

COMMENT

DAIRY FARMS AND H-2A HARMS: HOW PRESENT IMMIGRATION POLICY IS HURTING WISCONSIN AND IMMIGRANT WORKERS

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The Wisconsin Dairy Industry is in a sour situation because it lacks a sufficient legal workforce. Since the advent of new milking technology, a push for industrialization, and the regulation of milk prices, the number of farms in America's Dairyland has fallen, but their size has dramatically increased. Simultaneously, a shadow market of undocumented dairy workers emerged in Wisconsin, as farmers were desperate to fill positions in their milking parlors. Farmers in other agricultural sectors facing domestic labor shortages have the option of employing foreign workers through the H-2A agricultural guest worker program to fill their labor needs. However, this option is unavailable to dairy farmers, rendering them with no sustainable legal options for hiring foreign workers to meet labor demands. Additionally, even if dairy farmers could hire H-2A foreign workers, the current H-2A program features serious flaws including rampant worker exploitation, high cost, and an unwieldy application process.

This Comment proposes redesigning the H-2A guest worker visa program from a federally-sponsored model to a state-sponsored model, utilizing the principles of federalism, delegation, and sub-delegation. The state-sponsored model offers solutions to three problems: Wisconsin dairy worker shortages; Wisconsin dairy's relationship with undocumented workers; and H-2A failings. First, the state-sponsored guest worker program will offer Wisconsin dairy farmers a legal option to fulfill their labor needs and will reap economic benefits in Wisconsin and the United States. Second, the new H-2A program will allow for the participation of undocumented workers and provide lasting opportunities for legal immigration. Third, this state-sponsored model will correct the abuses and frustrations prevalent in the current H-2A program, through flexibility, state oversight, and employer de-centralization. Overall, this Comment's proposed state-sponsored H-2A program will lead to greater protection of workers, economic benefit, and increased national security.

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INTRODUCTION

What will happen when the dairy state has to close its dairy farms due to a lack of workers? This is the question currently plaguing Wisconsin dairy farmers, and all dairies throughout the United States.¹ Wisconsin, America's Dairyland, is facing a crisis as dairy farms in rural communities struggle to find consistent and reliable workers.² Dairy farmers are hard-pressed to attract Americans to work on their farms due to the declining rural population, the increasing size of

1. See Lee Bergquist, *Wisconsin Farm Group Assails Failure of House to Pass Immigration Bill*, MILWAUKEE J. SENTINEL (June 27, 2018, 6:42 PM), <https://www.jsonline.com/story/news/2018/06/27/wisconsin-farm-group-assails-failure-house-pass-immigration-bill/740496002/> [<https://perma.cc/57XG-ZCMB>].

2. Julie Grace, *Wisconsin Dairy Navigates Gaps in Immigrant Labor Policy*, WIS. ST. FARMER (Aug. 24, 2018, 12:07 PM), <https://www.wisfarmer.com/story/news/state/2018/08/24/where-migrants-documented-undocumented-fit-into-wis-ag-workforce/1085101002/> [<https://perma.cc/FJ3P-UYAJ>].

dairies, and the demanding physical labor in extreme temperatures that the work requires.³ Ordinarily, agricultural employers with labor shortages can request visas for foreign workers, but dairy farmers cannot. Agricultural work is considered “un-skilled,” a category which has only 10,000 resident visas available annually and a wait list approximately twenty years long.⁴ Farmers in other fields can apply for H-2A temporary agricultural worker visas instead of petitioning for “un-skilled” resident visas when they have domestic labor shortages.⁵ However, although the statutory definition of “agricultural” work explicitly includes “dairying,” dairy work does not meet the H-2A “seasonal” or “temporary” requirement because it is a year-round endeavor.⁶ Furthermore, dairy workers do not qualify for the other guest worker visa, the H-2B visa, because the H-2B visa is limited to non-agricultural workers.⁷

The Wisconsin dairy industry is just one example of an industry lost in the shuffle of the federal guest worker program. In addition, H-2A employers gripe about the cost and burdensome application requirements and H-2A workers report prevalent mistreatment. These deficiencies in the federal guest worker program lead to economic struggles and continued dependence on undocumented individuals. Ultimately, this Comment will propose changes to the current H-2A guest worker program. Specifically, it will outline a program that is state-run, but federally overseen, and that will be responsive to state-specific agricultural needs. This Comment further argues that incorporating a pathway to lawful permanent residence, employer decentralization, and participation of undocumented individuals will benefit employers, workers, Wisconsin, and the country as a whole.

Given the current political climate surrounding immigration, those wary of immigration reform will be quick to critique this program. For example, lawmakers may be hesitant to support a state-based model for guest worker visas because the federal government has historically controlled most aspects of immigration. In response, this proposal acknowledges that barrier and recognizes that the proposal’s success depends on federal cooperation and agreement to relinquish some

3. See Bergquist, *supra* note 1.

4. JILL HARRISON ET AL., U. WIS. MADISON PROGRAM ON AGRIC. TECH. STUDIES, *Briefing Paper No. 5, Legal Issues Facing Immigrant Dairy Workers in Wisconsin*, in CHANGING HANDS: HIRED LABOR ON WISCONSIN DAIRY FARMS 1, 2 (2009).

5. 8 U.S.C. §§ 1101(a)(15)(H)(ii), 1188(i)(2) (2012).

6. *Id.*; 29 U.S.C. § 203(f) (2012); Merrill Bent, Note, *A Land of Milk and Honey: Dairy Farms, H-2A Workers, and Change on the Horizon*, 35 VT. L. REV. 741, 742–43 (2011).

7. See Bent, *supra* note 6, at 743.

immigration power to the states. Other critics might think that state programs would be difficult to oversee federally, or that fifty different guest worker programs would lead to an even more confusing immigration schema. In reality, by transitioning H-2A control from the federal government to the states, federal regulation and responsibility would decrease, and the new regulating body, the state, would be responsible for overseeing only their state's portion of the program. Moreover, this proposal is limited to agricultural guest worker visas, a relatively small subset of all U.S. immigration.

Furthermore, workers' rights advocates may be concerned that state sponsorship of guest worker programs would not resolve the mistreatment of guest workers. This proposal specifically addresses the vulnerability of guest workers and offers two solutions to mitigate that concern: authorization for guest workers to change employers within the state's H-2A program, and allowing green card eligibility after five years of participation in the H-2A program. The state-sponsored H-2A program would be a step toward the humanization of guest workers and would allow for specialized responses to state-specific needs.

This Comment contains three parts. Part I outlines the history of guest worker programs in the United States and the H-2A visa program. It also examines the Wisconsin dairy industry, explaining its ineligibility for the H-2A program, labor shortage, reliance on undocumented workers, and desire to have a guest worker program that can serve its needs. Part II proposes modifications to the H-2A visa program by transferring "ownership" of the program from the federal government to the states. It addresses possible constitutional issues and offers a comparison to the Canadian Provincial Nominee Program. Part III demonstrates how the state-sponsored H-2A program provides solutions for the Wisconsin dairy labor shortage, the problem of undocumented labor, and the failures of the H-2A program.

I. THE H-2A IN THE USA

The United States has a rich history of offering guest worker programs to foreign workers, one of which is the H-2A visa program. Guest worker programs are essential to the United States economy and ensure a flow of workers, even when national unemployment is low. However, the current guest worker programs, in particular H-2A, are far from perfect. They ignore the needs of industries that desperately require guest workers and fail to adequately protect vulnerable workers. This Part proceeds in five sections. First, it outlines the history of the guest worker programs in the United States and provides a framework for why the United States chooses to sponsor guest workers—primarily due to shortages of U.S. workers. Second, this Part focuses on the H-2A visa program, summarizing qualification criteria and benefits. The

final three sections present three problems arising from critical faults in the H-2A program: dairy exclusion from H-2A; an increased dependence on undocumented labor; and troubles within the H-2A program itself.

A. A Brief Overview of Guest Worker Programs—Got Labor?

The United States has the largest and longest-running temporary guest worker program in the world.⁸ Historically, the United States relied on guest worker programs to remedy short-term labor shortages or stimulate economic growth for a defined period of time.⁹ Then, in 1952, Congress passed the Immigration and Nationality Act (INA), which instated the H-2 guest worker visa program.¹⁰ In 1986, the Immigration Reform and Control Act (IRCA) amended this provision of the INA to divide the H-2 program into the H-2A and the H-2B programs.¹¹ Since 1986, both the H-2A and H-2B programs have operated continuously.

The H-2A and H-2B visa programs have grown considerably as demand for foreign workers has increased in the United States.¹² In 2013, the U.S. Department of Labor (DOL) certified 98,821 H-2A visas, in 2017, 161,583, and in 2018, 242,762.¹³ The demand for foreign workers increased because growth in the overall skill level of American workers created a deficiency of low-skilled workers.¹⁴

8. Andrew J. Elmore, *Egalitarianism and Exclusion: U.S. Guest Worker Programs and a Non-Subordination Approach to the Labor-Based Admission of Nonprofessional Foreign Nationals*, 21 GEO. IMMIGR. L.J. 521, 523–24 (2007).

9. Mariana C. Minaya, *American Dreams, Trafficking Nightmares*, 2 TENN. J. RACE, GENDER & SOC. JUST. 64, 87–88 (2014).

10. Bent, *supra* note 6, at 743. *See also* §§ 1101(a)(15)(H)(ii), 1188(i)(2).

11. *Id.*

12. Jennifer Gordon, *Regulating the Human Supply Chain*, 102 IOWA L. REV. 445, 456–57 (2017).

13. DEP'T OF LABOR, OFFICE OF FOREIGN LABOR CERTIFICATION ANNUAL REPORT 2016, 40 (2016) https://www.foreignlaborcert.doleta.gov/pdf/OFLC_Annual_Report_FY2016.pdf [https://perma.cc/9UXU-MBVU] [hereinafter ANNUAL REPORT 2016] (statistics for 2013); U.S. DEP'T OF STATE, REPORT OF THE VISA OFFICE 2017: TABLE XVI(B) NONIMMIGRANT VISAS ISSUED BY CLASSIFICATION (2017) <https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2017AnnualReport/FY17AnnualReport-TableXVIB.pdf> [https://perma.cc/75Y8-QHSZ] (statistics for 2017); U.S. DEP'T OF LABOR, OFFICE OF FOREIGN LABOR CERTIFICATION: H-2A TEMPORARY AGRICULTURAL LABOR CERTIFICATION PROGRAM – SELECTED STATISTICS, FY 2018 YTD (2018) https://www.foreignlaborcert.doleta.gov/pdf/PerformanceData/2018/H-2A_Selected_Statistics_FY2018_Q4.pdf [https://perma.cc/9AC6-C9ET] [hereinafter H-2A STATISTICS 2018] (statistics for 2018).

14. Michael A. Clemens & Lant Pritchett, *Temporary Work Visas: A Four-Way Win for the Middle Class, Low-Skill Workers, Border Security, and Migrants*,

However, low-skilled work remains an essential part of the U.S. economy.¹⁵ Industries such as agriculture, tourism, and construction cannot outsource work to other countries because they require the physical presence of low-skilled workers.¹⁶ Other industries featuring high-skilled workers, such as education, medicine, and business, require complementary low-skilled workers, like health care aids, childcare workers, and janitors to function properly.¹⁷ In response, the H-2A program provides visas for seasonal agricultural guest workers while the H-2B program covers temporary workers in low-skilled non-agricultural work.¹⁸

Unauthorized workers inevitably fill low-skilled work that U.S. or lawful foreign workers do not fill.¹⁹ According to the Center for Global Development, “the real alternative to a formal program for low-skill workers is a labor shortage or a black market.”²⁰ Temporary guest worker programs supplement workers for low-skilled, non-substitutable positions that often support higher skilled jobs in the United States.²¹ Therefore, guest worker programs are an essential element of the immigration scheme in the United States and the efficacy of the programs must be addressed when discussing how to reform immigration policy.²²

B. The H-2A Visa Process

Although the H-2A and H-2B visa programs both stem out of the old H-2 visa program, they have different criteria for use and are subject to different regulations.²³ H-2A visa holders are agricultural

CTR. FOR GLOBAL DEV. (2013), <https://www.cgdev.org/sites/default/files/time-bound-labor-access.pdf> [<https://perma.cc/HPF9-UBHH>].

15. Dale W. Jorgenson et al., *Education, Participation, and the Revival of the U.S. Economic Growth* 8, 31 (Nat'l Bureau of Econ. Research, Working Paper No. 22453, 2016), <http://www.nber.org/papers/w22453> [<https://perma.cc/37TK-CZ46>].

