbursed for the cost of training. One worker-serving organization, which focuses particularly on serving indigenous-origin communities in the Southeast, reinforced some of these employer concerns, sharing that while Guatemalan migrants commonly have experienced farming and food production in their home country, Hondurans, Salvadorians, and Nicaraguans generally are more likely to come from urban areas. Therefore, they are more likely to seek jobs in construction, restaurants, and roofing, and may face greater difficulty obtaining farm work.

Relatedly, employers expressed concerns regarding reports of a higher number of workers from Northern Central America breaking H-2A contracts. The feelings of many employers can be summed up by the employer who noted they would not want to “take a bed” from an experienced worker to make way for workers from Northern Central America. Most employers expressed that they did not want to invest time, wages, and resources into training workers if they would “abscond” on their contracts or be unwilling to return in following years. Several employers also expressed concerns with the additional transportation costs that they would incur bringing workers from Northern Central America.

Several employers mentioned that the increased transportation costs would be a factor when considering where to bring H-2A workers from. Because of the distance, some employers believe that they will need to transport workers from Northern Central America via plane and are worried about the costs associated with traveling via air.

Employer recommendations on Northern Central America recruitment: Several employers articulated that they would need to be reimbursed for training time and costs in order to be incentivized to recruit workers from Northern Central America. One employer suggested that the U.S. government work to train workers in their countries of origin, creating a pool of experienced workers who would be “ready to go” as a vetted and trained recruitment pool. Other employers suggested bringing the workers to the United States ahead of the work season beginning, specifically to receive training. Employers also suggested that they be reimbursed for the costs of transporting workers from Northern Central America.

3. **Ongoing administrative burdens.** Employers expressed significant frustration with the administrative and bureaucratic process required to participate in the H-2A visa program. Many mentioned unpredictable and long wait times as having a negative impact on their agricultural production. One employer relayed that an unexpected delay in consular processing overseas resulted in a week-long delay for 100 workers contracted by this employer, during which the employer had to pay for their time, housing, and meals while the workers waited. The employer estimated this cost them \$15,000 in unanticipated costs. Many employers suggested that identity verification for workers should happen quicker. Some employers shared their feeling that the different government agencies and departments involved with processing H-2A visas do not understand farming or the importance of time and seasonality to harvests and fail to accommodate their farms’ needs during visa processing. Employers are frustrated at the level of work they have to put in to receive the workers they are “paying for.”

Employer recommendations regarding administrative burdens: Multiple employers pointed out that at the height of the COVID-19 pandemic, in-person interview requirements for H-2A visas were waived and that processing visas were much quicker as a result. Employers suggested making this permanent, as administrative delays and costs associated with transporting workers to in-person interviews have become more prevalent. Employers also recommended that if they were bringing the same H-2A worker year after year, there should be an easier, expedited, and less burdensome process for simply renewing the visa. Another employer recommendation was contract flexibility, such as allowing workers to switch between tasks on the farm and not be bound to the job that the worker was originally brought into the country to perform. Currently, H-2A guidelines prohibit employers from assigning an H-2A worker a different role on the farm without a petition. Employers are also prohibited from transporting workers from one site to another. Some employers suggested allowing FLCs to “crossover” H-2A workers, and share them among different sites, including those owned by other employers. As with training, employers again convened on the idea of having a pool of workers “ready to go,” with their administrative requirements done, with the workers on stand-by in countries of origin for when an employer needs them.

Advocacy and Labor Feedback

Workers, unions, and worker-serving organizations shared substantive and systemic concerns with the H-2A program and its potential expansion in Northern Central America. Creating and sustaining greater autonomy and workplace empowerment for H-2A workers is the general theme of all the suggestions made by farm worker unions, farm worker-serving organizations, and the individual H-2A workers interviewed.

1. **Autonomy and workplace empowerment.** A common refrain from labor and farm worker advocates was the concern that the H-2A system gives employers near-total control over H-2A workers’ lives, including their housing, working conditions, transportation, and access to the visa itself, creating a dangerously unbalanced power dynamic between an H-2A worker and their employer. As a result of this power imbalance, H-2A workers often work to the limits of their abilities, yielding high productivity rates. However, H-2A workers are also unlikely to complain about working conditions and are willing to work as demanded, to keep their jobs and hope of being invited back in future seasons.

