



## **Details on the Proposed North American Agricultural Visa Program (NAAV) to Replace the Flawed H-2A and H-2B Programs**

### **Overview**

Federal studies examining the H-2A and H-2B programs have analyzed the serious flaws in the design and implementation of current guestworker programs. Immigrant advocates, independent researchers, and agricultural producers have observed still more problems.

We have reviewed these studies, as well as evaluations of the Canadian guestworker program, and concluded that bold program redesign is crucial and that an alternative approach could provide a more cost-effective and flexible way to balance the needs of both agricultural employers and current U.S. farmworkers and, at the same time, decrease abuses of newly-admitted foreign workers.

The North American Agricultural Worker Visa (NAAV) program we propose would be a component of new comprehensive immigration reform (CIR) legislation in 2017 and would replace the antiquated provisions of the H-2A and H-2B guestworker programs, consolidating both into a program allowing capped annual admissions of foreign-born workers. Our analysis and proposed policy approach takes into account the impact a CIR-based legalization program would have on the agricultural labor market—on agricultural employers, current agricultural workers, and newly-admitted workers from Mexico and Central America.

### **A Summary of the Proposed North American Agricultural Worker Visa Program**

Under the NAAV program, newly-admitted foreign-born workers would be granted a 3-year portable work visa which would require them to work at least 100 days per year in agriculture. It also would allow them, after completing their contract with the employer who offered them an initial job, to move onward to work for other agricultural employers or in other employment during seasonal troughs in farm employment. They could also return to their home country when little seasonal work is available. The work visa would be renewable every three years for an additional 3-year period, assuming they had worked the required time in agriculture and had no disqualifying crimes. After 6 years, NAAV visa holders who had complied with all visa requirements would become eligible for a green card.



NAAV does away with much of the current DOL Office of Foreign Labor Certification H-2A bureaucracy and dramatically decreases the costs associated with hiring an H-2A worker (which are estimated as about 40% higher than for hiring a domestic worker).

In order to hire a NAAV-authorized worker, employers would be required to register with USDA, providing evidence that they are hiring for farm labor tasks, pay a fee, and they would need to provide a prospective NAAV applicant seeking employment a bona fide job description. They would also be required to report annually to USCIS the number of days each NAAV worker they employed had worked in agricultural job tasks. But they would not need to submit a multitude of individual applications, and any worker they wanted to retain could continue to work for them throughout the 3-year visa period. GAO, as well as informed observers, note that most H-2A workers are not really temporary; they return year after year. So moving away from temporary employment toward long-term stable employment will benefit both agricultural employers and their workers.

The NAAV program would dispense with the burdensome and dysfunctional H-2A requirement of “positive recruitment” which, in fact, fails to assure local workers access to available jobs. It would, however, require that NAAV workers be paid the Adverse Effect Wage Rate (AEWR). In contrast to the current H-2A program, and in combination with immigration reform provisions legalizing the currently unauthorized workforce, this would encourage hiring local workers.

Since NAAV workers would be allowed labor market mobility, they would not be provided the benefits currently required under the H-2A program for guestworkers. The NAAV program would not require employers to provide newly-hired foreign-born workers with transportation from or to their home country, housing, meals, daily transportation to and from the worksite, or pay for their visa (since it would be an individual one, not an employer petition) or guarantee them a fixed period of work (since their visa would allow them to leave to work for another employer). NAAV workers and domestic workers would be on an even footing.

As a result of improved agricultural labor mobility, market forces would work better in matching labor supply to demand throughout the year. The NAAV workers’ time could be utilized more efficiently than in job orders for temporary labor and domestic workers would benefit from bona fide free-market competition among employers to hire the best workers. The possibility of continuously employing NAAV workers would allow employers to invest in training newly-admitted workers and reap a return on their investment.



Since NAAV is oriented toward building stable, ongoing employer-employee relationships, it would encourage sound labor management and facilitate newly-admitted foreign workers' integration into local communities (as opposed to H-2A workers housed in physically and socially isolated settings). After 6 years of compliance with program requirements to work in agriculture each year, NAAV workers would be allowed to submit petitions for their spouses and minor children to join them, at the same point at which they could apply for a Green Card.

Agricultural industry need for admissions of foreign-born workers would not be tested at the individual company level (a meaningless exercise) or stem from attestation (an even less meaningful provision), but rather be assessed at the sub-industry level (i.e. based on type of agricultural production—vegetable, fruit production, dairy, livestock, landscaping, reforestation—and probably regionally.) During an initial transition period of 3 years, admissions would provisionally be set at a level of 120,000 workers per year—the current level of attrition of foreign-born workers in the farm labor force due to aging or workers moving into non-agricultural employment. In subsequent years, a national commission would determine the appropriate annual level of admissions, taking into account market developments, changing patterns of production, technology, and indicators of local labor supply.