16. Gordon, *supra* note 12, at 454.

17. Clemens & Pritchett, *supra* note 14, at 3.

18. Gordon, *supra* note 12, at 456.

19. Clemens & Pritchett, *supra* note 14, at 3. See Keith Aoki & John Shuford, *Welcome to Amerizona – Immigrants Out!: Assessing “Dystopian Dreams” and “Useable Futures” of Immigration Reform, and Considering Whether “Immigration Regionalism” is an Idea whose Time Has Come*, 38 FORDHAM URB. L.J. 1, 54 (2010).

20. Clemens & Pritchett, *supra* note 14, at 5.

21. *Id.* at 3.

22. See Sanam Yasseri, Note & Comment, *Out of the Shadows: A Call to End the Exploitation of Non-Agricultural Migrant Workers by Reforming the U.S. H-2B Guest Worker Program*, 15 SW. J. INT'L L. 361, 382 (2009).

23. *Sweet Life v. Dole*, 876 F.2d 402, 406 (5th Cir. 1989).

foreign workers who are temporarily or seasonally employed.²⁴ First, to qualify for an H-2A visa, the applicant must be a non-immigrant.²⁵ This means that the H-2A applicant has “residence in a foreign country which he has no intention of abandoning” or is not attempting to enter the United States with the purpose of immigrating permanently.²⁶ The H-2A applicant cannot have “dual intent” for immigration purposes, meaning that she or he cannot be admitted with the intention of working in the United States temporarily while also pursuing a path to lawful permanent residence.²⁷

Second, H-2A workers must “perform agricultural labor or services.”²⁸ The term “agriculture” encompasses all the branches of farming and specifically includes “dairying.”²⁹ Third, H-2A workers can only work in employment that is “temporary or seasonal.”³⁰ Agricultural employment is “temporary” when the employment need spans one year or less and “seasonal” when tied to a cyclical growing pattern that requires more workers than necessary for usual business operations.³¹ Employers who hire temporary or seasonal agricultural workers can only apply for H-2A visas for foreign workers when they cannot find adequate numbers of Americans who are “able, willing, and qualified” to perform such labor and employing foreigners would not adversely affect the wages or working conditions of U.S. workers.³² The overall aim is that the employment of foreign workers should not prejudice American workers, but rather fill a legitimate labor need that American workers are not fulfilling.³³

An employer proves its legitimate need with a labor certification from the DOL, showing that the employer’s request meets the statutory requirements for employing H-2A workers.³⁴ First, the employer starts this process no less than sixty and no more than seventy-five days before the proposed worker enters the United States by submitting a job order—listing the job’s benefits, wages, responsibilities, working conditions, and period of employment—to the appropriate State

24. 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1188(i)(2) (2012); 8 C.F.R. § 214.2(h)(1)(ii)(C) (2019).

25. §§ 1101(a)(15)(H)(ii)(a), 1188(i)(2).

26. *Id.*

27. Other temporary visas, such as the H-1B visa, allow for dual intent. *See* Rick Su, *Immigration as Urban Policy*, 38 *FORDHAM URB. L.J.* 363, 383 (2010).

28. 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1188(i)(2).

29. *Id.*; 29 U.S.C. § 203(f) (2012).

30. §§ 1101(a)(15)(H)(ii)(a), 1188(i)(2); 8 C.F.R. § 214.2(h)(1)(ii)(C) (2019).

31. 8 C.F.R. § 214.2(h)(5)(iv)(A) (2019).

32. 8 U.S.C. §§ 1188(a)(1)(A)–(B) (2012).

33. Bent, *supra* note 6, at 743–45.

34. *Id.* at 744.

Workforce Agency within the state where the work will occur.³⁵ The job order must include free housing, kitchen facilities, workers compensation insurance, guaranteed work for three-fourths of the contract period, and reimbursement for international transportation costs.³⁶ The job also must pay workers the prevailing wage rate, the federal or state minimum wage, or the adverse effect wage rate, whichever is highest.³⁷

Next, the employer files an H-2A application with the DOL's Office of Foreign Labor Certification National Processing Center no less than 45 days before the work start date.³⁸ Then, once the employer receives a Notice of Acceptance of the H-2A application from the DOL (usually within seven days), the employer conducts active recruitment of U.S. workers through advertisements and soliciting former U.S. employees.³⁹ After that, the employer completes the temporary labor certification process by submitting proof of recruitment efforts, certification of housing standards, and verification of workers compensation coverage to the DOL.⁴⁰ When the DOL approves the H-2A application and grants full certification, the employer pays to the DOL a flat fee of one-hundred dollars and an additional ten dollars per worker, with a maximum of \$1000.⁴¹ There is no cap on the number of H-2A visas certified each year.⁴² After receiving the labor certification, the employer files the I-129, Petition for a Nonimmigrant Worker, with U.S. Citizenship and Immigration Services (USCIS) and pays a \$460 flat filing fee for all H-2A workers requested.⁴³ USCIS then conducts

35. Fritz M. Roka et al., *Pre-employment Costs Associated with H-2A Agricultural Workers and the Effects of the '60-minute Rule,'* 20 INT'L FOOD AND AGRIBUSINESS MGMT REV. 335, 338–39 (2017). Wisconsin's State Workforce Agency is the Wisconsin Department of Workforce Development.

36. 20 C.F.R. § 655.122 (2019).

37. § 655.120(a). The adverse effect wage rate is “equal to the annual weighted average hourly wage rate for field and livestock workers (combined) for [each] region as published annually by the United States Department of Agriculture.” *Adverse Effect Wage Rates — Year 2019*, U.S. DEP'T OF LABOR (Dec. 21, 2018), <https://www.foreignlaborcert.doleta.gov/adverse.cfm> [<https://perma.cc/JP9N-JMJQ>]; Lindsay M. Pickral, Comment, *Close to Crucial: The H-2B Visa Program Must Evolve, but Must Endure*, 42 U. RICH. L. REV. 1011, 1019 (2008).

38. 20 C.F.R. § 655.130.

39. §§ 665.143, .151–.53; Roka et al., *supra* note 35, at 341 (estimating that advertising costs \$10 per worker).

40. §§ 655.122, .160–.65, .171.

41. § 655.163.

42. 8 U.S.C. § 1184(g) (2012); Minaya, *supra* note 9, at 90.

43. *I-129 Petition for a Nonimmigrant Worker*, USCIS (2019), <https://www.uscis.gov/i-129> [<https://perma.cc/8E9Q-UA8F>]. See also DEP'T OF HOMELAND SEC., INSTRUCTIONS FOR PETITION FOR NONIMMIGRANT WORKER (2019), <https://www.uscis.gov/sites/default/files/files/form/i-129instr.pdf> [<https://perma.cc/7V3V-Y96Z>].

background checks on the requested workers.⁴⁴ Upon approval of the I-129, the employer applies for the H-2A visa with the U.S. Department of State and pays \$190 per visa.⁴⁵ Many employers hire third party Farm Labor Contractors (FLCs) to help them through this process.⁴⁶

The H-2B visa is the H-2A's counterpart in industries such as tourism, hospitality, forestry, landscaping, and construction.⁴⁷ H-2B workers can only "perform nonagricultural work of a temporary or seasonal nature, if there are not sufficient workers who are able, willing, qualified, and available . . . to perform such services."⁴⁸ Like H-2A employers, H-2B employers apply for labor certifications through the DOL, and then petition USCIS and the Department of State for visas.⁴⁹ In contrast, regulations governing H-2B work offers do not require the same benefits afforded to H-2A workers.⁵⁰ Also, the number of H-2B visas certified each year is statutorily capped at 66,000.⁵¹ However, for the 2019 fiscal year, the Trump administration expanded the cap to 96,000.⁵² Because the H-2B is not relevant to dairy work, it is not the subject of this Comment.

C. The Dairy Industry Problem: Why the H-2A Does Not Mix with Milk

The dairy industry is in a sour position because dairy workers do not qualify for either the H-2A or the H-2B guest worker visas.⁵³ Although the definition of "agriculture" includes "dairying," the dairy

44. Roka et al., *supra* note 35, at 340.

45. *Id.* at 343; U.S. DEP'T OF STATE *Temporary Worker Visas*, <https://travel.state.gov/content/travel/en/us-visas/employment/temporary-worker-visas.html> [<https://perma.cc/7N5N-PH2D>]. The employer may pay for the \$190 visa fee directly, or reimburse the worker for the fee after the worker's arrival. 20 C.F.R. 655.135(j) (2019); *see also* Temporary Agricultural Employment of H-2A Aliens in the United States, 75 Fed. Reg. 6884, 6925 (Feb. 12, 2010).

46. Roka et al., *supra* note 35, at 336, 338.

47. *See* Pickral, *supra* note 37, at 1014.

48. 8 C.F.R. § 214.2(h)(ii)(D) (2019).

49. Pickral, *supra* note 37, at 1017.

50. *Castellanos-Contreras v. Decatur Hotels LLC*, 622 F.3d 393, 400–04 (5th Cir. 2010) (holding that employers were not required to reimburse employees for visa costs, relocation expenses, or recruitment fees for H-2B workers, even though H-2A workers receive some of these benefits).

51. 8 U.S.C. § 1184(g)(1)(B) (2018).

52. 8 C.F.R. § 214.2(h)(6)(x)(A) (2019). Also, Trump hotels have hired H-2B workers in the past and his Mar-a-Lago Florida Club hired seventy-eight H-2B workers in 2018. Heather Long, *Trump Administration Nearly Doubles H-2B Guest Worker Program, Which Brings Many Mexican Workers*, WASHINGTON POST, (Apr. 6, 2019, 10:44 AM), https://www.washingtonpost.com/business/2019/04/06/trump-administration-nearly-doubles-h-b-guest-visa-program-which-brings-many-mexican-workers/?utm_term=.66d2f006533e [<https://perma.cc/VG48-537R>].

53. Bent, *supra* note 6, at 742–43.

industry operates seven days a week, 365 days per year and thus cannot be classified as “seasonal” or “temporary.”⁵⁴ Because “[a] cow does not take a day off,” the dairy industry is exempt from participation in this visa program.⁵⁵ Recently, however, dairy farms in Wisconsin, and furthermore, the United States, lack sufficient U.S. workers and are demanding options to hire foreign workers.⁵⁶

Since the late 1990s and early 2000s, industrialization, technology, and the regulation of milk prices have changed the landscape of dairying in Wisconsin.⁵⁷ Faced with a growing demand for milk, small family farms either employed economies of scale principles and grew their herds, or conversely, closed their doors when they could not keep up.⁵⁸ To illustrate, the number of dairy farms nationwide has shrunk from 1.1 million in 1964 to 41,809 in 2016.⁵⁹ Simultaneously, the average herd size has grown considerably, with farms of over 1000 cows producing the majority of U.S. milk each year.⁶⁰

With larger herds and larger farms, came a pressing labor demand for Wisconsin dairies.⁶¹ The decline of rural populations, a low unemployment rate, long hours, and the hard labor in extreme conditions involved in dairy farming created shortages of domestic workers in the rural areas where dairies reside.⁶² Farmers, needing a

54. 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1188(i)(2) (2018); 8 C.F.R. § 214.2(h)(ii)(C) (2019); Bent, *supra* note 6, at 742–43.

55. Dee J. Hall & Riley Vetterkind, *Why Immigrant Workers Became the Backbone of Wisconsin's Dairy Business: Signature Industry Faces Increasing Strain from Reliance on Undocumented Labor*, WIS. CTR. FOR INVESTIGATIVE JOURNALISM, (Oct. 6, 2017, 6:00 AM), <https://www.wiscontext.org/why-immigrant-workers-became-backbone-wisconsins-dairy-business> [<https://perma.cc/L44D-JZDF>] (quoting Chuck Ripp, a Wisconsin a dairy farm owner).

56. Bent, *supra* note 6, at 747; Alexandra Hall, *Under Trump, Wisconsin Dairies Struggle to Keep Immigrant Workers*, WIS. PUB. RADIO, (Mar. 16 2017, 11:30 AM), <https://www.wpr.org/under-trump-wisconsin-dairies-struggle-keep-immigrant-workers> [<https://perma.cc/2GRC-XCV6>] (“Tim O’Harrow, a dairy farmer in Oconto Falls [Wisconsin], says the biggest issue he worries about every day is having enough people to milk his 1,500 cows.”); Bergquist, *supra* note 1.

57. See JULIE C. KELLER, *MILKING IN THE SHADOWS: MIGRANTS AND MOBILITY IN AMERICA’S DAIRYLAND* 19 (2019).

58. *Id.* at 23–24.

59. *Id.* at 19.

60. *Id.*

61. *Id.* at 24–26.