Many employers themselves echoed this in interviews, many of whom suggested that the main benefit of hiring H-2A workers was their commitment to a contracted period that would guarantee their labor for a set period, implicitly restraining workers from competing for higher wages or better working conditions as part of an open labor market.

H-2A workers interviewed for this report similarly articulated feeling trapped, with their ability to leave the farm and their employer-provided housing entirely dependent on their employer. H-2A workers have also been subjected to unsafe working conditions, substandard housing, human trafficking and forced labor, and retaliation via immigration actions by employers.

Advocacy and labor recommendations regarding autonomy and workforce empowerment: A Collective Bargaining Agreement (CBA) is the best way to

institutionalize worker empowerment. This is the only sustainable way to empower workers to fully enforce their rights themselves, creating a mechanism for direct communication with their employer. The DOL is not responsible for a CBA, which is a private agreement between employers and a union. Unlike systems that rely on government inspection, a CBA relies on the workers' own resources, in the form of union dues. These dues fund a dedicated union representative whose mandate is to be in constant touch with workers and express any concerns or grievances they may have with their employer. Workers under a CBA would thus have an opportunity to not simply know their rights, but to enforce them. Some farm worker unions shared they already represent some H-2A workers, providing a practical example of how the benefits of CBAs can raise standards, improve conditions, and create workplace empowerment for H-2A visa workers. To address some of the transportation concerns, one organization suggested the employer or U.S. government be required to provide H-2A workers with a vehicle for their personal use, enabling independent transportation.

2. **Displacement of domestic workers.** Farmwork is skilled and physically demanding work with a history of low wages and exclusion from certain labor rights. For over a century, American agriculture has relied primarily on Mexican-origin migrants and other foreign-origin groups to provide the bulk of the U.S. agricultural labor force. However, most farm workers in the United States today are longstanding residents in this country and have put down roots in their communities. Many labor and advocacy organizations have expressed concerns that the H-2A program displaces these U.S.-based workers.

The existing legal requirements of the H-2A program require employers to demonstrate that no U.S.-based worker was available or willing to do the job. However, advocacy organizations have documented multiple cases of U.S.-based farm workers who are U.S. citizens and Legal Permanent Residents, who have been terminated or refused work in favor of H-2A workers. Advocacy organizations and labor organizations surveyed in this report shared that such displacement of domestic workers by H-2A workers is a routine and widespread occurrence in U.S. agriculture, despite statutory requirements. While many cases have been referred to DOL, insufficient funding and resources constrain the ability of the Agency to respond expeditiously. Other times, U.S.-based workers are simply unaware of their rights or how to file complaints regarding their displacement by H-2A workers.

There were several reasons offered on why illegal displacement of U.S.-based farm workers can occur. U.S.-based workers often relocate to a different job site or employer in search of better conditions and/or wages throughout the course of the season. Subsequently, it is our experience that this results in a preference among some employers for H-2A workers; some employers surveyed for this report themselves explicitly shared that they prefer to hire guest workers because workers are bound to stay with the employer who hires them, per the requirements of the program. Additionally, advocacy and labor organizations cited examples where they believe employers may leverage the use of H-2A workers during labor disputes to replace U.S.-based workers who attempt to form a union or otherwise raise their wages or working conditions. There are several ongoing and recently settled public cases further demonstrating that this discrimination is often gender, age, or race based.

Advocacy and labor recommendations regarding concerns of displacement of domestic workers: Covering H-2A workers in a CBA prevents the H-2A workers from having an undue advantage over U.S.-based agricultural workers. Doing so addresses

the fundamental power imbalance, as union representation gives H-2A workers a transparent grievance process and protection from retaliation. Similarly, this would eliminate the possibility of using H-2A workers as more compliant replacements for existing U.S.-based agricultural workers, as workers can negotiate a seniority system as part of a union contract. This prevents the at-will firing of existing workers, regardless of status, to make way for new ones. As a result, under a seniority system, the H-2A program would function closer to its original intention: only filling genuine labor shortages in the agricultural labor force, and not displacing existing U.S.-based agricultural workers.

