FARMWORKER JUSTICE

December 1, 2025

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U.S. Department of Labor

Brian Pasternak
Administrator
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Submitted electronically via regulations.gov.

**RE: DOL Docket No. ETA-2025-0008
Adverse Effect Wage Rate Methodology for the Temporary Employment of H-2A Nonimmigrants in Non-Range Occupations in the United States (RIN 1205-AC24)**

Dear Acting Assistant Secretary Frazier and Administrator Pasternak,

We, the undersigned organizations representing migrant and seasonal farmworkers, submit this comment in response to the invitation from the Department of Labor ("the Department" or "DOL") for public comment on its Interim Final Rule ("IFR") titled "Adverse Effect Wage Rate Methodology for the Temporary Employment of H-2A Nonimmigrants in Non-Range Occupations in the United States."[1] We oppose the Department's revised methodology, as laid out in the IFR. The IFR drastically reduces farmworker wages and transfers housing costs to H-2A workers.

Farmworker Justice is a national organization that aims to empower farmworkers and their families to improve their living and working conditions, immigration status, health, occupational safety, and access to justice. The additional signers of these comments include farmworker organizations, legal services organizations, as well as other organizations whose staff have assisted both U.S. and foreign farmworkers navigate the H-2A program for decades. We have witnessed firsthand the experiences of farmworkers participating in the H-2A program and in corresponding employment, and we provide their

[1] IFR, 90 Fed. Reg. 47914 (Oct. 2, 2025).

stories throughout our comments. We seek to center farmworkers' experiences in our evaluation of the IFR, and we hope the Department will do the same.

Table of Contents

I. The New Methodology Will Have an Adverse Effect on U.S. Workers

A. The Plain Text of 8 U.S.C. § 1188(a)(1) Shows That the Department Must, in Its Administration of the H-2A Program, Anticipate and Mitigate Potential Adverse Effects on U.S. Workers Similarly Employed

Whenever the Department of Labor ("Department") promulgates a rule pertaining to the H-2A program, it must prospectively analyze and mitigate any potential adverse effects the rule may have on the wages and working conditions of U.S. workers similarly employed, irrespective of domestic employers' need for foreign labor. This obligation, statutorily prescribed by the plain language of 8 U.S.C. § 1188(a)(1), was at the heart of Congress' motivation in enacting the provision, and continues to underpin judicial analyses of H-2A regulations. The Department has also historically acknowledged its responsibility to account for and protect against adverse effects on U.S. workers similarly employed through its prior rulemaking, which features data-driven analyses of the rule's projected impact on the U.S. labor supply.

1. The Statutory Text of 8 U.S.C. § 1188(a)(1)(B) Directs the Department to Prevent U.S. Workers From Being Adversely Affected, an Obligation That Exists in Tandem With, but Without Subordination to, § 1188(a)(1)(A)

By its plain language, 8 U.S.C. § 1188(a)'s grant of authority to the Department to administer the H-2A program is premised on a free-standing directive: to prevent adverse effects on U.S. workers. The full subsection is as follows:

> (a) Conditions for approval of H-2A petitions.
>
> > (1) A petition to import an alien as an H-2A worker (as defined in subsection (i)(2)) may not be approved by the Attorney General unless the petitioner has applied to the Secretary of Labor for a certification that—
> >
> > > (A) there are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services involved in the petition, and
> > >
> > > (B) the employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed.[2]

The first condition underscores the purpose of the H-2A program—to supplement the country's domestic agricultural labor force with temporary foreign workers when necessary. Absent a demonstrated shortage of domestic agricultural labor, there is no need to shore it up with temporary foreign workers, and thus no justification for permitting an employer to import temporary foreign workers. Employers may only be authorized to hire foreign workers if the Department certifies that the foreign workers' employment will not adversely affect the wages and working conditions of workers in the U.S. similarly employed. The second condition directs the Department to safeguard U.S. workers similarly employed whenever there is a demonstrated need for temporary foreign labor. Importantly, the statute does not

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[2] 8 U.S.C. § 1188(a).

contain any language suggesting the satisfaction of either condition is dependent on the other; they are independently required. See *Overdevest Nurseries, L.P. v. Walsh*, 2 F.4th 977, 982 (D.C. Cir. 2021)(cleaned up)(noting when interpreting 8 U.S.C. § 1188(a) in a slightly different context that, "[h]ad Congress intended to unambiguously limit the reach of subsection B to [the] 'able, willing, and qualified' U.S. workers [referenced in A], it could have simply reused this language from subsection A in the very next provision"). Thus, the authority granted under 8 U.S.C. § 1188(a) to supplement U.S. agricultural labor with temporary foreign workers when necessary through the H-2A program is limited by its directive to prevent adverse effects on U.S. workers similarly employed; *the Department cannot elect to prioritize one condition at the expense of the other*.