62. Grace, *supra* note 2. An ongoing debate continues about the cause of labor shortages and the role that immigrants play therein. For two differing points of view on this debate, compare Hall & Vetterkind, *supra* note 55 (“[I]t was a matter of what wages needed to be paid to get people to do onerous jobs that most people don’t want to do . . . The labor market for the dairy industry in Wisconsin is the same as any other labor market . . . If demand outstrips supply, then the price — of labor in this case — must increase to meet demand.”) (quoting Neil Rainford, a labor activist who stands for the supposition that if dairy farms increased their wages, they would not have

higher quantity and better quality of workers, moved away from relying solely on family members or local hired hands and turned their sights to immigrant workers.⁶³ In 2009, immigrants composed forty percent of Wisconsin's dairy workforce and yet twenty percent of farms experienced a labor shortage.⁶⁴ In 2015, fifty-one percent of dairy workers nationwide were immigrant laborers.⁶⁵

When employers cannot fill their labor gap with U.S. workers or with foreign workers legally authorized to work in the United States, they turn to undocumented workers.⁶⁶ Nationwide, an estimated fifty percent of all agricultural farm workers do not have work authorization.⁶⁷ Wisconsin dairy farms are no different.⁶⁸ Employers often do not truly know if they are employing undocumented or documented workers due to the prevalent use of false green cards and social security cards, making employment of undocumented workers difficult to track.⁶⁹ However, a 2015 Texas A&M University study

trouble recruiting U.S. workers) with Hall & Vetterkind, *supra* note 55 (“[I]mmigrant labor ‘keeps the economy of rural Wisconsin humming’ and ‘it is not replaceable by domestic labor — it’s not going to happen.’”) (quoting Brad Barham, a professor of agricultural economics at University of Wisconsin-Madison); FLYNN ADCKOCK, ET AL., THE ECONOMIC IMPACTS OF IMMIGRANT LABOR OF U.S. DAIRY FARMS 2, 20 (2015) (reporting that dairy farms hiring immigrants pay higher wages than the national average).

63. KELLER, *supra* note 57, at 25–26.

64. Grace, *supra* note 2. For reference, in 2015, immigrants in Wisconsin made up 5.9 percent of Wisconsin's overall labor force. IMMIGRANTS IN WISCONSIN, AM. IMMIGR. COUNCIL (2017). <https://www.americanimmigrationcouncil.org/research/immigrants-in-wisconsin> [https://perma.cc/SAU9-DWX4]. Approximately 80,000 of Wisconsin's immigrants are undocumented residents, which is twenty-seven percent of Wisconsin's immigrant population and 1.3 percent of the state population. *Id.* See also Bent, *supra* note 6, 747–48.

65. ADCKOCK, ET AL., *supra* note 62, at 2.

66. Bent, *supra* note 6, at 748.

67. TRISH HERNANDEZ & SUSAN GABBARD, FINDINGS FROM THE NATIONAL AGRICULTURAL WORKERS SURVEY (NAWS) 2015–2016: A DEMOGRAPHIC AND EMPLOYMENT PROFILE OF UNITED STATES FARMWORKERS (Jan. 2018), https://www.doleta.gov/naws/research/docs/NAWS_Research_Report_13.pdf [https://perma.cc/8DG9-4FYD]. Of the farm workers with work authorization, not including H-2A workers, twenty-nine percent are U.S. Citizens, twenty-one percent are Lawful Permanent Residents, and one to two percent participate in a visa program. *Id.* at 5; KIRK KARDASHIAN, MILK MONEY: CASH, COWS, AND THE DEATH OF THE AMERICAN DAIRY FARM 136 (2012).

68. Grace, *supra* note 2.

69. See Alexia Fernández Campbell, *The Truth About Undocumented Workers and Taxes*, THE ATLANTIC (Sept. 12, 2016), <https://www.theatlantic.com/business/archive/2016/09/undocumented-immigrants-and-taxes/499604/> [https://perma.cc/4YZE-N2HE]. See also Miriam Jordan, *8 Million People Are Working Illegally in the U.S. Here's Why That's Unlikely to Change.*, N.Y. TIMES (Dec. 11, 2018), <https://www.nytimes.com/2018/12/11/us/undocumented-immigrant-workers.html> [https://perma.cc/KZ4V-TR69].

reported that seventy-one percent of dairy farmers said they had low or medium confidence in the validity of the employment documents of their workers.⁷⁰ In addition, in interviews with Wisconsin dairy farmers in 2011 and 2012, researcher Julie C. Keller found that some farmers gave workers loans to “get [their] papers in order” or “‘arrange’ the documents needed for hiring”—euphemisms for purchasing false documents.⁷¹ She also found that Wisconsin farmers often lent money to their workers to facilitate their border crossing.⁷² These farmers were “complicit in the act of smuggling by funding the process for their labor needs.”⁷³ Wisconsin dairy farmers are not blind to the fact that they hire undocumented workers, and furthermore, rely on the personal recommendations of prior undocumented immigrant workers when making hiring decisions.⁷⁴

Wisconsin dairy farmers “clearly benefit[]” from hiring immigrant workers.⁷⁵ Farmers report more time off, a focus on management instead of filling in shifts, less money spent on recruitment efforts, ease of mind by having reliable workers, less turnover, and less time spent training.⁷⁶ Consequently, dairy farms rely on immigrants to run their operations and end up hiring immigrants year after year.⁷⁷ Regardless, farms shoulder increased fear of immigration “crackdowns that could jeopardize their livelihoods” as farm raids and deportations of undocumented workers have ramped up in the recent years.⁷⁸ “[F]or the farmer who wakes up one morning to find all of his workers arrested, and 1,200 cows waiting to be milked, urgency is an understatement.”⁷⁹

The American Dairy Coalition (ADC), a nationwide coalition of dairy farmers based in Green Bay, Wisconsin reported in June of 2018 that the dairy industry needs a guest worker program to stay in

70. See ADCOCK, ET AL., *supra* note 62, at 10.

71. KELLER, *supra* note 57, at 12, 39–41.

72. *Id.* at 41–43.

73. *Id.* at 40.

74. *Id.* at 37–39.

75. *Id.* at 28.

76. *Id.* at 28–29.

77. See Grace, *supra* note 2 (suggesting that some employers prefer to employ immigrants because of their work ethic and because they are easier to manage than U.S. workers due to their likelihood to not “ruffle any feathers” or otherwise advocate for themselves); *Without Immigrant Workers, Who Will Milk the Cows?*, DAIRY HERD MGMT., (Jan. 17, 2011, 10:57 PM), <https://www.dairyherd.com/article/without-immigrant-workers-who-will-milk-cows>.

78. Grace, *supra* note 2. See also ADCOCK, ET AL., *supra* note 62, at 11 (the majority of farms surveyed have a high concern of immigration raids or ICE enforcement).

79. KARDASHIAN, *supra* note 67, at 134.

business.⁸⁰ The president of this group said that “ADC is extremely disappointed and frustrated with the lack of desire to move forward a guest-worker program to ensure the dairy industry has an adequate labor force to feed the world.”⁸¹ Farmers worry about how immigration policies affect their farms and the impact that these policies will have on their immigrant workers.⁸² Furthermore, a 2010 U.S. Department of Agriculture study demonstrated overwhelming support by dairy farmers with herds of 500 or more cows for a guest worker program to include dairy work.⁸³ In addition, smaller farms in Wisconsin report that they would have to close their barn doors if they lost their immigrant workers who are suspected to be undocumented.⁸⁴

The success and stability of the dairy industry is critical to the U.S. economy.⁸⁵ Overall, the dairy industry contributes more than \$206.09 billion to the economy, which is about one percent of the GDP and directly creates 977,727 jobs.⁸⁶ The Wisconsin dairy industry adds more than \$43.4 billion to Wisconsin’s economy annually, comprises over 9,400 farms and 400 dairy processors, and employs about 78,900 people.⁸⁷ Also, Wisconsin is the second largest producer of milk in the United States and America’s largest producer of cheese.⁸⁸ Eliminating the immigrant labor on dairy farms nationally would decrease the total

80. See Bergquist, *supra* note 1; *American Dairy Coalition Requests House Leadership to Stand by Their Promise*, WIS. ST. FARMER (July 1, 2018, 5:15 PM), <https://www.wisfarmer.com/story/opinion/contributors/2018/07/01/american-dairy-coalition-house-leadership-should-stand-promise/749667002/> [https://perma.cc/9J9K-WAZY].

81. Bergquist, *supra* note 1.

82. DAIRY HERD MGMT., *supra* note 77.

83. U.S. DEP’T OF AGRIC., 2010 DAIRY PRODUCER SURVEY—ADDENDUM (2010).

84. DAIRY HERD MGMT., *supra* note 77; Hall, *supra* note 56 (“If ICE came in here and checked my employees and found that they were undocumented and those [ten] people left, my next option of course is to close down . . . and try to find a market for my cows and sell out. And I wouldn’t be able to farm anymore and it would just about kill me. I have no choice. I mean the cows have to be milked. I know no other source of labor.”) (quoting John Rosenow, a Wisconsin dairy farmer).

85. A 2014 study by Texas A&M University predicted catastrophic losses for the dairy industry and the national economy in general if dairy farms were to lose their immigrant workers. See ADCKOCK, ET AL., *supra* note 62, at 2.

86. IDFA *Quantifies Economic Impact on Dairy – and It’s a Powerful Picture*, INT’L DAIRY FOODS ASS’N (Aug. 2, 2017), <https://www.idfa.org/news-views/headline-news/article/2017/08/02/idfa-quantifies-economic-impact-of-dairy-and-it-s-a-powerful-picture> [https://perma.cc/R3XE-K4HA]; but see ADCKOCK, ET AL., *supra* note 62, at 15 (finding the total economic impact of dairy to be \$136.9 billion in 2015).

87. Rob Kleman, Opinion, *We All Rely on Dairy for the Impact It Has on Wisconsin*, USA TODAY NETWORK—WIS. (June 15, 2017, 2:15 PM), <https://www.fdlreporter.com/story/opinion/columnists/2017/06/15/commentary/400639001> [https://perma.cc/KR7S-V8GG].

88. Hall, *supra* note 56.

economic output by \$32.1 billion, increase retail milk prices by an estimated 90.4 percent, and eliminate 204,208 jobs.⁸⁹ If Wisconsin wishes for its cheesy legacy to endure, it must promote a policy that supports dairy farms.

D. The Dairy Worker Problem: Udderly Dependent on Employers

Dairy farmers and their undocumented employees do not equally share the benefits and risks of employing undocumented labor. In contrast, the “real costs of this risky work . . . are absorbed by migrant workers rather than employers,” starting before workers leave their home countries.⁹⁰ First, undocumented workers fleeing poverty secure funds to pay for a *coyote*⁹¹ to help them cross the border, often putting up their houses or land as collateral for loans.⁹² Migrants pay large amounts of money, ranging from \$3,000 to \$10,000, to *coyotes* to be smuggled into the United States, and on their journey face violence and great danger.⁹³ Since 2000, more than 6,000 people have been found dead in the desert trying to cross the border between the United States and Mexico.⁹⁴ Due to the perils of crossing the border, once in the United States, migrants often stay for many years and are unable to take trips back home.⁹⁵

Upon arrival to Wisconsin, undocumented dairy workers often have a job lined up and live in accommodations on the farm grounds or close to the farm, just like H-2A workers.⁹⁶ Dairy workers on average work eight hours per day, seven days per week, and earn about \$750 per two weeks, although it is not uncommon to work over sixty hours per week.⁹⁷ If living on the farm, farmers deduct “rent” from their paycheck.⁹⁸ Legally, like all Wisconsin agricultural workers, labor regulations do not guarantee dairy workers a day off, nor do they require employers to pay overtime.⁹⁹

89. ADCOCK, ET AL., *supra* note 62, at 13, 20.

90. KELLER, *supra* note 57, at 36–37.

91. *Coyotes* are individuals who facilitate the illicit border crossing process. *Id.* at 45, 75.

92. *Id.* at 42.

93. JILL HARRISON ET AL., U. WIS. MADISON PROGRAM ON AGRIC. TECH. STUDIES, *Briefing Paper No. 2, A Look into the Lives of Wisconsin's Immigrant Dairy Workers*, in CHANGING HANDS: HIRED LABOR ON WISCONSIN DAIRY FARMS 5 (2009).

94. KELLER, *supra* note 57, at 138.

95. *Id.* at 127.

96. *Id.* at 43–45, 83, 87.

97. *Id.* at 2, 88. See HARRISON ET AL., *supra* note 93, at 6 (recognizing that many dairy employees “work over 60 hours per week”).

98. KELLER, *supra* note 57, at 85.

99. *Id.* at 83.