Less effective than a CBA, but still important for protecting U.S.-based workers is maintaining a fair AEW standard that protects both H-2A and U.S.-based farm worker wages and ensures there is not an economic incentive to displace U.S.-based farm workers. While the employers relayed recommendations (included above within this report) that amount to seeking significant government subsidies covering their costs of participating in the H-2A program, it is crucial that this grant pilot program strike a careful balance between subsidies and stricter requirements and labor protections. Failure to do so would dramatically weaken the economic positions of U.S.-based workers – an outcome that runs contrary to this pilot program’s explicit goal of improving labor conditions for farm workers, including existing U.S.-based farm workers. Lastly, all advocates and unions recommend stricter enforcement of the existing rules that require agricultural jobs to first be offered to U.S.-based farm workers, including stricter penalties for employers who violate these rules, including disqualification from the H-2A program.

3. **Retaliation protection.** Farm worker advocacy organizations and labor unions expressed that one of their deepest concerns with the H-2A program is the lack of meaningful protections against employer retaliation against workers who complain. Given that a workers’ visa is dependent on their employer, employers hold massive power over their workers, and even the threat of their job and visa being terminated and revoked causes many H-2A workers to remain silent and refrain from complaining about unsafe living and working conditions. Given H-2A workers’ non-immigrant status, their inability to remain in the country beyond their employment, and being restricted to working for the specific employer who brought them to the country, the status quo for H-2A workers is ripe for coercion. Employers are legally allowed to fire – and thus deport – any worker they choose at any time or decide not to re-hire them again. There are also cultural and linguistic barriers, with many H-2A workers being unaware of even their limited legal rights or which government agencies to turn to in the event of workplace retaliation. As a result of often being isolated on farms and dependent on employers for housing and transport, many workers also have no third-party assistance they can turn to for aid in situations of retaliation.

Advocacy and labor recommendation regarding retaliation protection: Nearly all organizations recommended a CBA or Worker Social Responsibility (WSR) program as the only sustainable means of protecting workers against retaliation. Many organizations recommended that farmers should be required to recognize freedom of association for both H-2A and domestic workers as it would allow workers to file complaints and unionize without fear of deportation, as well as having more vetted channels available to report abuses. The union grievance process, in particular, would serve to protect workers from retaliation and from front line management who may be acting in neither the employer’s or the workers interest, with workers able to enforce their rights on their

own or work through their union representative to be protected and defended by their labor union. Furthermore, grievance processes that do not involve an independent third party, like a union, cannot protect the grievance holder from retaliation. A collective bargaining agreement also allows workers to negotiate in a seniority or hiring system as part of a union contract. Such a provision would also help ensure that workers cannot be fired without just cause or not brought back the following year, a more subtle form of retaliation frequently experienced by H-2A workers, giving workers the confidence that they have job security as a union member.

One advocacy organization also suggested protections so that individuals can provide information about their employment location to U.S. government officials anonymously and protocols for making complaints to eliminate the fear of retaliation. Multiple advocacy organizations suggested that worker skills training is an opportunity window to combat retaliation if it includes comprehensive rights training and provides them with contacts in government or outside organizations they can reach out to for help reporting abuse. Such a recommendation can only work if the government or external organization has the resources to respond promptly during the season.

Another advocacy organization recommended surveying workers at least twice, about a month into their contract and once they have returned to their home countries, so they can share their experiences without fear of retaliation. The results of the post-employment survey help determine the farm's ability to recruit H-2A workers in the future. However, workers would need to be guaranteed alternative employment or migration pathway to the United States to ensure honesty in reporting in the event the previous employing farm is barred from the H-2A program due to a poor workers' rights score. H-2A workers have themselves reported that they have been unwilling to report poor working conditions or violations of H-2A rules as enforcement would likely mean the end of their jobs.