Employers of NAAV workers would be required to deduct FICA contributions from workers' checks, pay UI contributions, and offer ACA-compliant health insurance as is legally-required for other workers. As is the case under current IRS rules regarding "substantial presence", the NAAV workers would be subject to federal income tax if they resided in the U.S. for most of the year. The NAAV workers, since they would be work-authorized and their visas portable, would be eligible for unemployment insurance on the same terms as other workers (i.e. adequate base period wages, able and available for work). Payments into workers' Social Security accounts, as is the case under current law, would only become available if/when workers transitioned into permanent residence status, and eventually, citizenship, and so qualified for benefits (e.g. based on age, disability).

### **Development of the Current NAAV Proposal**

Many studies show that the current H2A/H2B guestworker program approach has serious shortcomings both in protecting workers and in responding to employers' needs. Our proposal also takes into account ongoing concerns and the growing urgency expressed by agricultural producers and associations (e.g. an August 2016 estimate by United Fresh that agriculture lost \$1.3 billion due to labor shortages, or the Partnership for a New Economy campaign).

The reform proposal we present here incorporates insights from analysis of data and reports from DOL's Office of Foreign Labor Certification and other oversight reports, including the



Department of Labor Inspector General’s 1998 report (“Consolidation of Labor’s Enforcement Responsibilities could better protect agricultural workers”), a 2008 ETA/DOL study (“Evaluation of the H-2A Alien Labor Certification Process and the U.S. Farm Labor Market”), and, most recently a 2015 GAO Report, (“H-2A and H-2B Visa Programs: Increased Protections Needed for Workers”).<sup>1</sup>

Our discussion focuses on ways in which the proposed NAAV program would reform the currently flawed H-2A program, but we believe the same considerations would apply to the H-2B program. Although the H-2B program is titled “non-agricultural,” about half of the positions certified under its provisions are actually for workers in industry sectors that are agriculture-related (landscaping, forestry, and meat/fish production). By the same token, there is no sound rationale for including non-agricultural occupations (such as cook, equipment mechanic, heavy equipment operator) in the H2A program of agricultural foreign-labor admissions. It would make sense to include agricultural industry sectors and occupations which are clearly agricultural in a revised and updated program to address agricultural labor needs. The H-2A and H-2B programs are administratively complex; consolidating them and finding a new, more uniform and systematic approach to meeting agricultural producers’ needs for foreign labor is urgent—to meet industry needs and to rationalize policy.

The 2013 Senate bill, S 744, created a “W” visa for non-agricultural occupations, which could serve as a model for reforming H-2A and H-2B. To manage the numbers of admissions it created the Bureau of Immigration and Labor Market Research as an independent statistical agency within U.S. Citizenship and Immigration Services, run by a Commissioner appointed by the President. This Bureau was charged with determining which occupations had shortages of labor and was to permit an employer to petition the Commissioner for a determination that a particular occupation in a particular metropolitan statistical area was a shortage occupation. W visa holders were to be allowed to bring their immediate families, with the spouse allowed to work, and were to be given 3-year visas, which could be renewed indefinitely. Employers were to register with Homeland Security, pay prevailing wages, conduct extensive recruitment activities seeking domestic workers, and pay a fee for each W worker hired. Workers were to start with a particular employer but the visa was portable, with the stipulation that the worker was not to be unemployed for more than 60 days without leaving the country. After 3 years, the employer could petition for LPR status for the worker. The maximum number of W visas was to rise from 20,000 in the first year to 75,000 in the fourth year and thereafter be determined by the Bureau with an annual cap of 200,000.

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<sup>1</sup> A bibliography of sources we have consulted is available.



## **Responding to the Immediate and Long-Term Needs of Agricultural Employers Currently Relying on the H-2A Programs**

The current farm labor force is aging (National Agricultural Worker Survey 2016). In 2000, the average crop farmworker was 31 years old; the average worker is now 38 years old—meaning that about half the current farm labor force is already middle-aged. Even if there is a successful legalization program which yields a greatly-increased supply of work-authorized, experienced farmworkers (immigration reform is likely to provide about 1 million current farmworkers with eligibility for legalization), agricultural employers will be relying on an aging workforce.

Restrictionists' proposition that there would be an adequate supply of U.S. workers to fill all agricultural jobs without any admissions of new foreign-born workers is flawed because it assumes that with adequate increases in farmworker wages unlimited numbers of new US workers would become available.