The working conditions of dairy workers are generally subpar, given that dairying is a dangerous occupation and not well regulated.¹⁰⁰ In a 2017 study of New York immigrant dairy workers, twenty-eight percent reported wage theft and sixty-six percent had one or more injuries on the job.¹⁰¹ Forty-eight percent were bullied or discriminated against at work and twenty-percent received inappropriate comments from managers about race or citizenship status.¹⁰² “Eighty-eight percent of workers surveyed believe their employers care more about the cows than about workers’ well-being.”¹⁰³

Dairy worker housing is sometimes decent, but often of very poor quality, featuring conditions like overcrowding, no locks, insect infestation, questionable water quality, and holes in the walls or floor.¹⁰⁴ Although technically the farmers providing housing must comply with the county housing code, many do not, and inspections are rare.¹⁰⁵ “The lack of housing regulations . . . puts workers in a precarious position, since leaving their substandard housing situation effectively means leaving their jobs.”¹⁰⁶ In other words, employers often expect workers to live in the housing provided, and thus housing and employment are intimately linked.¹⁰⁷

The combination of long work hours, few days off, remote living, lack of driver’s licenses or car ownership, fear of apprehension and deportation, and language differences presents barriers to interactions with the nearby rural communities, and thus many workers rarely leave the farms.¹⁰⁸ Furthermore, many unauthorized immigrant workers would like to have legal status, but essentially no pathways to do so exist.¹⁰⁹ Regardless, undocumented workers continue to migrate to the United States seeking employment because they do not have better options available to them in their home countries.¹¹⁰

100. KARDASHIAN, *supra* note 67, at 141–42; KELLER, *supra* note 57, at 81.

101. CARLY FOX ET AL., WORKER’ CTR. OF CENT. N.Y. & WORKER JUSTICE CTR. OF N.Y., MILKED: IMMIGRANT DAIRY FARMWORKERS IN NEW YORK STATE, 5, 11 (2017).

102. *Id.* at 10.

103. *Id.*

104. KELLER, *supra* note 57, at 86–88.

105. *Id.* at 87–88.

106. *Id.* at 88.

107. *Id.* at 83–84.

108. *Id.* at 106–13, 116.

109. HARRISON ET AL., *supra* note 93, at 5.

110. *Id.* at 2.

E. The H-2A Problem: Fraud and Mistreatment

The United States employs over 1.13 million non-H-2A agricultural workers and roughly half lack work authorization.¹¹¹ As mentioned, in 2018, 242,762 H-2A visas were granted, but H-2A usage is inconsistent across states.¹¹² The top ten states employing H-2A workers make up about seventy percent of the total H-2A pool, and the top ten employers hired sixteen percent of all H-2A workers.¹¹³ For example, the top three states, Georgia, Florida, and Washington, employed 32,364, 30,462, and 24,862 H-2A workers respectively.¹¹⁴ In contrast, in 2016, Wisconsin employed only 853 H-2A workers.¹¹⁵ Although the H-2A visa provides a legal avenue for employers to hire agricultural workers, the program is not without faults. First, employers complain that the H-2A process is cumbersome and expensive.¹¹⁶ Second, H-2A workers are particularly vulnerable to abuse, often mistreated by employers, and have few options for legal recourse.¹¹⁷

As described, the H-2A process is very involved and time consuming for employers.¹¹⁸ Also, hiring H-2A workers is more expensive for employers than hiring domestic or undocumented workers.¹¹⁹ For example, in Wisconsin, the adverse effect wage rate—the rate that H-2A employers must abide by—for 2019 is \$13.54 per hour.¹²⁰ In contrast, the average wage for non-H-2A Wisconsin farmworkers is \$12.55 per hour.¹²¹ In addition, the pre-employment costs for H-2A workers, including visa fees, housing, and international travel, are estimated at \$2,000 per worker.¹²² Employers find the

111. *Farm Labor*, U.S. DEP'T OF AGRIC., (September 23, 2019), <https://www.ers.usda.gov/topics/farm-economy/farm-labor/#size> [<https://perma.cc/75WE-MCBB>]. This number may actually be higher as illicit hiring can go unreported. *See* Grace, *supra* note 2.

112. H-2A STATISTICS 2018, *supra* note 13.

113. *Id.*

114. *Id.*

115. ANNUAL REPORT 2016, *supra* note 13, at 44.

116. Alana Semuels, *For U.S. Farmers and Mexican Workers, It's Tough Being Legal*, L.A. TIMES, (Mar. 30, 2013, 10:00 AM), <https://www.latimes.com/nation/la-na-guest-worker-20130331-dto-htmstory.html> [<https://perma.cc/7M47-3L8C>].

117. Elmore, *supra* note 8, at 535–41.

118. *See supra* Section I.B.

119. *See* Semuels, *supra* note 116.

120. U.S. DEP'T OF LABOR, *supra* note 37.

121. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, MAY 2017 STATE OCCUPATIONAL EMPLOYMENT AND WAGE ESTIMATES (2018).

122. Roka et al., *supra* 35, at 335.

housing requirement particularly onerous.¹²³ H-2A regulations mandate that they must either rent housing for their workers or provide it themselves.¹²⁴ Thus, farmers new to the H-2A program may have to build accommodations for their workers if there are not rental options nearby.¹²⁵ For these reasons, although the use of H-2A is increasing, farmers still turn to undocumented workers when they cannot find sufficient domestic workers instead of employing H-2A workers.¹²⁶

The current H-2A program is inherently flawed and opens doors for the mistreatment of guest workers.¹²⁷ First, employers have historically engaged in fraudulent recruiting methods that result in large debts incurred by H-2A workers before arrival in the United States.¹²⁸ Large farms often utilize Farm Labor Contractors (FLCs), who function as recruiters and help facilitate the H-2A visa process.¹²⁹ For example, FLCs play a role in the recruitment of thirty-eight percent of California crop workers.¹³⁰ However, in 2015, the U.S. Government Accountability Office (GAO) confirmed that many FLCs were charging prospective workers prohibited fees.¹³¹ FLCs often charged fees over \$1,250, resulting in workers taking out loans to pay the fees, often putting their houses up as collateral.¹³² These prohibited fees lead to H-2A workers entering the United States already in “debt bondage” to FLCs.¹³³ The GAO also found that some employers or FLCs did not give workers accurate or adequate information about the job they were accepting prior to coming to the United States.¹³⁴

Once in the United States, H-2A workers are also vulnerable to exploitation from employers looking to skirt the rules.¹³⁵ Employers can easily take advantage of H-2A workers because the standards for

123. Frank Giles, *More Farms Growing with H-2A Help*, GROWING PRODUCE, (Mar. 18, 2019), <https://www.growingproduce.com/fruits/more-farms-growing-with-h-2a-help/> [<https://perma.cc/3M3D-NZPL>].

124. 20 C.F.R. § 655.122(d)(1) (2019).

125. See Giles, *supra* note 123.

126. Semuels, *supra* note 116.

127. See Shannon Leigh Vivian, Note, *Be Our Guest: A Review of the Legal and Regulatory History of U.S. Immigration Policy Toward Mexico and Recommendations for Combating Employer Exploitation of Nonimmigrant and Undocumented Workers*, 30 SETON HALL LEGIS. J. 189, 195–96 (2005).

128. Cf. Yasseri, *supra* note 22, at 369–70.

129. Roka et al., *supra* 35, at 336, 338–39; KELLER, *supra* note 57, at 37.

130. KELLER, *supra* note 57, at 38. Some, but not all, FLCs utilize the H-2A and H-2B visas to secure willing foreign workers. *Id.*

131. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-15-154, H-2A AND H-2B VISA PROGRAMS: INCREASED PROTECTIONS NEEDED FOR FOREIGN WORKERS 29 (2015).

132. *Id.* at 30.

133. *Id.* at 28, 30.

134. *Id.* at 29.

135. See Vivian, *supra* note 127, at 195–96.

treatment of guest workers are lower than for U.S. workers, because guest workers have inherent forced loyalty, and because regulations governing H-2A are poorly enforced.¹³⁶ For example, H-2A workers are tied to a specific employer during their contract period and cannot change jobs.¹³⁷ In addition, they often do not speak English, do not have much money, experience isolation from family and friends, lack a comprehensive understanding of their rights, and do not know how to report workplace mistreatment.¹³⁸ Records of mistreatment and workplace abuses within the United States include: confiscated passports, wage theft, human trafficking, inconsistency between wages promised and wages actually paid, illegal housing charges, being held captive against one's will, and dangerous working conditions.¹³⁹ Regardless, the guest worker has “overwhelming incentives not to quit” and rarely reports exploitation because his or her legal status is on the line.¹⁴⁰ Workers fear that employers will retaliate against them through firing, deportation, and blacklisting if they complain about mistreatment.¹⁴¹ Also, if H-2A workers are discharged before the end of their contract period, including for illness, they must return to their home country and pay for transportation home.¹⁴² Consequently, workers who do quit are likely to engage in unauthorized work to earn money for travel back to their home country.¹⁴³

Furthermore, H-2A workers have few avenues for legal recourse. Usually, a farmworker, authorized or undocumented, can seek redress under the Migrant and Seasonal Agricultural Worker Protection Act.¹⁴⁴ This Act entitles farmworkers to sue their employer in federal court for violations like: inaccurate terms and conditions of employment at the

136. Elmore, *supra* note 8, at 535–40.

137. See 8 USC §§ 1101(a)(15)(H)(i)(b), 1101(a)(15)(H)(ii)(a), 1184(i)(1), 1184(n), 1188(i)(2) (2012) (only allowing H-1B workers to transfer jobs).

138. Vivian, *supra* note 127, at 193–96.

139. See S. POVERTY LAW CTR., CLOSE TO SLAVERY: GUESTWORKER PROGRAMS IN THE UNITED STATES 1–2 (Feb. 19, 2013), <https://www.splcenter.org/20130218/close-slavery-guestworker-programs-united-states> [<https://perma.cc/8PYB-5YYQ>]; Elmore, *supra* note 8, at 540–45, 564–65; Vivian, *supra* note 127, at 193–95; David Bacon, *Guest Farm Workers Face Exploitative, Harsh Conditions*, PEOPLE'S WORLD, (June 13, 2018, 9:51 AM), <https://www.peoplesworld.org/article/guest-farm-workers-face-exploitation-harsh-conditions/> [<https://perma.cc/S95Q-P5EK>].

140. Elmore, *supra* note 8, at 542.

141. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 131, at 37.

142. 8 C.F.R. § 214.2(h)(4)(iii)(E) (2018); 8 U.S.C. § 1184(n) (2012). H-2A workers in general have 30 days after their contract period is done to find other employment or to return home, and after a three-year period of H-2A status they must return home for at least three months. 8 C.F.R. §§ 214.2(h)(5)(viii)(B)–(C).

143. Elmore, *supra* note 8, at 542.

144. 29 U.S.C. §§ 1801–72 (2012).

time of recruitment; failure to meet housing standards; failure to pay wages on time; improper payroll records; or transportation reimbursement.¹⁴⁵ However, this statute explicitly excludes H-2A workers.¹⁴⁶ H-2A workers must resort to whatever remedies they may have under state law.¹⁴⁷ In addition, H-2A workers and advocates report barriers in access to counsel.¹⁴⁸

II. A VISION FOR A STATE-SPONSORED H-2A PROGRAM

To mitigate, and hopefully resolve, the problems described above, states should be allowed to regulate and organize their own H-2A guest worker visa programs.¹⁴⁹ Allowing states to regulate an H-2A program would permit them to respond to state-specific agricultural and immigration needs, which would reap benefits for the state economy, agricultural industries, and foreign workers.¹⁵⁰ Due to the current political climate surrounding immigration, this proposal aims to appeal to both Democrats and Republicans alike to encourage collaboration and bipartisan support. On one hand, Democrats tend to support immigration reform that gives options to undocumented workers and protects immigrants' rights.¹⁵¹ On the other hand, Republicans often are swayed by a "states-rights" or federalism argument that decreases overall federal power by giving the states space to create their own policies and procedures.¹⁵² In addition, the proposal encompasses solutions directed at economic prosperity, which will entice both sides of the aisle.

This Part proceeds in four sections. First, this Part proposes moving regulation of the guest worker visa program out of the hands of

145. *Id.* §§ 1821–23, 54.

146. *Id.* § 1803(a)(3)(D).

147. Mary Lee Hall, *Defending the Rights of H-2A Farmworkers*, 27 N.C.J. INT'L L. & COM. REG. 521, 532 (2002).

148. *Id.* at 533–34.

149. *Cf.* State Sponsored Visa Pilot Program Act of 2017, S. 1040, 115th Cong. (2017) (proposing "[t]o amend the Immigration and Nationality Act to provide for a State-sponsored nonimmigrant pilot program . . .").

150. *Cf. id.*

151. *See Immigration Reform*, DEMOCRATS.ORG, (Jan. 25, 2019), <https://democrats.org/issues/immigration-reform/> [https://perma.cc/G4RH-CGLF] ("Democrats believe immigration is not just a problem to be solved, it is a defining aspect of the American character and our shared history.").