4. **Illegal recruitment fees.** Farm worker advocates expressed concern regarding the persistent issue of bribery in the H-2A recruitment process. Many H-2A workers in the United States arriving from Mexico, Guatemala, and elsewhere routinely arrive in the United States in significant debt due to paying illegal recruitment fees. In addition, some individual H-2A workers interviewed shared that they obtained visas in exchange for political favors from local politicians in their countries of origin. While it is widely reported and known that many workers in the H-2A visa program pay an illegal recruitment fee, this is currently almost impossible to address as the consequence for a worker reporting this payment is the revocation of their visa – which means the worker loses the job opportunity. Many workers participating in the H-2A program would rather pay the fee/bribe, even if it means significant amounts of their wages will go towards paying that debt, than miss out on the chance to work – which is the only consequence of reporting such abuses for the workers. We anticipate such issues becoming more prevalent in Northern Central America, given the significant issues with governance, corruption, and the rule of law that are already root causes of migration from the region.

Advocacy and labor recommendation regarding illegal recruitment fees: Workers must be protected from illegal recruitment fees and retaliation through reporting mechanisms in their home country that will not cause the revocation of their H-2A visa. Workers who report illegal recruitment fees must instead be offered alternative employment at the same or higher wages or – failing that – be offered an alternative legal migration pathway into the United States and/or a transfer of money equivalent or

greater to the wages that would have been obtained through their work on the H-2A visa. Failure to do so will continue to incentivize worker silence and the paying of illegal and exploitative recruitment fees that strengthen criminal groups and undermine workers' rights. Furthermore, this reinforces the need to ensure workplace rights are enforceable by workers, without being dependent on third parties, and without risking losing access to their visas.

5. **Northern Central America recruitment.** Advocates shared deep, sometimes fundamental, concerns about governance, corruption, and the rule of law in Northern Central American countries. Worker-serving organizations expressed the need for stronger protections for workers to prevent creating something akin to legalized human trafficking, in which significant portions of H-2A workers' wages are not going to the worker but to a criminal group, exploitative labor contractor, or corrupt official in their countries of origin. H-2A workers interviewed for this report already shared that some were only able to obtain visas by doing political favors for local government leaders in their countries of origin.

Advocacy and labor recommendations regarding Northern Central America recruitment: Farm worker serving organizations and unions recommend stringent oversight to prevent trafficking, corruption, and other abuses of prospective H-2A visa workers in the context of governance challenges within Northern Central American countries. For example, while employers would like to waive in-person interview requirements for the sake of time, doing so may contribute to the conditions that allow for human trafficking. In addition, the UFW has already identified cases in which the waiving of these in-person interview requirements led to minor children working under H-2A visas obtained with false documents without a U.S. consular officer having a chance to visually ascertain the real ages of the minor children. As such, we recommend that in-person interview requirements remain in place to mitigate the possibility of trafficking under the auspices of the H-2A visa.

6. **Housing.** Like employers, H-2A workers and farm worker advocates interviewed similarly identified housing as a major concern, specifically the poor quality of employer-provided housing and the prospect of government-subsidized H-2A housing removing economic barriers to the displacement of local U.S.-based farm workers.

The poor quality of much employer-provided H-2A worker housing has been consistently documented. During the pandemic, H-2A workers were disproportionately exposed to and infected with COVID-19 because of the cramped and unsanitary conditions in much employer-provided H-2A housing.⁴ H-2A workers report frustration with the lack of privacy in their employer-provided housing. They shared that their toilet, shower, and laundry room are in the same room, with only two bathrooms available for 30 workers. These workers also mentioned substandard heating and no air conditioners. One worker shared that fellow workers had previously installed window AC units and were 1) not reimbursed, 2) employers kept the AC unit, and 3) the employer demanded workers remove the AC due to increased electricity costs. Another H-2A worker reported similar concerns, describing living in trailers with eight workers per trailer and only two bathrooms. The UFW has also found instances in which the housing listed on the H-2A application is not where workers live, indicating the occurrence of successful deception and fraud in some H-2A job order applications.