Post-IRCA research by a leading applied research firm, Mathematica, showed that even very large increases in hourly wages would not attract domestic workers to farmwork. Our own post-IRCA research (Kissam, Griffith, Runsten, and Garcia 1990) for the Department of Labor (the Farm Labor Supply Study) showed that even in farmworker families in long-established farmworker communities in Florida, Texas, and California, few US-raised youth were willing to go into farmwork. More recently, even with widespread unemployment among the grown children of farmworkers during the 2007-2009 recession and rising wages due to decreases in new border-crossers, very few young adults from farmworker families who had worked as youth in farm labor returned to farm work and labor shortages persisted.

There is a long history of misguided efforts to make agricultural jobs available to U.S. workers who neither wanted them nor were prepared to do them. At the end of the Bracero Program in the mid-1960s, Ventura, CA, citrus growers ran a recruitment effort in downtown Los Angeles, but few workers lasted even a day. Similar efforts to rely on Puerto Rican workers in the Pennsylvania apple harvest or on senior citizens for the Washington apple harvest also failed. In 2011, anti-immigrant laws passed in Georgia and Alabama caused severe agricultural labor shortages and the employment of domestic workers who did not have the necessary skills and rapidly quit, leaving tons of watermelons and other produce to rot in the fields.<sup>2</sup> Similar reports emerged from Colorado.<sup>3</sup> Testimony by Carol House at the California Board of Food and Agriculture in August 2012 showed that of 35,000 domestic workers referred to growers by state employment departments nationally in 2010, 68% rejected the jobs outright and 27%

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<sup>2</sup> Greg Asbed and Sean Sellers, "The High Cost of Anti-Immigrant Laws," *The Nation*, October 11, 2011

<sup>3</sup> Kirk Johnson, "Hiring Locally for Farm Work is No Cure-All," *New York Times*, October 5, 2011.



either didn't show up for work or left before it was done. The US labor market will continue to require modest influxes of foreign-born workers.

Increases in wages and improvements in working conditions for farmworkers would attract a modest influx of workers born and raised in the U.S., but these dynamics cannot be reasonably expected to draw an adequate supply of workers to meet agricultural labor needs. Data from the National Agricultural Worker Survey shows that from 2004-2014, the proportion of US-born workers in the farm labor force only increased by 1% (from 27% to 28%) although real hourly wages increased by about 6% during that same period.<sup>4</sup> The assumption that the solution to securing a domestic agricultural labor supply is to modestly improve wages and working conditions is unfounded. It deserves note that the agricultural producers now submitting H-2A requests include not only employers with atypical needs (e.g. requests for sheepherders) but, also, an increasing number of large and well-managed companies seeking workers in commodities such as lettuce production or berry harvesting.

Newly-arriving Mexican and Central American workers bring energy and flexibility to the labor market but often have no experience in U.S. production methods. The NAAV program's multi-year period of work authorization will allow agricultural employers to reap the returns of training invested in newly-hired workers. The 3-year duration of the NAAV visa, indefinitely renewable if workers put in 100 days a year in agriculture, will both serve employers' needs and stabilize the farm labor market. The key assumption underlying the current guestworker programs—the idea that agricultural industry demand is primarily for temporary workers—is flawed.

GAO's 2015 analysis of the current H-2A program shows that in recent years most guestworkers have actually been employed as semi-permanent workers. Although the current H-2A program has been justified by the presumed need for temporary supplies of workers to meet peak season labor demand, the GAO analysis shows that, during the 5-year period analyzed, 55% of H-2A workers entered the U.S. only once, but that 19% entered twice, 11% entered 3 times, 9%

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<sup>4</sup> (increase in US-born workers): Daniel Carroll, Susan Gabbard, and Jorge Nakamoto, "A Changing Crop Labor Force and the Implications for Health Care", presentation to National Advisory Council on Migrant Health Meeting, January, 2016. (increases in real wages for farmworkers) extrapolation from Farm Labor Supply data from 2004-2012 with the estimate for 2013-2014 based on the author's report that farmworkers' real wages have been increasing by 0.6%/year since 1990. Median real wages—denominated in 2012 dollars—were \$10.40/hr. in 2004 and \$10.80 in 2012. From <http://www.ers.usda.gov/topics/farm-economy/farm-labor.aspx>





entered four times, and 16% entered five times. Most who re-entered in multiple years probably returned to the employer with whom they had worked the previous year.

The 6-year pathway to permanent residence status offered in the NAAV program will encourage visa holders to continue to work in agriculture for at least that period of time. These NAAV provisions orient the program toward being “self-enforcing”—with market forces rewarding employers and workers alike for negotiating stable working relationships. Slowing the treadmill of circular migration and reducing the role of binational labor market intermediaries will inevitably improve the quality of workplace supervision and increase labor force productivity.