152. *See A Rebirth of Constitutional Government, The Tenth Amendment: Federalism as the Foundation of Personal Liberty*, GOP, (Jan. 25, 2019), <https://gop.com/platform/we-the-people/> [https://perma.cc/7R8V-MVDY] ("We pledge to restore the proper balance and vertical separation of powers between the federal government and state governments — the governments closest to, and most reflective of, the American people.").

the federal government and into the hands of the states. Next, it examines a Canadian guest worker program, which has successfully transitioned from being a federally controlled program to one that is province-run. Third, this Part considers counterarguments to the proposal. Finally, it tackles the question of the proposal's constitutionality and the wisdom in moving past a federal system to a state-sponsored model.

A. The Proposal: States to Regulate Guest Worker Visas

A state-sponsored visa program would differ significantly from the current H-2A visa scheme and its inception requires an act of Congress. First, Congress would abolish the current H-2A program and pass new legislation consistent with the plan described below.¹⁵³ Second, Congress would delegate regulation of the overarching program to the U.S. Department of Labor (DOL), which would articulate general standards and regulation for how the states can structure their H-2A guest worker programs.¹⁵⁴ Third, the DOL would sub-delegate the implementation and on-the-ground regulation to the states, who would tailor the H-2A visa to their individual state.¹⁵⁵ The states would not be required to participate in the new H-2A, but rather, would voluntarily partake in the program if they desired to have H-2A workers in their state.¹⁵⁶

Under the state-sponsored model basic goals of the H-2A program would remain similar. First, the new H-2A visa would be available to employers only in agricultural sectors with a shortage of local workers who are “able, willing, and qualified” to fill the job.¹⁵⁷ Second, new H-2A visas would only be limited to situations where employing foreign workers would not adversely affect U.S. workers working conditions or wages.¹⁵⁸ Just like the H-2A program currently in place, the new H-2A would have no federal cap, but in contrast, under the new H-2A program states could effectively set their own cap through the number of visas they request.¹⁵⁹

When formulating the individual state H-2A program, each state's workforce agency would consider all agricultural and tangential work taking place in the state and define which types of agricultural

153. See U.S. CONST. art. I, §§ 1, 8.

154. See *Mistretta v. United States*, 488 U.S. 361, 379 (1989).

155. Cf. Jessica Bulman-Pozen, *Federalism as a Safeguard of the Separation of Powers*, 112 COLUM. L. REV. 459, 473 (2012) (discussing the choices available to Congress concerning implementation of federal regulations and cooperative federalism).

156. See *New York v. United States*, 505 U.S. 144, 177 (1992).

157. 8 U.S.C. § 1188(a)(1)(A) (2012).

158. § 1188(a)(1)(B).

159. See 8 U.S.C. § 1184(g) (2012).

employers can apply for H-2A visas. The state would be allowed to set their own goals and requirements from year-to-year to meet the industry needs within the state and ensure domestic worker protection.¹⁶⁰ Then, the state, through its workforce agency, would petition the DOL and U.S. Citizenship and Immigration Services (USCIS) for the number of visas that they would need each year for the next five-year period.¹⁶¹ That number would be guaranteed to the state for the next five years, although the state would not be required to use all their visas. The DOL would ensure that the state complies with the umbrella DOL regulations for state H-2A programs and USCIS would work side-by-side with the state to process the visa applications and background checks.

Once states have secured their requested number of visas, employers within the state would petition the state for foreign workers. The employers would be required to pay a standard fee, set by the state, for each worker requested that encompasses visa costs, international travel, housing, and transportation, among other things. Under the current H-2A program, employers must pay for these items directly.¹⁶² As mentioned above, current estimates for pre-employment costs for H-2A workers, meaning all costs not including wages, is \$2,000 per worker.¹⁶³ Here, the pre-employment costs would be funneled through the state in the form of a standard fee, but the employer would still be required to pay the H-2A worker the prevailing wage in the industry.¹⁶⁴ This standard fee, likely less than \$2,000, but up to the state's discretion, would also take the place of the DOL Labor Certification. Given that the DOL certifies the majority of H-2A labor certification petitions that it receives, this change would not have a huge impact on the number of H-2A visas that are ultimately issued.¹⁶⁵ The expense to hire foreign workers serves to ensure that employers are only hiring foreign workers when they have a true shortage of labor. However, the states should attempt to minimize the fee, when possible, so that it is not cost prohibitive for employers.

160. For example, if the state saw a worker shortage only within one agricultural sector, they could limit their H-2A visas for that sector for however long was necessary or until another sector needed foreign workers. Similarly, if a state felt like employers were abusing the H-2A program, the state could limit the number of visas given or get rid of their H-2A program altogether. *See id.* (setting federal quotas).

161. *See, e.g.,* Bulman-Pozen, *supra* note 155, at 473. The time period does not have to be five years but should be federally decided so that the transition from H-2A to Lawful Permanent Residents is consistent across states.

162. 20 C.F.R. § 655.122 (2018).

163. Roka et al., *supra* 35, at 335.

164. *See* 20 C.F.R. § 655.10(a); Pickral, *supra* note 37, at 1019–20.

165. Vivian, *supra* note 127, at 204–05.

From there, the state's own workforce agency would play the role that the employer currently plays in the H-2A process.¹⁶⁶ The state's workforce agency would recruit foreign workers, pay for their international travel and visa costs, ensure adequate housing in the city of employment, and match the workers with employers based on mutual desires and needs.¹⁶⁷ As mentioned above, the employer participation fees would fund these activities and the money that had previously been used for federal oversight, would be reallocated to the states.¹⁶⁸ Given that states have varying resources available for such a program and would have different levels of participation, recruitment would look different depending on the state. For example, a smaller state with few resources might choose to partner with a specific country or region when recruiting to save costs, but a larger state aiming to attract many H-2A workers might advertise heavily in various countries. States could also partner with neighbor states in the recruitment phase.

Moreover, the program would be open to undocumented immigrants who are currently in the United States.¹⁶⁹ When employing undocumented immigrants, the state would save money because they would not have to pay for international relocation and visa costs. Instead, the state could issue a conditional work authorization card to the undocumented individual to work in the agricultural industry within the specific state. The state could decide, if desired, to give employers a "discount" for employing undocumented workers by decreasing the standard fee, or the state could maintain the fee and use the savings for running their H-2A program.

The employer would, in some ways, be taking a risk by applying for a foreign guest worker because once hired, the worker would be able to change jobs as desired within the agricultural industry within the state.¹⁷⁰ This would incentivize the employer to treat their workers well and work hard to retain them, as they must for U.S. workers.¹⁷¹ The states would monitor workplaces to ensure that H-2A employers treat their workers fairly. Also, the statutory bar preventing H-2A workers

166. See generally Yasseri, *supra* note 22, at 373.

167. Cf. *Id.* As a current example of state-involvement with H-2A, in May of 2019 Washington passed a law that required the state's Employment Security Department to process H-2A applications and to recruit workers. See *Governor Signs Bill to Strengthen Washington Agricultural Economy*, EMP. SECURITY DEP'T: WASH. ST., (May 21, 2019), <https://esd.wa.gov/newsroom/governor-signs-bill-to-strengthen-washington-agriculture-economy> [<https://perma.cc/7EJU-NEAZ>].

168. See 20 C.F.R. §§ 655.10, .122.

169. See *infra* note 172 and accompanying text.

170. See generally Elmore, *supra* note 8, at 541-43 (advocating for employer de-centralization in the guest worker visa process).

171. See *supra* Section I.E.

from seeking legal recourse under the Migrant and Seasonal Worker Protection Act would be removed.¹⁷²

The new H-2A visas would be renewable annually for up to five years, without the requirement of returning to the worker's home country when the contract period ends. However, the worker would be free to return to his home country if desired. If the worker successfully renews H-2A employment for five years, she or he would be eligible to apply to adjust her or his status to be a lawful permanent resident through USCIS.¹⁷³ Because the H-2A visa would offer a path to eventual lawful permanent resident status, the H-2A applicant would not have to prove a non-immigrant intent when entering the United States.

B. The Canadian Model: The Provincial Nominee Program

Canada provides an example of a country that has moved away from purely federal oversight of immigration to include the needs and preferences of individual regions through the Provincial Nominee Program (PNP).¹⁷⁴ Like the U.S. system, the Canadian Immigration system is separated into three prongs: familial, economic, and refugee.¹⁷⁵ The Provincial Nominee Program, which had its beginnings in 1998, falls within the economic prong, which deals with immigration contributing to economic development.¹⁷⁶ The Canadian federal government maintains control of the familial and refugee prongs and of

172. See Sovereign Hager, Note, *Farm Workers and Forced Labor: Why Including Agricultural Guest Workers in the Migrant And Seasonal Worker Protection Act Prevents Human Trafficking*, 38 SYRACUSE J. INT'L L. & COM. 173, 176 (2010).

173. See Agricultural Worker Program Act of 2019, S. 175, 116th Cong. (2019); Ellyn Ferguson, *Democrats Propose Legal Status for Undocumented Immigrant Farmworkers*, ROLL CALL (Jan. 18, 2019, 4:22 PM), <https://www.rollcall.com/news/congress/democrats-propose-legal-status-immigrant-farmworkers> [https://perma.cc/CQA2-CFD6].

174. Matthew La Corte & Jeremy L. Neufeld, *Research Paper: The Legislative History of State-Based Guest Worker Programs*, NISKANEN CTR. (May 9, 2017), <https://niskanencenter.org/wpcontent/uploads/2017/05/TheLegislativeHistoryofState-BasedGuestWorkerPrograms.pdf> [https://perma.cc/YY7L-LDA3]. Note that the Provincial Nominee Program encompasses a broader range of visas/immigration benefits than this Comment does. The Provincial Nominee Program does not have a focus solely on guest workers.

175. Delphine Nakache & Catherine Blanchard, *Remedies for Non-Citizens under Provincial Nominee Programs: Judicial Review and Fiduciary Relationships*, 37 DALHOUSIE L.J. 527, 529 (2014).

176. *Id.*; CITIZENSHIP AND IMMIGRATION CAN., EVALUATION DIV., EVALUATION OF THE PROVINCIAL NOMINEE PROGRAM, 1 (Sept. 2011) [hereinafter CITIZENSHIP AND IMMIGRATION CAN.].

other programs within the economic prong.¹⁷⁷ Under the Provincial Nominee Program, Canadian provinces can negotiate with the federal government to attract specific types and numbers of immigrants to their provinces.¹⁷⁸ Because provinces aim to attract considerably different types of immigrants, this program allows the provinces to focus on their individual needs when making immigration policy decisions.¹⁷⁹ The provincial nominee program allows provinces to prioritize low-skilled or high-skilled work, and allows a pathway to permanent residence for participants in the program.¹⁸⁰ Also, province participation in the program is not mandatory and currently two provinces do not participate.¹⁸¹

A program like this could prove to be successful and benefit the United States, like it has benefited Canada. The 2011 Canadian government's "Evaluation of the Provincial Nominee Program," reported that stakeholders continued to desire the program, the program fulfilled the labor shortages of various provinces and territories, and it regionalized the benefits of immigration thirteen years after its inception.¹⁸² Furthermore, the majority of participants in the Provincial Nominee Program had become economically established in Canada and very few needed employment insurance or social services benefits.¹⁸³ In fact, Canada wishes to add one million additional permanent residents by 2021 using programs like the Provincial Nominee Program to account for the declining birth rate and the aging Canadian population.¹⁸⁴ The Provincial Nominee Program has proved essential because it helps to spread out the benefits of immigration to all provinces and territories instead of just to major cities, like Toronto, Montreal and Vancouver.¹⁸⁵ This Comment's state-sponsored H-2A program seeks to fulfill agricultural labor shortages throughout the United States by allowing states to play a more active role in attracting

177. CITIZENSHIP AND IMMIGRATION CAN., *supra* note 176, at 1–2.

178. Su, *supra* note 27, at 378; RESEARCH & EVALUATION BRANCH: IMMIGRATION, REFUGEES, AND CITIZENSHIP CAN., EVALUATION OF THE PROVINCIAL NOMINEE PROGRAM, 31 (2017) [hereinafter RESEARCH & EVALUATION BRANCH] ("The original intent of the PNP [Provincial Nominee Program] was to allow PTs [Provinces and Territories] to nominate individuals who meet their economic needs and who may not have been selected under other federal economic programs . . .").

179. RESEARCH & EVALUATION BRANCH, *supra* note 178, at 7.

180. Sarah Marsden, *Assessing the Regulation of Temporary Foreign Workers in Canada*, 49 OSGOODE HALL L.J. 39, 49 (2011).

181. Nakache & Blanchard, *supra* note 175, at 530.

182. CITIZENSHIP AND IMMIGRATION CAN., *supra* note 176, at 67.

183. *Id.* at 36.