⁴ <https://calmatters.org/california-divide/2020/08/guest-worker-covid-outbreak-california/>

Lastly, U.S.-based farm worker communities routinely face housing insecurity, including for workers who live with their families. Since a 2018 rule change allowed H-2A workers to access publicly funded FLH housing⁵, local U.S.-based farm workers have faced increased competition for, discrimination in, and eviction from publicly funded farm worker housing. California State Law (AB1783, R. Rivas)⁶ currently prohibits any state funding from supporting H-2A housing. The UFW supported this legislation at the time for a simple reason: public sector underwriting of the private employers' costs to access the H-2A program undercuts the economic position of U.S.-based agricultural workers, making it potentially cheaper for growers to hire H-2A workers than continue to employ their existing U.S.-based agricultural workers.

Advocacy and labor recommendations regarding housing: The UFW also has fundamental concerns with many of the recommendations employers made to have USDA provide, build, subsidize, finance, or otherwise cover housing costs for employers looking to expand their use of the H-2A system due to our experience that this has adverse effects on U.S.-based farm workers and their families. We only support covering H-2A housing costs for grantees of the pilot program, as recommended by employers, in the narrow circumstance that those employers are willing to sign CBA or WSR agreements that protect the seniority of current U.S.-based workers at those employers and make the new housing equally accessible to all employees of the farm. If these conditions are not met, then the UFW recommends that no subsidies for housing be included as part of the grant program.

Advocates and unions instead recommend more frequent inspections for grantees of this program and stricter penalties for failure to provide adequate housing among H-2A employers. This is urgently necessary to protect the lives and health of current and future H-2A workers. To ensure that increased inspections are not perceived as penalizing employers for participating in the program, we recommend that more effective inspections of H-2A housing not be limited to program participants. However, we recognize this falls out of the pilot program's scope.

Independent of the program, the UFW does believe there should be increased USDA funding for farm worker housing that is accessible to long-standing U.S.-based farm worker communities who routinely face housing insecurity, including for workers who live with their families.

7. **Trafficking and other illegal activity.** As documented, the visa program with the most reported trafficking cases is the H-2A program.⁷ Operation Blooming Onion investigation is further evidence human trafficking and forced labor under the cover of H-2A visas is a persistent and urgent problem. The UFW and several other organizations surveyed for this report have all directly uncovered cases of human trafficking, child or forced labor, wage theft, or other abuses occurring under the auspices of the H-2A visa program. This includes worksites without legitimate job orders, where nominal "H-2A" workers have been trafficked within the United States from one employer to another. All farm labor

⁵ <https://www.usda.gov/media/press-releases/2018/07/10/usda-applauds-housing-eligibility-temporary-farm-workers>

⁶

https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB1783&search_keywords=housing

⁷ Polaris, "Human Trafficking on Temporary Work Visas: A Data Analysis 2015-2017," June 2018, p. 20, available at <https://polarisproject.org/human-trafficking-on-temporary-work-visas-a-data-analysis-2015-2017/>.

organizations surveyed are interested in seeing increased enforcement and oversight from DOL, United States Citizenship and Immigration Services (USCIS), and USDA related to the H-2A program.

Advocacy and labor recommendations regarding trafficking and other illegal activity: The persistence of illegal activity such as trafficking, wage theft, and forced labor under the H-2A program indicates the need for higher levels of oversight of the H-2A program. To ensure that H-2A workers are protected and covered by U.S. laws, DOL, who has primary oversight over this program must be adequately staffed. Despite the rapid growth of the H-2A program in recent years, increasing 18% in the past year alone, the number of DOL inspectors assigned to monitor the H-2A program has not increased. That enforcement and oversight must be stepped up across the program – not just for those employers participating in the pilot program. We acknowledge that the constraints on DOL’s budget is a product of inadequate appropriations from Congress.

We strongly recommend a CBA or WSR requirement for participating in the program as it would allow for consistent worker interaction and oversight by a third-party organization with a mandate to represent, protect, and/or advocate on behalf of the H-2A workers. This is why most advocacy organizations surveyed for this report recommended a collective bargaining agreement. Including a third-party organization whose sole involvement purpose is to protect workers and prevent human trafficking is essential to the success of the H-2A Program and protecting human lives.