Those workers who are not interested in securing permanent U.S. residence and who instead want to engage in shuttle migration, returning home each winter when there is less work, could renew their NAAV visa indefinitely. Our preliminary projection is that about half of the NAAV visa holders will, ultimately, qualify for and seek LPR status, while the other half, the “target earners” and shuttle migrants, will be available on a seasonal basis or will drop out of the program. The NAAV program, by allowing market dynamics to function properly, will result in a beneficial mix of semi-permanent and temporary workers.

It is responsible economic and social policy to encourage ongoing improvements in workplace conditions and workers’ earnings, while at the same time responding to employers’ needs, which are, after all, key considerations in overall community well-being. However, expansion of the current H-2A program (the current de facto non-solution which generates a multitude of complaints from both employers and workers) does little to provide immediate benefits to agricultural employers and does a great deal to stall ongoing progress by industry leaders toward improving farmworkers’ work lives while also remaining profitable.

### **Protecting US Workers**

Although some unions and politicians are firmly opposed to any new admissions of foreign workers, most research shows that immigration actually contributes to job growth for U.S.-born workers. However, there is no similar evidence to suggest that the current H-2A program provisions “protect” US workers.

As has been shown in numerous research studies, ongoing immigration will continue to contribute to overall U.S. economic well-being and generate more jobs for US workers. It turns out that earlier estimates of the impact on native-born workers that showed large negative



effects were mistaken because they had assumed among other things that immigrants and natives with similar educational levels were perfect substitutes for one another, which is not the case. For many reasons immigrants are actually complements to native-born workers. Though at some point immigrants take over jobs previously held by the native-born—whether through attrition or through conscious employer policies—their overall effect, even on those native-born workers, is positive because the economy grows and evolves to make the groups complements to one another.

Restrictionists’ assumption that blocking new admissions of foreign workers is the only way to protect US workers’ labor rights and increase farmworkers’ earnings is flawed. The need for newly-admitted foreign “replenishment” workers in some clusters of occupations and industry sectors will continue unabated even if wages increase substantially (e.g. as a result of an increasing number of state minimum wage laws and, potentially, further increases in the federal minimum wage).

At the same time, the “business as usual” push for unlimited admission of new foreign-born workers is not the answer to agricultural employers’ labor problems and will hurt current farmworkers. This “magic” non-solution of expanding the H-2A and H-2B programs would undermine both positive trends in farm labor recruitment and management and rural community well-being in agricultural areas of the U.S.

Without guestworker program reform, the H-2A program, since it is uncapped, will simply continue to expand, doing nothing to protect U.S. workers, saddling employers with unwarranted costs, and generating a range of unnecessary bureaucratic tasks. Admitting too many foreign-born workers might even decrease the labor supply available to agricultural employers. Current immigrant farmworkers’ ability to earn a sustainable living is already uncertain and huge influxes of new workers which depressed current farm labor wages would drive many—including the “loyal” farmworkers who would be happy to continue working indefinitely in agriculture—to seek non-agricultural employment. Expansion of the H-2A and H-2B programs would effectively remove larger and larger pools of jobs from the US labor market, a process of “virtual offshoring” as employers develop recruitment and hiring processes designed to be unfriendly to US workers.

We propose a significant revision to the H-2A provision that currently requires that employers who hire H-2A workers pay a higher wage (the AEWR—Adverse Effect Wage Rate) to both the newly-admitted foreign workers and other workers in similar jobs. We propose that the foreign-born workers admitted under NAAV be paid the AEWR, as is currently the case under H-2A. However, our proposal eliminates the requirement that NAAV employers pay the same





wage to US workers as to the NAAV workers. This would counter the current trend where companies that hire H-2A workers begin to diminish their hiring of local workers. It will also have a leveling effect across the country, accounting for some of the differences in minimum wages.

Adoption of newly-available production technology, systematic improvement of production systems, and ongoing improvements in supervision and workplace conditions are all part of the answer. Consequently, our proposal for the NAAV program rejects the H-2A provisions for uncapped issuance of visas based on questionable evidence of individual employers' inability to recruit U.S. workers: reports of "positive recruitment" difficulties or "attestation" that no US workers are available.

Instead we envision that a Foreign Labor Commission would periodically determine an appropriate level of admissions of new foreign-born workers. By fine-tuning new admissions of foreign workers into agriculture to balance employers' needs (at the sub-industry level) with the employment needs of current farmworkers in rural communities (70% of whom are themselves foreign-born), NAAV will create a "virtuous spiral" of economic progress. In contrast, expansion of H-2A and H-2B or, worse, provisions banning all new admissions of foreign-born workers and wasting taxpayer dollars in futile efforts at border control, will exacerbate current problems. NAAV's provisions for a flexible cap on admissions of new foreign-born workers for agriculture will, on the one hand, decrease the attractiveness of unauthorized border crossing among potential migrants, and, on the other hand, avoid the destabilizing effect that unlimited admissions of workers would have on the agricultural labor market.