184. AHMED HUSSEN, IMMIGRATION, REFUGEES, AND CITIZENSHIP CAN., 2018 ANNUAL REPORT TO PARLIAMENT ON IMMIGRATION 2, 12 (2018).

185. *Id.* at 3–5.

workers, just as the successful Provincial Nominee Program has done in Canada.

C. Questioning the Status Quo

Historically immigration has fallen within the federal powers.¹⁸⁶ And, Congress has preempted meaningful state action on immigration through comprehensive immigration legislation.¹⁸⁷ However, “this principle does not alter the fact that immigrants are also residents of the places where they live, work, own businesses, attend school, raise families, pay taxes, attend religious services, receive public services, participate in their communities, and have other meaningful ties.”¹⁸⁸ Although the federal government has historically held the power to regulate immigration, perhaps it is not always the body best suited to do so.¹⁸⁹ For example, states are more responsive to local needs than the federal government, are in a better position to experiment, and provide greater accountability.¹⁹⁰ Furthermore, “decentralization offers . . . the virtues of federalism.”¹⁹¹

Recently, states have been trying to regulate immigration in response to local citizen demands.¹⁹² In 2010, forty-five states introduced 1200 bills or resolutions that dealt with immigration.¹⁹³ In

186. U.S. Const. art. I, § 8, cl. 4. (granting Congress the power to establish a “uniform Rule of Naturalization”); *Chae Chan Ping v. United States*, 130 U.S. 581, 609 (1889) (identifying, for the first time, the immigration power as an inherent federal power incident to national sovereignty); *Fong Yue Ting v. United States*, 149 U.S. 698, 713 (1893) (“The power to exclude aliens and the power to expel them rest upon one foundation, are derived from one source, are supported by the same reasons, and are in truth but parts of one and the same power.”); Aoki & Shuford, *supra* note 19, at 72.

187. *See generally* Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. §§ 1101–78).

188. Aoki & Shuford, *supra* note 19, at 72.

189. Su, *supra* note 27, at 370–71.

190. Davon M. Collins, Note, *Toward a More Federalist Employment-Based Immigration System*, 25 YALE L. & POL’Y REV. 349, 350, 356 (2007) (arguing for decentralizing the entire employment-based immigration system and allowing the states a voice in the matter).

191. *Id.* at 359; *see also* Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787, 793 (2008) (“The values of federalism thus have a productive role to play in the immigration debate by providing varied approaches to immigration-related matters, and the different experiences of subnational governments will help to elucidate the larger questions of how best to formulate a national immigration policy.”).

192. Aoki & Shuford, *supra* note 19, at 18–23.

193. *Id.* (“The scope of subnational legislation and law enforcement measures has been wide-ranging: non-citizen voting, sanctuary and anti-sanctuary ordinances, family law, identification/driver’s licensing, employment and employment discrimination, immigration and customs enforcement workplace raids, housing and

addition, thirteen different states have considered legislation that would create individual state-based guest worker programs for foreign workers and/or initiatives for undocumented residents to gain status through work in industries that traditionally attract guest workers, such as agriculture or the service industry.¹⁹⁴ However, the federal government's reluctance to consider state plans as viable options has stymied all such efforts.¹⁹⁵ For example, in 2015, Utah passed a bill to establish a pilot project to recruit guest workers from Nuevo Leon, Mexico.¹⁹⁶ This bill was contingent on federal authorization, but instead of offering its consent, the federal government threatened to sue Utah should it attempt to implement the Act.¹⁹⁷ Other efforts include the 2012 California Agricultural Jobs and Industry Stabilization Program, which would have opened agricultural and service industry jobs up to undocumented workers, but died in the appropriations committee despite widespread support, and the 2008 Colorado Nonimmigrant Agricultural Seasonal Worker Pilot Program, which would have expedited the H-2A visa process to increase the numbers of seasonal workers in Colorado, but never materialized due to federal noncooperation.¹⁹⁸ Altogether, this demonstrates that states are demanding better options, but the federal government is reticent to loosen its grip on immigration or immigration related initiatives.¹⁹⁹

D. Constitutional Concerns

The state-sponsored model of guest worker programs does not infringe on federal authority to legislate and regulate immigration.²⁰⁰ Consequently, the historical federal jurisdiction over immigration issues need not be a roadblock to the limited immigration reform proposed by this Comment. The Constitution's text, structure, and history do not explicitly "express a preference" for delegation or non-delegation of

housing discrimination, education, immigrant integration and support, human trafficking, gang activity, and English language measures.").

194. La Corte & Neufeld, *supra* note 174.

195. *Id.* at 8.

196. H.B. 466, 59th Leg., Gen. Sess. (Utah 2011).

197. La Corte & Neufeld, *supra* note 174, at 7.

198. *Id.* at 2-3.

199. The approval of the federal government is a clear roadblock to the success of this Comment's proposal. *See* La Corte & Neufeld, *supra* note 174, at 8. In response, this Comment serves as a testament to the current status in Wisconsin related to guest worker programs and as further support for a state-sponsored guest worker program. Hopefully this Comment would persuade the federal government to reconsider its historical stance limiting guest worker programs to federal control.

200. Aoki & Shuford, *supra* note 19, at 5.

federal legislative power to states.²⁰¹ However, the Constitution also does not unambiguously prohibit such behavior.²⁰²

Over the years, the Supreme Court has considered the scope of permissible delegation of federal power in light of separation of powers concerns.²⁰³ In *J.W. Hampton Junior & Company v. United States*,²⁰⁴ the Court said that “[i]f Congress shall lay down by legislative act an intelligible principle to which the person or body authorized . . . is directed to conform, such legislative action is not a forbidden delegation of legislative power.”²⁰⁵ Since then, the Court has only struck down Congressional acts delegating to the executive on non-delegation grounds in two cases: *Panama Refining Company v. Ryan*,²⁰⁶ and *A. L. A. Schechter Poultry Corporation v. United States*.²⁰⁷ These cases have served as “the high water mark for the non-delegation doctrine.”²⁰⁸ As long as the statute authorizing delegation contains more than an “intelligible principle” for the delegation, which includes outlining general policies and setting specific directives and minimal standards, the act survives.²⁰⁹ Furthermore, according to Justice Thurgood Marshall, the non-delegation doctrine “has been virtually abandoned . . . for all practical purposes”²¹⁰

Today, in the context of delegation to states, Congress regularly “authorizes federal administrative agencies to ‘approve’ state laws [and] to sub-delegate power to the states.”²¹¹ Under the Tenth Amendment, Congress may not commandeer the states, nor may it require states to regulate federal law.²¹² However, Congress may invite and encourage states to implement federal law, usually under the direction, regulation,

201. Joshua D. Sarnoff, *Cooperative Federalism, the Delegation of Federal Power, and the Constitution*, 39 ARIZ. L. REV. 205, 211 (1997); U.S. CONST. art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States”); *Id.* § 8 (“The Congress shall have Power . . . [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”).

202. Sarnoff, *supra* note 201, at 230–31.

203. *See generally id.* at 238–55 (discussing the role of the Supreme Court in deciding when delegation of federal legislative powers is appropriate).

204. 276 U.S. 394 (1928).

205. *Id.* at 409.

206. 293 U.S. 388 (1935).

207. 295 U.S. 495 (1935); Gary J. Greco, *Standards or Safeguards: A Survey of the Delegation Doctrine in the States*, 8 ADMIN. L.J. AM. U. 567, 572 (1994).

208. Greco, *supra* note 207, at 572.

209. *Mistretta v. United States*, 488 U.S. 361, 379 (1989).

210. *Fed. Power Comm’n v. New Eng. Power Co.*, 415 U.S. 345, 352–53 (1974).

211. Sarnoff, *supra* note 201, at 255.

212. *New York v. United States*, 505 U.S. 144, 177 (1992).

or approval of the federal executive.²¹³ For example, the Medicaid program invites states to formulate their own plans for medical assistance, provided that “such methods of administration . . . are found by the Secretary to be necessary for the proper and efficient operation of the plan” and comply with Department of Health and Human Service requirements.²¹⁴ In addition, the Clean Air Act authorizes states to develop and implement plans for businesses within their state to comply with national air quality and emission standards, established by the Environmental Protection Agency.²¹⁵ The federal government is free to delegate these issues to the states, under federal oversight, but still letting states exercise individual discretion.²¹⁶ Nothing is stopping the federal government from delegating regulation of the H-2A visa program to the states other than the federal government itself.

III. THE NEW H-2A PROGRAM: AN ANSWER TO DAIRY DREAMS AND IMMIGRANT INJUSTICE

The state-sponsored H-2A program responds to the three concerns outlined in Part I. This Part proceeds in three corresponding sections, addressing each of these concerns. First, this Part shows how the new H-2A program remedies the Wisconsin dairy worker shortage and reliance on undocumented laborers by explaining what the state-sponsored program could look like in Wisconsin. It also discusses other recent efforts to fix the dairy problem and explains why those efforts are insufficient. Moreover, it argues that the new H-2A program is economically beneficial and would bolster national security. Second, this Part advocates for the importance of undocumented worker

213. *Id.*; Bulman-Pozen, *supra* note 155, at 473. (“Congress often turns to the states for a host of practical reasons: because they have relevant expertise; because they have in place an administrative apparatus that the federal government lacks; because relying on states will be cheaper or will foster experimentation; because states can be “force multipliers” that amplify enforcement of federal law; because congressional delegations fight to protect existing state programs from federal preemption; because of a more diffuse interest in devolution.”).

214. 42 U.S.C. § 1396a(a)(4)(A) (2012).

215. 33 U.S.C. §§ 1316, 1318(c) (2012) (“Each State may develop and submit to the Administrator procedures under State law for inspection, monitoring, and entry with respect to point sources located in such State. If the Administrator finds that the procedures and the law of any State relating to inspection, monitoring, and entry are applicable to at least the same extent as those required by this section, such State is authorized to apply and enforce its procedures for inspection, monitoring, and entry with respect to point sources located in such State.”).

216. *See United States v. Mazuri*, 419 U.S. 544, 556–58 (1975) (explaining why courts cannot delegate authority to independent sovereigns, including states and Indian tribes); Sarnoff, *supra* note 201, at 255.

participation, not only to benefit Wisconsin or the United States, but also to benefit those who have served the United States as agricultural laborers for years. Finally, this Part shows that the state-sponsored model and employer de-centralization will better protect H-2A workers in America.

A. How the State-Sponsored H-2A Program Solves the Dairy Farmer Problem

As discussed, Wisconsin's dairy industry is at a crossroads due to a labor shortage, which leads dairy farmers to turn to undocumented workers to fill their labor needs.²¹⁷ Farmers are asking themselves, Do their workers have documentation? Will their workers be discovered and deported? How would they run their farms if that happened? Are they breaking the law? This Comment's proposed state-sponsored H-2A program serves as a solution to dairy farmers' labor woes.

1. WISCONSIN: LAW IN ACTION

Under the state-sponsored H-2A program, states have flexibility to tailor their programs to meet their needs. For example, under the new H-2A, Wisconsin would first consider the breadth of their H-2A program by defining what types of agricultural work would qualify for H-2A visas. Given the prominence of the dairy industry within Wisconsin, Wisconsin would be wise to explicitly include dairying and would not limit their program to purely seasonal workers.²¹⁸ Second, Wisconsin would assess how many H-2A visas the state would need over the next five-year period. Because of the dairy industry concerns, it would be prudent for Wisconsin to consult industry leaders, such as the American Dairy Coalition, to get an estimate of workers needed.²¹⁹ Third, employers requiring guest workers would petition Wisconsin for the number of workers needed and pay a fee, set by Wisconsin, for each employee requested. Wisconsin would determine the standard fee by attempting to strike a balance between its program costs and a reasonable fee for Wisconsin's farmers.

From there, Wisconsin would consider its priorities in recruiting foreign workers. Perhaps Wisconsin would partner with a particular

217. Grace, *supra* note 2.

218. See *supra* Section I.C. (discussing dairy farms' unique reliance on undocumented workers to fill the labor shortage in an industry that is neither seasonal nor temporary).

219. See Bergquist, *supra* note 1.

region or country to recruit workers.²²⁰ Or perhaps Wisconsin would prioritize recruiting undocumented individuals already living in Wisconsin. Regardless, the Wisconsin Department of Workforce Development would be tasked with recruiting workers, assigning them to employers, and developing guest worker housing throughout the state. Ideally, the housing would be located in towns, but near the farms, so that H-2A workers could have increased social interactions with the hosting town. The Department of Workforce Development may need to create a separate unit to manage and monitor the H-2A process, funded by the employer fees. Furthermore, once the program was up and running, the Department of Workforce Development would monitor businesses to make sure that they were complying with regulations and treating their workers fairly. Workers would be free to transfer to other agricultural jobs within Wisconsin if their original placement did not work out. Five years into the program, Wisconsin's guest workers would be eligible to adjust status from H-2A visa holder to lawful permanent resident by petitioning U.S. Citizenship and Immigration Services.