Recent independent news reporting documented abuses described above as well as additional concerns.⁸

Synergies between Advocacy, Labor, and Employer Feedback

While there are significant disagreements and conflicting economic interests between workers and employers, there are some areas of shared concern.

1. **All employers, labor unions, and farm worker-serving organizations surveyed for this report expressed the need for the pilot to address training and preparation specifically for Northern Central American workers.** There is significant agreement that workers recruited from Northern Central American countries would require and benefit from a significant amount of training and workplace rights education prior to beginning their jobs in U.S. agriculture, whether this training occurs in country or in the United States. Employers and advocates alike suggested USDA funding for providing job training and subsidizing wages during training periods. These trainings could be conducted in cooperation with third party farm worker serving organizations, that would educate workers as to how to enforce their rights and who to contact in the event of grievances, retaliation, inadequate housing, and other unsafe conditions. Some advocates also proposed that during this training, H-2A workers should also be learning skills that can be applied to building agricultural infrastructure in their home country. Employers and experts consulted on building a third-party training program cautioned that they held concerns about the economics of setting up

⁸ “Human Trafficking or a Guestworker Program?” <https://prismreports.org/2023/04/14/h2a-visa-wage-theft-exploitation/> and “The New American Slavery,” <https://www.buzzfeednews.com/article/jessicagarrison/the-new-american-slavery-invited-to-the-us-foreign-workers-f> are two examples.

a successful training program by a third party that is crop-specific without employers revealing specific company practices. In part because of these challenges, inviting potential grant applicants to bring proposals that include training could help develop new models for training farm workers that reduce economic costs for employers while providing real economic benefits and strengthen workplace rights for farm workers.

- 2. Advocates and labor unions recognized the necessity of some incentives for employers to be paired with greater worker rights and protections.** While some advocate and farm worker-serving institutions made clear their opposition to any use of the H-2A program, others were willing to concede that incentivizing employers to participate in a program with higher standards of workplace protections could be viable and would be worth subsidizing some employer costs. Nevertheless, a careful balance must be struck to avoid creating employer incentives that undermine the economic position of existing U.S.-based farm workers or H-2A workers themselves.

To incentivize employer participation in this pilot program, the UFW proposes the following recommendations:

- Financial support to employers to help pay for costs associated with collective bargaining agreements.
- Financial support for employers to help pay for costs associated with participating in WSR programs.
- Job Training and supplementing a training wage.

While there are employer recommendations that would create further subsidies, it is paramount that these recommendations are not implemented without requiring employers to sign on to CBA or WSR agreements – as in a vacuum these employer recommendations would unacceptably weaken the relative position of U.S.-based farm workers, including current union members. We reiterate here our understanding that the goals of this program include to improve working conditions for all farm workers in the United States including all guest and U.S. based workers.

- 3. An agreement that workers need independent representation.** Only a few of the employers alluded to the types of protections available to workers and the benefits to employers of CBAs. One employer explicitly suggested that unions should represent workers “in their countries of origin” to ensure protection against corruption, bribery, and other exploitative and criminal behavior in the visa recruitment process. While no employer currently without a collective bargaining agreement was willing to volunteer that union representation on their farm could be part of the solution, many acknowledged that workers were often put in bad situations and would benefit from some sort of organization or institution that advocates on their behalf. What shape that would take if not a union was difficult for employers to define.
- 4. A recognition that greater enforcement of existing rules is warranted.** Both employers and advocacy organizations acknowledged entrenched concerns related to worker abuse and exploitation within the H-2A programs. Employers interviewed for this report acknowledged the occurrence of events such as Operation Blooming Onion and made clear they did not approve of such abuses and that, in contrast, they viewed themselves as “good employers” who appreciate and respect the contributions of their workers. Many employers were quick to point to increased enforcement as the solution to many termed “bad actors” among employers. This aligns with longstanding frustration that advocacy groups and labor

unions have expressed regarding the need for increased enforcement of the H-2A program's existing rules and regulations.