Annual savings of \$20-30 million on DOL Office of Foreign Labor Certification (OFLC) and State Workforce Agencies (SWA) desk review of H-2A and H-2B applications, housing inspections, and Interstate Job Clearance order circulation of H-2A job orders could be used to enhance enforcement of existing laws and regulations under the Agricultural Worker Protection Act (AWPA). In the course of final negotiations to put the NAAV program in place it would be feasible to determine the federal cost savings from closing out the OFLIC and SWA activities required by H-2A and H-2B and re-purposing savings to better-designed efforts by the DOL Wage and Hour Division to enforce existing laws.



## **Assuring Newly-Admitted Foreign Workers' Human Rights and Economic Well-being**

Affording NAAV visa holders the crucial right to leave one agricultural employer and seek a job with another who offers better pay or better working conditions, benefits, or supervision is more important to newly-arriving immigrant workers than the supplementary protections granted in the current H-2A program, such as the ¾ rule and employer-provided transportation and housing, which many observers believe are used as means to isolate and control workers.

The NAAV program would provide newly-admitted foreign workers with NAAV visas the most valuable tool to protect them employer abuse—the freedom to change jobs. We propose that NAAV applicants pay for their own visas and that the visa fees be as low as possible (to decrease incentives to intermediaries to engage in loan-sharking). Since USCIS must fund visa-related operations from applicant fees, we suggest that the initial visa fee (including biometrics etc.) be \$400 and that there be an annual renewal fee of \$200 for the two subsequent years in the 3-year work visa period, in order to spread the cost out for the workers. Of course the NAAV employers can also be required to pay fees for every NAAV worker they hire, which might offset some of what would otherwise be charged to the workers.

We have developed detailed scenarios to analyze the economic impact on NAAV workers of gaining labor market mobility, eligibility for unemployment insurance, and work authorization for multiple years as contrasted to the temporary work authorization and loss of guaranteed benefits to housing, transportation, etc. currently available to H-2A workers. We project that the NAAV program would yield the typical newly-admitted foreign-born worker about \$2,300 in increased effective income during his first year in the U.S.—taking into account likely increases in annual earnings due to the ability to seek additional work, offset by paycheck deductions for FICA and the loss of the various benefits currently made available under H-2A provisions (e.g. housing, transportation). We examined a range of different scenarios of possible outcomes for newly-admitted NAAV workers (in different work locations, different initial employers, different personal objectives and skills) and expect that economic benefits for individual workers would range from about \$200 to \$18,000 in their first year. Appendix A to this document includes a detailed discussion of the assumptions and calculations we used for this analysis.

How does NAAV manage to benefit both newly-admitted foreign-born workers and agricultural employers? The answer is that exchanging the highly bureaucratic yet abuse-ridden guestworker approach in favor of a market-oriented approach is a win-win proposition, primarily because it makes it possible to deploy the available labor supply more efficiently.



Employers will get more of the labor they need while workers get more of the employment earnings they need. Labor mobility provides workers with an antidote to employer abuse while, at the same time, employers can dismiss workers whose work is unsatisfactory.

The NAAV workers' spouses and minor children would be able to join them after they had completed 6 years of work in agriculture and transitioned into LPR status. Spouses and working-age children would, then, become work-authorized themselves at the point the NAAV worker secured LPR status. These family unification provisions offer the NAAV workers strong incentives to continue working in agriculture. We don't propose immediate family immigration (as the non-agricultural W visa did) because agriculture is seasonal and many NAAV visa holders would come and go from the United States. But perhaps some provision could be made for families of livestock workers who do obtain permanent jobs.

### **Protecting NAAV Applicants' Rights during the Visa Application Process**

Some of the most egregious abuses in the H-2A program are those associated with worker recruitment. H-2A (and H-2B) workers are often required to bribe recruiters and pay illegal fees to secure work. While we favor a free market approach, we believe that assuring the integrity of the recruitment process must be a binational responsibility, and that a "free market" does not imply one where anything goes. Our NAAV proposal envisions that the U.S. consular service would provide orientations (as well as print-based and online materials) informing NAAV applicants of their rights and responsibilities, both in the course of recruitment and as an integral part of the visa application process.