2. OTHER ATTEMPTS TO PROVIDE LEGAL AVENUES FOR DAIRIES TO HIRE FOREIGN WORKERS

Currently and historically, legislators and dairy lobbyists have attempted to modify the H-2A program to explicitly allow dairy participation, but thus far, all such efforts have failed.²²¹ Recently, on March 14, 2019, Representative Anthony Brindisi introduced a bill in the House “[t]o amend the Immigration and Nationality Act to provide a special rule for the period of admission of H-2A nonimmigrants employed as dairy workers. . . .”²²² Although this would solve the discrete problem of dairy exclusion from H-2A, it does not fix any of the deep imperfections of the H-2A, including but not limited to, cost, difficulty of application, worker exploitation, lack of oversight, and

220. KELLER, *supra* note 57, at 11 (finding that many Wisconsin dairy workers come from Veracruz, Mexico).

221. See Dairy and Sheep H-2A Visa Enhancement Act, H.R. 1778, 116th Cong. (2019); Dairy Act of 2017, H.R. 2087, 115th Cong. (2017); H-2A Improvement Act, S.852, 112th Cong. (2011).

222. See Dairy and Sheep H-2A Visa Enhancement Act, H.R. 1778, 116th Cong. (2019). Other recent bills have proposed similar actions by advocating for changing the “seasonal” H-2A requirement to allow year-round work. See Paperwork Reduction for Farmers and H-2A Modernization Act, S. 1887, 116th Cong. (2019); Paperwork Reduction for Farmers and H-2A Modernization Act, H.R. 3319, 116th Cong. (2019).

lack of legal recourse for workers.²²³ As seen below, a state-sponsored H-2A program would remedy these issues in a more holistic way.²²⁴

In 2017, Senator Ron Johnson introduced a bill in the Senate to create a “W” visa, which would have allowed states to recruit temporary workers who “contribute to the economic agenda of the State.”²²⁵ These workers could have included investors, migrant workers, academics, or entrepreneurs.²²⁶ If Wisconsin chose to do so, this program could have covered dairy workers.²²⁷ However, the bill only allowed 10,000 visas per state, and many states employ far more H-2A workers than that number alone.²²⁸ In addition, the program was not limited to agricultural workers, thus the 10,000 visas would have been quickly eaten up by high-skilled immigrants, who tend to bring more money into states.²²⁹ Also, the program did not re-do the H-2A program nor would it have been open to undocumented individuals, unlike the suggestions in this proposal, thus allowing the issues therein to continue festering.²³⁰

3. WHY THE STATE-SPONSORED H-2A MODEL ECONOMICALLY BENEFITS WISCONSIN AND THE UNITED STATES

Immigrants contribute to the economy, spurring “prosperity and growth.”²³¹ H-2A guest workers, specifically, fill an important need in the U.S. agricultural industry.²³² The new H-2A program would fix the labor shortage problem that Wisconsin’s dairy industry is facing due to

223. See *supra* Section I.E. (describing the difficulties faced by H-2A workers and employers alike).

224. See *infra* Section III.C. (explaining why a state-sponsored program would alleviate many of the imperfections the H-2A program currently has).

225. State Sponsored Visa Pilot Program Act of 2017, *supra* note 149.

226. David Bier, *State-Sponsored Visas: New Bill Lets States Invite Foreign Workers, Entrepreneurs, and Investors*, CATO INST. (May 11, 2017), <https://www.cato.org/publications/immigration-research-policy-brief/state-sponsored-visas-new-bill-lets-states-invite> [<https://perma.cc/DHC9-AR8S>].

227. See Grace, *supra* note 2 (stating that the dairy industry relies on migrant workers; therefore, those workers would be covered under the “W” visa).

228. See *supra* note 114 and accompanying text.

229. See Marsden, *supra* note 180, at 49 (“[Low-skilled worker] exclusion from the federal migration regime thus remains significantly unfavourable in terms of the stratification of migrant labour.”).

230. See *supra* Section I.E.; State-Sponsored Visa Pilot Program Act of 2017, *supra* note 149.

231. Aoki & Shuford, *supra* note 19, at 44.

232. Clemens & Pritchett, *supra* note 14, at 3 (“The [Bureau of Labor Statistics] projects that the US economy will need an additional 3.6 million people to work in these [low-skilled] jobs. . . . And without workers, these sectors cannot grow or generate all the other jobs they create.”).

ineligibility for current visa programs.²³³ The farms in Wisconsin would no longer fear closure because of worker shortages.²³⁴ Furthermore, employers at Wisconsin dairy farms would have greater security in their laborers into the future because the H-2A workers would be able to renew their visas for five years and then become lawful permanent residents.²³⁵

In a variety of other ways, increased options for legal immigration will pay economic dividends.²³⁶ First, guest workers create “new, ethnically derived markets” that aid the economy.²³⁷ They spend money on food, clothing, and other necessities of life and pay taxes, but they do not see the full benefit of their tax dollar because although many are eligible for benefits, they often do not know about the benefits for which they qualify.²³⁸ Second, immigration of high-skilled and low-skilled migrants has “long-term benefits . . . in terms of higher GDP per capita for recipient countries” that are “broadly shared across the population. . . .”²³⁹ For example, immigrants are twice as likely as U.S. born individuals to start businesses.²⁴⁰ In 2015, thirty percent of business owners in the Milwaukee metropolitan area were immigrants.²⁴¹ Furthermore, quick integration into the labor market and society will allow a country to see the economic benefits of immigration more rapidly.²⁴² In contrast, forcing people into an underground economy ultimately can be harmful to the country’s overall economy.²⁴³ If the United States wishes to benefit for years on end from guest workers’ labor, it should reward such workers with lawful permanent resident status.

Making a path to permanent residence for guest workers and undocumented individuals is a topic that has been at the forefront of legislators’ and immigrant advocates’ minds lately. For example, U.S.

233. See *supra* Section I.C. (describing the labor shortage that Wisconsin faces).

234. DAIRY HERD MGMT., *supra* note 77.

235. See *supra* Section II.A.

236. Florence Jaumotte, et al., *Impact of Migration on Income Levels in Advanced Economies*, SPILLOVER NOTES (Int’l Monetary Fund, D.C.), Dec. 2016, at 17.

237. Vivian, *supra* note 127, at 194.

238. *Id.*

239. Jaumotte, et. al., *supra* note 236, at 17.

240. Dane Strangler & Jason Wiens, *The Economic Case for Welcoming Immigrant Entrepreneurs*, EWING MARION KAUFFMAN FOUND. (Sept. 8, 2015), <https://www.kauffman.org/what-we-do/resources/entrepreneurship-policy-digest/the-economic-case-for-welcoming-immigrant-entrepreneurs> [https://perma.cc/5R9R-C9NB].

241. AM. IMMIGR. COUNCIL, *supra* note 64, at 4.

242. Jaumotte, et al., *supra* note 236, at 1.

243. *Id.* at 17.

Senator Dianne Feinstein and Representative Zoe Lofgren proposed legislation on January 17th, 2019, that would create a “blue card,” which would provide a path to permanent resident status for guest workers and undocumented immigrants working in agriculture.²⁴⁴ This bill grants eight-year work status, a “blue card,” to individuals working in the agricultural industry for 100 days during the two-year period prior to the enactment of the bill who pay fines and pass background checks, regardless of their current immigration status.²⁴⁵ After possessing a “blue card” for three to five years, depending on how many days per year the individual is working, the individual would be eligible to apply for lawful permanent residence and trade his or her “blue card” in for a green card.²⁴⁶ However, the “blue card” differs from the state-sponsored H-2A program in that it does not reconfigure the H-2A program to ensure worker protection or that employers’ labor needs are met.²⁴⁷ Also, it only addresses current workforce needs and does not provide a continuing program to replace workers as they age out or move on to other employment.²⁴⁸ Furthermore, the 2019 bill proposing the “blue card” revives proposals in previous sessions of Congress that were unsuccessful, so it may not fare well in the current divided Congress.²⁴⁹

In addition, President Trump has commented on immigration reform for seasonal farm workers, which is speculated to be in response to the “blue card” proposal.²⁵⁰ In a speech to the American Farm Bureau on January 14th, 2019, he said, “we want to take people in to help our farmers . . . [w]e’re going to make that actually easier for them—to help the farmers. Because you need these people.”²⁵¹ Also, President Trump seemed to show support for immigrant farmworkers in a tweet saying, “could somebody please explain to Nancy [Pelosi] & her ‘big donors’ in wine country that people working on farms (grapes) will have easy access in!”²⁵² Perhaps, President Trump would agree to

244. See Agricultural Worker Program Act of 2019, S. 175, 116th Cong. (2019); Ferguson, *supra* note 173.

245. See Agriculture Worker Program Act of 2019; Ferguson, *supra* note 173.

246. See Agricultural Worker Program Act of 2019.

247. See Dan Wheat, *Ag Labor Bill Needs Guestworker Reform, Employers Say*, CAPITAL PRESS (Jan. 18, 2019), https://www.capitalpress.com/nation_world/ag-labor-bill-needs-guestworker-reform-employers-say/article_4de81940-1b4c-11e9-a695-9f1eec7ae941.html [<https://perma.cc/Q6WK-JL96>].

248. *Id.*

249. See Ferguson, *supra* note 173.

250. *Id.*

251. *Id.*

252. Donald J. Trump (@realDonaldTrump), Twitter (Jan. 18, 2019, 6:00 AM), <https://twitter.com/realdonaldtrump/status/1086262002815766533> [<https://perma.cc/Z8YU-ER73>].

sign a bill reforming guest worker programs into law—like the proposal in this Comment.

4. MORE THAN JUST WISCONSIN: WHY THE STATE-SPONSORED MODEL IS IN THE INTEREST OF THE UNITED STATES' NATIONAL SECURITY

The national security interest insists that the United States allow undocumented dairy workers and H-2A workers to become lawful permanent residents. The labor market is the predominate motivating force behind immigration, authorized or unauthorized.²⁵³ However, present restrictive immigration laws pose significant barriers for medium and low-skilled workers to immigrate to the United States legally and such workers experience increasing difficulty in gaining permanent residence.²⁵⁴ Also, business owners in the United States find it difficult to meet their need for medium and low-skilled labor.²⁵⁵ This results in an increase in people entering the United States without authorization or overstaying their visas and thus an increased population of undocumented individuals.²⁵⁶ Presently, the United States is home to approximately 10.7 million individuals without immigration authorization.²⁵⁷ As one immigration scholar writes, “the alternative to authorized migration is not an absence of immigration, but rather unauthorized migration. There will remain a high rate of unauthorized migration so long as developing countries lack sufficient employment opportunity and there are available jobs in the U.S.”²⁵⁸

All benefit when immigrants are in a country legally rather than without authorization. On one hand, undocumented immigrants are particularly vulnerable due to their immigration status.²⁵⁹ Having authorization can dramatically protect them from exploitation and encourage them to engage more fully with their community and economy.²⁶⁰ On the other hand, the United States has a strong interest

253. Aoki & Shuford, *supra* note 19, at 58. In addition, “[f]amily unification, education, armed conflict, and natural disaster are influential factors behind immigration and thus important considerations for immigration policy reform.” *Id.*

254. *Id.* at 54.

255. *Id.*

256. *Id.*; Kevin R. Johnson, *Ten Guiding Principles for Truly Comprehensive Immigration Reform: A Blueprint*, 55 WAYNE L. REV. 1559, 1612 (2009).

257. JEFFREY S. PASSEL & D’VERA COHN, PEW RES. CTR., U.S. UNAUTHORIZED IMMIGRANT TOTAL DIPS TO LOWEST LEVEL IN A DECADE 5 (2018), <https://www.pewresearch.org/hispanic/2018/11/27/u-s-unauthorized-immigrant-total-dips-to-lowest-level-in-a-decade/> [https://perma.cc/3JWS-B7DQ].