- 5. A desire for continued conversations and dialogues among all industry actors.** We found that all surveyed expressed appreciation for the chance to express their views and interest in the views of others. We strongly recommend a process of regular interactions and consultations between employers participating in the pilot program and farm worker-serving organizations to identify and consider worker needs on an ongoing basis. For example, farm worker-serving organizations could provide information on rights and acculturation in the United States to H-2A workers. During interviews, two employers suggested this idea as something they could support, though questions about where such trainings would occur, whether on employer property or not, and whether they could occur without employer permission remained unresolved.

Summary Recommendations

The most important and transformative recommendation of farm worker-serving organizations is for agricultural employers who participate in the pilot program to adopt a Collective Bargaining Agreement (or CBA) as a condition for receiving the desired USDA incentives and subsidies for recruiting workers from Northern Central America.

There are several reasons why a Collective Bargaining Agreement provides unique protections for workers while strengthening partnerships with employers.

- 1.) Under a CBA, workers use their own money to enforce existing labor protections that the government cannot do at scale. For example, workers in the H-2A program are the only workers in the United States who are not covered by the protections of the Migrant and Seasonal Workers Protection Act.
- 2.) A CBA includes a worker-driven and union-supervised grievance procedure to resolve disputes quickly and without government intervention or expensive proceedings.
- 3.) A CBA includes an audit and compliance mechanism of existing laws that the U.S. government can have confidence in without increasing government costs and without having to rely on unverifiable self-reporting by employers. DOL already requires *bona fide* unions to file LM-2 forms, which serve as an existing check and oversight on unions and ensuring collective bargaining agreements serve their purpose.
- 4.) Employers covered by collective bargaining agreements are less concerned about legal liability under the H-2A visa program regulations.
- 5.) Employers covered by collective bargaining agreements have more assurances that workers the employers have invested training in can return in subsequent years.

Another potential way of ensuring high standards for the treatment of H-2A workers participating in this program would be a worker-driven social responsibility (WSR) program, which is a model centered on legally binding agreements between growers and buyers that can drive worker rights and protections through the supply chain. Employers hoping to receive the incentives to hire H-2A workers from Northern Central America could be required to sign with an existing, recognized, and effective WSR program. This could create comparable protections to a CBA but would be reliant on outside third parties and consumer pressure for retailers and others to buy WSR products.

Requiring the implementation of a CBA or WSR serves all the goals of the pilot program by:

- Ensuring that American food security and our agricultural supply chain is safeguarded by ensuring the workforce that makes it possible is healthy, free from criminal abuse and exploitation, and able to advocate for its needs;
- Reducing irregular migration by expanding legal pathways that are genuinely free from illegal recruitment fees, trafficking, and forced labor and thus represent a genuinely superior way of traveling, living, and working in the United States and preferable alternative to simply crossing the U.S.-Mexico border irregularly; and
- Improving working conditions for farm workers by raising standards and protections for H-2A workers and preventing the displacement of existing U.S.-based farmworkers.

CONCLUSION

Guaranteeing fair treatment of H-2A workers in a system that has far too often permitted their abuse and exploitation is an urgent but complex challenge for all actors in the agricultural economy, immigration system, and food supply chain. It is paramount that the significant challenges experienced by previous and current H-2A workers are not replicated among the population of prospective Northern Central American workers that the pilot program is designed to help. Temporary labor migration pathways will only be effective as an alternative to irregular migration if they can credibly offer the potential migrant a better, more dignified, more secure, and more economically rewarding path.

Requiring the adoption of CBA or WSR for employers wishing to participate in the pilot program would meet the Administration's priorities while also providing a significant step forward for worker rights in U.S. agriculture. Short of this type of requirement, the USDA should ensure the pilot includes meaningful requirements for grantees that go above and beyond current labor protections in statute and that address the issues raised in this report. We believe that it is paramount that we use this opportunity to create the highest standards of safety, empowerment, and working conditions possible for agricultural workers.

It is our hope that, in time, the successes found by this pilot program will be expanded whether by administrative rules or new legislation to benefit all workers in the H-2A program, not simply the ones from Northern Central America.

We encourage USDA to continue to convene partnerships between employers and labor organizations in the agricultural economy.