Both governments would also make a commitment to collaborate to assure that employers who are certified as eligible to employ NAAV visa holders would be immediately de-registered if they were found to be falsifying details about jobs offered, accepting bribes for hiring specific workers, or abusing the workers they have hired—based on results of DOL Wage and Hour investigations, findings from ongoing monitoring of working conditions at NAAV employers' workplace, or complaints filed by NAAV workers. De-registered employers would not be allowed to recruit potential NAAV workers in Mexico.

NAAV applicants would submit applications directly to U.S. consular offices (which exist in most of the major migrant-sending states of Mexico, for example) and pay their visa fee. The US consular service, in conjunction with DHS would secure biometric data and screen them for security.



Applicants would apply directly to NAAV-registered agricultural employers to secure a qualifying agricultural job (with expected employment for at least 60 days in order to discourage use of the NAAV program simply as a means to enter the U.S.) Processes for NAAV employers and NAAV visa-seekers to accept employment in an available agricultural job would be market-driven but might, for example, take place in the context of a “job fair” event/labor exchange in Mexico or other Central American countries. Of course many employers could recruit workers through referrals from their existing workforce.

NAAV applicants offered a job by a NAAV employer and thereby qualifying for issuance of the visa would be required to submit a valid letter certifying an employment offer. Given 21<sup>st</sup> century technology it would be quite straightforward for NAAV employers to be provided with technology to generate a secure key (code) to include with the employment offer letter which would be sent simultaneously to DHS and/or the State Department consular service verifying the veracity of the employment offer.

### **Innovation in Agricultural Job Recruitment—Binational Electronic Job Board**

The reality is that the stilted bureaucratic formal language of typical employment service orders (especially those posted in the interstate job clearance order system) does almost nothing to effectively recruit US workers or guarantee that contract terms and working conditions are as represented. It does even less to inform foreign workers about their prospective employer or worksite and it does not protect their labor rights. In the 21<sup>st</sup> century world of increased information connectivity, we believe one way market dynamics can be harnessed effectively to counter fraud and misrepresentation by employers or their labor recruiters is “crowdsourcing”.

This might, for example, consist of an electronic bulletin board as a virtual venue for exchange of labor market information among prospective NAAV applicants and prospective NAAV employers and, to the extent it is attractive, to all workers and all employers. Employers could provide detailed information on the jobs they offer and the workplace conditions at their worksites and NAAV workers could also post reviews of their employers--information on working conditions, unfamiliar crop-tasks, complaints, or commendations. This could and should replace the dysfunctional Interstate Job Clearance Order system.

Investments in a binational agricultural labor bulletin board/forum has promise as a market-driven alternative complement to other regulatory efforts to decrease fraud and abuse by intermediaries. A similar electronic bulletin board is currently being piloted by the Centro de Derechos del Migrante as part of its networking with H-2B workers. To be sure, not all prospective NAAV applicants will have Internet access but, even in small rural Mexican towns, Internet cafes are widely used, and smartphone penetration is quite high and increasing.



Employers could, as in other crowd-sourcing online forums, contest worker allegations and postings which were inaccurate or deemed unfair if they wished. We see this sort of non-governmental, non-formal “virtual marketplace” as an important element of nurturing more robust labor market dynamics—a benefit for employers and workers both.

### **Transition from the current H-2A Program to the NAAV program in the context of Immigration Reform in 2017**

The NAAV program would put in place a streamlined process to balance labor demand and supply—neither to “starve” agribusiness from access to new workers nor to “flood” the agricultural labor market with a massive wave of new foreign-born workers so as to depress current workers’ wages. As noted previously, we envision that, ultimately, a Federal Labor Commission will make annual determinations regarding level of admissions based on systematic, multi-faceted research to examine agricultural labor market developments.

A particular challenge in achieving this objective will be the transition from the current dysfunctional H-2A and H-2B guestworker programs to our proposed NAAV system. In the context of immigration reform it is important to “get it right” when balancing labor demand and supply for foreign labor. We propose a 3-year transition period to move from H-2A/H-2B programs into the new NAAV program. During this period, we propose that admissions of NAAV workers be capped at 120,000 per year. At the end of the transition period the Foreign Labor Commission would annually determine appropriate levels of admissions.

In the next several pages we describe some of the key details we envision for the transition from the current H-2A to the NAAV program.

### **Rationale for Provisional Level of NAAV admissions during a 3-year Transition Period**

Employers who currently rely heavily on manually-skilled foreign-born workers (e.g. in agriculture, construction, forestry, landscaping) have legitimate but exaggerated concerns about two threats to their labor supply:

- a) the inevitable aging of the current foreign-born agricultural workforce if there are no mechanisms for admission of new foreign-born workers
- b) the inevitable attrition of supplies of currently undocumented workers who, once legalized, will have greater labor market mobility than in the past.