258. Elmore, *supra* note 8, at 557.

259. Johnson, *supra* note 256, at 1614.

260. Bill Ong Hing, *The Case for Amnesty*, 3 STAN. J.C.R. & C.L. 233, 283–84 (2007).

in knowing exactly who is within their borders and controlling the entry and exit of foreign individuals.²⁶¹ The United States simply cannot detect individuals who are national security threats if they do not know that such individuals are present in the United States.²⁶² Therefore, allowing undocumented individuals to access the H-2A program and eventual lawful permanent resident status through the new H-2A visa program would enhance national security. The prevalence of the underground labor market would shrink, previously undocumented individuals would feel free to emerge from the shadows and be accounted for, and the newly documented would be more willing to cooperate with law enforcement.²⁶³

Individuals concerned with the effect of new immigrants on the United States may fear that offering increased opportunities for legal immigration and pathways to permanent residence would result in a surge of immigrants, which would in turn negatively impact our culture, economy, and the number of jobs available to Americans. However, the alarmist thinkers who adhere to this sentiment err in believing that this country is the pinnacle of a “promised land” to foreigners.²⁶⁴ Loosening the reigns on immigration would be unlikely to open the “floodgates” to immigrants overwhelming the United States.²⁶⁵ Given that the labor market primarily drives immigration, once the market is fulfilled, the number of immigrants would gradually slow down.²⁶⁶

B. How the State-Sponsored H-2A Solves the Dairy Worker Problem

Allowing the participation of undocumented workers in the new H-2A program will also help to remedy the troubles that come from working in the shadows. Not only will incorporating undocumented individuals already working in agriculture increase national security and be cost effective for states, due to the saved recruiting and visa costs, but it will also grant undocumented individuals legal status, which

261. SARA McELMURRY ET AL., THE CHICAGO COUNCIL ON GLOB. AFFAIRS & BIPARTISAN POLICY CTR., BALANCING PRIORITIES: IMMIGRATION, NATIONAL SECURITY, AND PUBLIC SAFETY 4 (2016), https://www.thechicagocouncil.org/sites/default/files/oct16_immigrationandnationalsecurity_report.pdf [<https://perma.cc/CJP3-H5EN>].

262. *Id.* at 14, 20.

263. Hing, *supra* note 260, at 274.

264. See KEVIN R. JOHNSON, OPENING THE FLOODGATES: WHY AMERICA NEEDS TO RETHINK ITS BORDERS AND IMMIGRATION LAWS 26 (2007).

265. *Id.* at 28.

266. See *id.* at 28–29 (making predictions based on U.S. federalism, the EU, and the relationship between Puerto Rico and the United States, all of which feature a right to free movement, but lack an inundation of immigrants, despite economic disparities and opportunities between countries/states); Elmore, *supra* note 8, at 557.

would change their lives. The idea of offering legalization options to undocumented immigrants is not new. In 1986, President Reagan granted amnesty for nearly three million undocumented immigrants as part of the Immigration Reform and Control Act of 1986.²⁶⁷ This Comment's proposal is not quite amnesty, but would allow undocumented dairy workers to participate in a legal visa program and then apply for a green card after five years of participation.²⁶⁸

A pathway to permanent residency is necessary to honor and repay the years of labor that dairy workers have provided to the United States. First, undocumented dairy workers are often present in the United States for years on end.²⁶⁹ For example, three-fourths of all foreign farm workers have been in the USA for more than ten years,²⁷⁰ and the average Wisconsin immigrant dairy worker has been in Wisconsin for 2.8 years.²⁷¹ As President Reagan once said, "I believe in the idea of amnesty for those who have put down roots and lived here, even though sometime back they may have entered illegally."²⁷²

Second, as discussed, dairy workers in Wisconsin are dependent on their employer's kindness to ensure fair treatment.²⁷³ Eventual lawful permanent resident status would humanize undocumented and H-2A workers and change the social perception and treatment of them as a commodity to the elevated status of a future citizen.²⁷⁴ This would, in turn, increase respect for them and decrease their exploitation. In a 1980 address, President Reagan said, "I want more than anything I've ever wanted, to have an Administration that will . . . let millions of people know that Miss Liberty still, 'Lifts her lamp beside the golden door'. . . . Let us pledge to each other, with this Great Lady looking on, that we can, and so help us God, we will make America great again."²⁷⁵ In other words, prosperity and progress involve respect for immigrants and legal options for immigration.

267. *Reagan Legacy: Amnesty for Illegal Immigrants*, NPR (July 4, 2010, 2:12 PM), <https://www.npr.org/templates/story/story.php?storyId=128303672> [https://perma.cc/PG4L-SK5K]; *See generally* Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (granting amnesty to illegal immigrants).

268. *See supra* Section II.A.

269. Hernandez & Gabbard, *supra* note 67, at 4, 27.

270. *Id.* at 4.

271. Harrison et al., *supra* note 93, at 1.

272. *A Reagan Legacy: Amnesty for Illegal Immigrants*, *supra* note 267.

273. *See supra* Section I.D.

274. *See Hing*, *supra* note 260, at 267–69.

275. President Ronald Reagan, Labor Day Address at Liberty State Park (Sept. 1, 1980).

C. How the State-Sponsored H-2A Solves the H-2A Problem

On July 26, 2019, the United States Department of Labor proposed revisions to regulations concerning the H-2A visa program to “moderniz[e] the H-2A program and eliminat[e] inefficiencies.”²⁷⁶ The proposed regulations included provisions to reduce the agricultural employers’ duty to recruit domestic workers, change the wage rates for H-2A workers, allow employers to “stagger” the entry of workers over the first 120 days of a contract, reduce the transportation reimbursement requirement for H-2A workers, and decrease the frequency of required inspections of worker housing, among other things.²⁷⁷ Overall, these proposed changes would benefit employers, but weaken protections of H-2A workers.²⁷⁸ Such a proposal to reform the H-2A visa program is insufficient and does not solve the problem of abusive treatment suffered by the workers who feed America.

In contrast, the state-sponsored H-2A program would help to resolve the various flaws of the current H-2A program. The problems discussed above include employer grievances that the program is expensive and cumbersome, lack of oversight of employers, and prevalent exploitation of H-2A workers.²⁷⁹ This Comment’s proposal takes the recruitment, housing, and visa application burden off of employers and transfers it to the state workforce agency. In addition, it substitutes the various costs that employers must pay for a state-set standard fee.²⁸⁰ Hopefully, these changes would ameliorate employer complaints about the visa process because it would be more straightforward for them. Also, shifting the recruitment burden to the states would insulate potential workers from illegal recruitment fees.²⁸¹ Furthermore, in an effort to better protect workers, this proposal transfers oversight of employer compliance with the program to the state workforce agency, allows workers to transfer jobs, and incorporates eligibility for lawful permanent resident status after five consecutive years of participation in the program.

276. Temporary Agricultural Employment of H-2A Nonimmigrants in the United States, 84 Fed. Reg. 36,168 (July 26, 2019). The comment period for this proposed regulation ended on September 24, 2019.

277. *Id.*

278. *Trump Department of Labor Proposes Harmful Changes to H-2A Agricultural Guestworker Program*, FARMWORKER JUST. 1, <https://www.farmworkerjustice.org/sites/default/files/resources/H-2ANPRMFactSheet7-26-19.pdf> [<https://perma.cc/BA9Z-6E4>].

279. *See supra* Section I.E.

280. *See supra* notes 111–27 and accompanying text.

281. *See supra* notes 124–30 and accompanying text.

1. ALTERING FEDERAL AND STATE OVERSIGHT RESPONSIBILITIES

Critics might argue that 50 different state guest worker programs would be difficult to oversee federally and would lead to a more confusing immigration schema. Although efficiency and administrability are legitimate concerns, the relatively narrow scope of guest worker programs in the total context of all immigration law would not place undue burdens on those overseeing the program federally. Currently, the federal government is responsible for overseeing all H-2A employers, which it has done quite poorly.²⁸² Reports show that the DOL approved employers' applications for H-2A visas with minimal review, or even in the face of fraud allegations.²⁸³ In addition, employers are rarely sanctioned when they engage in bad behavior and break the law.²⁸⁴ This proposal would move oversight of all employers to the states and would leave the federal government only with the responsibility of ensuring state compliance with the general objectives of the program. Instead of having virtually nonexistent accountability for H-2A employers, as is happening now, the state would be better situated to regulate their own employers because the smaller scale of regulation and enforcement would yield higher employer accountability.²⁸⁵ Granted, each state would have different duties in this respect. Notably, the distribution of H-2A workers is not equal amongst the states and some employers employ hundreds or thousands of H-2A workers.²⁸⁶ Thus, the flexibility of the new program in assessing and responding to the individual needs of states concerning regulation is beneficial.

282. See S. POVERTY LAW CTR., *supra* note 139, at 1–2; Elmore, *supra* note 8, at 540–44.

283. Elmore, *supra* note 8, at 538–40 (“DOL’s ETA [Employment and Training Administration] has been criticized for failing to adequately review certification requirements. DOL’s Office of Inspector General (“OIG”) reported that one DOL regional office approved applications within a day or two of receipt, despite notification from the corresponding SWA [State Workforce Agency] of fraud by the applicants.”).

284. *Id.* at 540. As far back as 1999, courts recognized that employers were running free from sanctions for misbehavior in relation to guest workers. *Vega v. Nourse Farms, Inc.*, 62 F. Supp. 2d 334, 342 (D. Mass. 1999) (“The fact is, when worker’s rights are violated, no one gets sanctioned.”); see S. POVERTY LAW CTR., *supra* note 139, at 39–40.

285. Collins, *supra* note 190, at 350, 359.

286. See *supra* notes 112–16 and accompanying text; ANNUAL REPORT 2016, *supra* note 13, at 44.

2. THE IMPORTANCE OF EMPLOYER DE-CENTRALIZATION

De-centralization of the employer in the H-2A visa process is another central aspect of the state-sponsored H-2A program.²⁸⁷ Currently, the United States issues H-2A visas to workers only in relation to the specific employer for which they are contracted.²⁸⁸ This means that guest workers are not free to quit their jobs and find new employment in the United States.²⁸⁹ Simultaneously, the United States has a history of oppression and exploitation of guest workers.²⁹⁰ One reason for the abuse is that employee's H-2A visa status is tied to their employer.²⁹¹

Allowing H-2A workers to transfer jobs within the agricultural industry of the state would decrease the prevalence of guest worker exploitation.²⁹² Arguably, it would be unfair to burden the employer with H-2A participation cost, only to have the worker quit and find new employment. Although this is a valid critique, the need for protection of vulnerable guest workers based on the historical mistreatment of them is paramount. Guest workers are not a bought commodity; they are human beings who have rights and need more protections. Allowing the H-2A worker to transfer jobs will encourage the employer to treat the worker fairly and not exploit him or her. If the employer treats the guest worker fairly and engages in efforts to retain him or her, as employers must do for U.S. workers, the guest worker will have incentives to stay. Furthermore, given that the proposal involves a path to permanent residence after five years of successful employment under the new H-2A program, the guest worker has additional reasons to remain successfully employed during that five-year period. By allowing the H-2A worker to transfer jobs, the interests of the H-2A worker and employer will be more fairly balanced.

CONCLUSION

America's Dairyland is in a sticky situation because it lacks sufficient national workers to run its milking parlors and has no sustainable means of recruiting foreign workers due to its ineligibility

287. See Vivian, *supra* note 127, at 206.

288. Elmore, *supra* note 8, at 535-36, 541.

289. *Id.*

290. See *supra* Section I.E; S. POVERTY L. CTR., *supra* note 139, at 1-2.

291. See S. POVERTY L. CTR., *supra* note 139, at 1. See generally Yasseri, *supra* note 22, at 369-70 (discussing the same issue of employer abuse of guest workers under the H-2B visa program in which migrant workers are similarly contracted to a single employer and forbidden from seeking other employment).

292. Elmore, *supra* note 8, at 535-36.

for the H-2A visa. To avoid shutting their doors, many dairy farmers hire immigrant laborers, often not knowing if they are authorized to work in the United States or not. Simultaneously, H-2A workers are particularly vulnerable to abusive practices by unscrupulous employers and spend years of their lives laboring on American farms with no hope of gaining permanent residence in the United States through their employment status. This Comment proposes a new state-sponsored H-2A program that would respond to such problems facing farmers and farmworkers.

This renovated H-2A visa program would significantly benefit dairy farmers in Wisconsin. By shifting control of the H-2A visa program from the federal government to the states, states could mold the program around their own agricultural needs. For Wisconsin, this would mean including the dairy industry. Although immigration has been traditionally under federal regulation, if the federal government relinquishes their control of guest worker programs, this shift would not spark constitutional issues.

Furthermore, adjustments to the H-2A program outlined in this Comment offer increased protections for immigrant farmworkers. First, employer de-centralization in the H-2A visa process, through state control over recruitment and authorization for the H-2A worker to switch jobs within the program, would combat rampant employer violations of the law and the frequent abuse of vulnerable immigrant guest workers. Second, participation of undocumented individuals and offering guest workers a path to lawful permanent residence and eventual citizenship, would realize nationwide benefits through political justice, increased economic development, and augmented national security. A state-run system not only serves workers, but also would prove to be economically beneficial for the United States.

Diverse immigrants built our great nation, and their continued participation and contribution makes it stronger. However, throughout the history of the H-2A program, the foreign hands that have fed America have been mistreated. This state-sponsored H-2A program will better protect workers while improving the United States immigration schema and spurring growth into the future.