Below we discuss these aspects of the agricultural labor supply in the context of immigration reform and our proposed approach to a transition period from the status quo to a reformed system under NAAV.

### ***Farm Labor Force Attrition due to Aging of the Current Foreign-born labor force***

“Background” attrition in the current foreign-born farm labor force can be estimated by assuming that the work life of a typical farmworker is about 25 years—e.g. that the average new foreign-born entrant into the U.S. farm labor force is 25 years old and that, on the average, each will work in farm work until he is 50 years old. This implies that there is labor force attrition of about 4% per year as workers “age out” of farm work.

Actual rates of “aging out” of farm work after 2017 might eventually be lower. For example, if legalization under immigration reform results in better farmworker access to preventive health care, better working conditions, and more effective employer strategies to provide upward career pathways within their operations for workers, each worker will be available for more years. Prolonging the effective working life of current farmworkers could, for example, decrease the attrition in the farm labor force by as much as one-third.

### ***Farm Labor Force Attrition resulting from Legalization as part of immigration reform***

Analysis of National Agricultural Worker Survey (NAWS) data shows that, despite agricultural employer worries that legalization under IRCA would lead to a mass exodus, in retrospect the actual SAW exit rate was modest. During the first 4 years after legalization 27% of the farmworkers who had legalized as SAWs exited, i.e. about 6.5% of the newly-legalized farm labor force per year (2012 analysis of NAWS data from 1989-2010). The historical data from 1992-2008 show that the SAW exit rate declined after the first 4 years and that the average attrition during the 16 year post-IRCA period that followed after the initial wave of SAW exiters was only about 2% per year. Furthermore, after this post-IRCA period, attrition decreased even further.

After immigration reform in 2017, it is very likely that the post-legalization exit of newly-legalized agricultural workers would be lower than in 1986 due to increasing expectations for English-language, reading and writing, and digital literacy skills in even lower-paid non-agricultural jobs.





Agricultural hourly wage rates are actually competitive with the hourly wages offered in non-agricultural jobs in “low skill” non-agricultural industry sectors which rely heavily on immigrant workers. Critical factors affecting retention of work-authorized employees relate more to availability of steady work, job security, quality of supervision, and workplace conditions. Here too, improved labor management practices have some promise in contributing to meeting industry labor needs.

### ***Aggregate Attrition in the Foreign-born U.S. Agricultural Labor Force***

In any case, the “aggregate attrition” for foreign-born workers in the U.S. farm labor force (aging + occupational migration) is at most 10.5% per year and might, in fact, be decreased by 2-3% per year if improved labor force management practices were more extensively used.

It is likely that the proportions of farmworkers leaving agriculture to find non-agricultural employment has been decreasing and will, in the future, decrease still more rapidly. The barriers confronting limited-English, minimally-educated, foreign-born farmworkers who seek to move into non-agricultural occupations post-legalization are much higher now than they were 30 years ago after passage of IRCA (due to ongoing escalation in 21<sup>st</sup> century workplace skills expectations).

About three-fourths of the farm labor force are foreign-born, meaning there are about 1.5 million foreign-born farmworkers in US agriculture. Therefore, it is reasonable to expect that no more than 155,000 farmworkers per year would leave farm work—either by aging out or by moving into a non-agricultural occupation. If there were continued improvements in farmworker access to health care, employment packages that included more fringe benefits, and ongoing efforts to coordinate employment across multiple sites, the attrition rate might fall to 6-7%, or about 100,000 per year.

Increasing reliance on new technology in agricultural production and increasing production unit size will result in a slightly increased influx of US workers into the growing segment of “middle skill” jobs in agriculture (e.g. field supervisors, checkers, equipment operators). So our best estimate of the need for foreign-born replacement workers for U.S. agriculture is that about 120,000 new foreign-born workers per year will be needed, a projected attrition of 5% per year from agricultural worker exits and 4% due to workforce aging, offset with an increase of 1% in US workers into new middle-skill positions in agriculture as new technology is deployed.

Our estimate of need for new foreign labor admissions conforms quite well to administrative data on current levels of request for foreign-born agricultural workers. Department of Labor



disclosure files on H-2A requests and certifications during the first two quarters of FY2016 suggest that in the period from FY2014 through FY2015 about 162,000 positions may have been

certified annually. Other estimates (**Ag Week** July 11, 2016) suggest that there were only about 116,000 H-2A positions certified in the most recent full year for which data are available (2014).

Portability of the NAAV visa would improve efficiency of the labor market, meaning that a NAAV worker who is authorized for year-round employment over a period of 3 years would generate more hours of farm labor per year than a current H-2A workers who is generally chained to a single employer (although those recruited by agricultural employer associations as in North Carolina may work for different employers). The transitional cap of 120,000 NAAV visas we propose is about 75% of the maximum level of H-2A positions certified in FY2015 and perhaps about 110% the actual level of H-2A admissions, since not all the H-2A positions certified were, in fact, filled.

Therefore, we believe that a provisional 3-year cap of 120,000 NAAV visas per year would be very close to actual labor market demand in the short run and that, in the long run, a systematic approach to monitoring industry labor need which yielded flexibility in annual caps of admissions would be effective in balancing labor demand and supply.

### ***Ongoing Admissions of Foreign-born Workers***

In the long run, it is uncertain what exact level of annual admissions of foreign-born workers would be needed to meet the needs of the agricultural industry. After IRCA, the initial SAW exit rate subsided—because many of the legalized workers planned to continue working in farm work, in some cases because they were happy with their employer and employment conditions, in other cases because they were unable to secure other employment, or a mixture of both.

After immigration reform in 2017 it would be important to track the post-legalization exit rate as it was post-IRCA. It would also be crucial to track market trends, changing production methods, and the numbers of foreign-born workers newly admitted under NAAV that chose to pursue the option of continuing in agriculture to eventually secure permanent residence, those who decided to return to their home countries after a period of time working in the U.S., and those who became shuttle migrants, coming to the U.S. for peak season work and then returning home.

The Foreign Labor Commission would make an initial, and subsequently, a “rolling” biennial determination of the annual number of NAAV visas to be made available in future years.



Carefully estimating an initial level for admissions and then adjusting these projections biennially would optimize cost-effectiveness. There would be less frequent determinations of labor market needs, but better ones, given a longer period to secure and analyze the underlying data for each determination. If labor shortages materialized, the Commission could increase NAAV admissions in subsequent years. If wages began to fall, admissions could be slowed.

**Mechanism for Issuing Visas during the H-2A Transition to the NAAV Program**

We propose that during Years 1-3 after passage of comprehensive immigration reform, which would incorporate provisions for the new North American Agricultural Visa program in lieu of the H-2A program, agricultural employers would be allowed to continue submissions of H-2A requests to the DOL Foreign Labor Certification Division while there is a transition to the new NAAV system where individual workers would be granted portable visas. The provisions of the transition would:

- Cap the number of H-2A requests which could be approved each year; the proposed caps are shown in **Table 1** below. They might vary substantially in future years, depending on market conditions, introduction of new production methods, etc.
- Require that the visas assigned to agricultural employers via the “legacy” H-2A process during each year of the transition be issued to the workers as NAAV visas, and once the original work assignment was satisfactorily completed, the worker could leave and find other work, as the visas would become portable during the remaining period of the 3-year term of the initial visa.

**Table 1-Issuance of NAAV visas during a 4-year period of transition from the H-2A Program to the new System (assuming CIR passage in 2017)**

Year	NAV visas issued in response to H-2A Requesters	Supplemental visas issued to individual NAAV applicants	Total new foreign-born entrants to agricultural labor force
2018	120,000	0	120,000
2019	80,000	40,000	120,000
2020	40,000	80,000	120,000



<b>Cumulative through 2020</b>	<b>240,000</b>	<b>120,000</b>	<b>360,000</b>
2022-as determined by Foreign Labor Commission	N/A	N/A	To be determined

**Summary Conclusion**

The NAAV program provides the opportunity for a win-win approach to managing agricultural labor supply. It is designed to take into account the needs of key stakeholders; agricultural producers, current US farmworkers and those legalized under comprehensive immigration reform, and newly-admitted foreign-born workers.

NAAV design allows federal tax dollars to be used more effectively than they are in the current dysfunctional, highly bureaucratic program. NAAV can decrease overall public expenditures on admission of foreign-born agricultural workers while at the same time increasing resources devoted to effective enforcement of current labor laws in agriculture.

NAAV provides a way to escape the tyranny of the status quo, a viable way to reform the H-2A and H-2B programs’ failed efforts to use regulatory micromanagement as a tool to overcome more than half a century of incremental band-aid “fixes” to the Bracero program, which had originally been meant simply as a temporary tool to overcome World War II labor shortages in agriculture.

NAAV incorporates provisions to overcome problems inherent in any program which provides new influxes of foreign-born workers to the U.S. labor market, but it takes a minimalist approach to regulation, which enhances employers’ freedom to recruit and hire productive workers and workers’ freedom to work for the employers who offer them the best wages and working conditions.

We firmly believe in the value of dialogue among stakeholders. We welcome discussion with interested organizations, policy analysts, and stakeholders as we move forward in refining details of the basic approach described here and provisions for transition to the new approach.