This reading comports with analyses by courts across the country and with the Department's own understanding of its statutory obligation. For example, after a close read of the statute, the United States District Court for the Southern District of Georgia concluded that "the 'best reading' of § 1188, in its entirety, is that Congress granted the Department the authority to issue regulations to ensure that any certifications it issues for H-2A visas do not 'adversely affect' American agricultural workers." *Kansas v. United States DOL*, 749 F. Supp. 3d 1363, 1374-75 (S.D. Ga. 2024). Likewise, the United States District Court for the Eastern District of Kentucky recognized that "DOL's mission under § 1188 is to ensure that the H-2A program's use of migrant workers 'does not adversely affect the wages and working conditions of American workers similarly employed.'" *Barton v. United States DOL*, 757 F. Supp. 3d 766, 781 (E.D. Ky. 2024) (quoting § 1188 and citing Kansas, 749 F. Supp. 3d at 1374-75). The Department seems to agree; in justifying a different rule, it insisted that it has "long relied on" § 1188(a)'s "grant of authority" to "establish [H-2A] program requirements that ensure the employment of H-2A workers does not adversely affect the wages and working conditions of workers." *N.C. Farm Bureau Fed'n, Inc. v. U.S. DOL*, 781 F. Supp. 3d 455, 466–67 (E.D.N.C. 2025) (quoting the U.S. DOL) (cleaned up). Neither the courts nor the Department qualify its understanding of § 1188's directive to prevent adverse effects to U.S. workers.

Though one older case, *Rogers v. Larson*, describes a "balance" struck between the H-2A program's requirements, the court's rationale is still consistent with the understanding that the Department is accountable to a statutory directive to consider adverse effects of foreign labor on U.S. workers, regardless of employer need. 563 F.2d 617 (3d Cir. 1977).[3] The court's primary task in *Rogers* was to evaluate whether a Virgin Islands labor law conflicted with, and was thus preempted by, the federal H-2 program. In its analysis, the court made the following observation about the statutes' respective purposes:

> The common purposes [of these statutes] are to assure an adequate labor force on the one hand and to protect the jobs of citizens on the other. Any statutory scheme with these two purposes must inevitably *strike a balance* between the two goals. Clearly, citizen-workers would best be protected and assured high wages if no aliens were allowed to enter. Conversely, elimination of all restrictions upon entry would most effectively provide employers with an ample labor force. The conflict arises because the Virgin Islands and the United States *strike the balance* between these two goals differently.[4]

[3] Though the *Rogers* decision predates the creation of the H-2A program through the Immigration Reform and Control Act of 1986 ("IRCA"), modern courts continue to rely on it for the proposition that the Department must "balance" the interests of employers and workers. *See, e.g.*, *AFL-CIO v. Dole*, 923 F.2d 182, 185 (D.C. Cir. 1991) (citing *Rogers* for the proposition that "[t]he Department is obliged to balance the competing goals of the statute – providing an adequate labor supply and protecting the jobs of domestic workers").
[4] *Rogers*, 563 F.2d at 626 (emphases added).

Given the court's use of language evoking a balancing test, one may argue it understands the Department's directive as a zero-sum game in which it weighs employers' need for a sufficient labor force against U.S. workers' need for adequate wages and working conditions.

However, when considering the meaning of the court's analysis notwithstanding its use of balance-striking imagery, it becomes clear that it regards the adverse effect consideration as an indispensable limitation on the program's overarching purpose of supplementing the existing domestic labor force rather than a sliding scale. In other words, the court is *not* prescribing wholesale consideration of grower needs and U.S. worker needs; it is merely acknowledging that the purpose of the H-2A program—to supplement the domestic labor force as needed—is often at odds with the statutory imperative to ward off adverse effects of that process on U.S. workers. The program's goal and limitation are interdependent in that the need to prevent adverse effects only exists because the H-2A program allows for the influx of foreign labor. *See Rogers*, 563 F.2d at 626 ("Clearly, citizen-workers would best be protected and assured high wages if no aliens were allowed to enter. Conversely, elimination of all restrictions upon entry would most effectively provide employers with an ample labor force."). This connectedness, however, does not mean (and the *Rogers* court does not suggest) the Department is permitted to weigh the interests of growers and workers; it means that the adverse-effect imperative should be viewed in context of the H-2A program's purpose. *See id.*; *see also La. Forestry Ass'n v. Sec'y United States DOL*, 745 F.3d 653, 678 (3d Cir. 2014) (quoting *Rogers* and noting that "DOL is not required to consider employer hardship under the statutory and regulatory framework from which its authority to issue labor certifications derives. The Department must, instead, balance the interests of 'assur[ing] an adequate labor force on the one hand and . . . protect[ing] the jobs of citizens on the other'") (cleaned up). In this way, *Rogers* aligns with the above interpretation of 8 U.S.C. § 1188(a) as a grant of authority to the Department to administer the H-2A program with an inviolable directive to prevent adverse effects on U.S. workers.

2. *The Purpose of 8 U.S.C. § 1188 Makes Clear That the Department's Primary Consideration Must Be the Adverse Effect of Foreign Labor on U.S. Workers*

The core directive of the statute, which is to ensure that temporary foreign workers do not supplant U.S. agricultural workers, would be frustrated if the Department were not required to consistently consider the adverse impact on U.S. workers. This purpose is clear from the text of the statute, but it is also evident from the legislative history of the statute, interpreting case law, and existing DOL regulations.

The current H-2A temporary agricultural guestworker program traces back to 1942 with the Bracero program, a bilateral agreement between the U.S. and Mexico to allow the entry of Mexicans into the U.S. for temporary work during the World War II shortage.[5] "From the beginning of the Federal Government's involvement in the lawful importation of foreign agricultural workers … the Government has sought to protect similarly employed U.S. workers from the adverse effect such employment would

[5] Labor Certification Process for the Temporary Employment of Aliens in Agriculture in the United States; Adverse Effect Wage Rate Methodology, 54 Fed. Reg. 28037, 28039 (July 5, 1989) [hereinafter AEWR Methodology 1989].

cause their wages."[6] The unfortunate reality is that the program, as supported by empirical evidence, has significantly affected the wages of U.S. agricultural workers.[7]

In 1952, Congress passed the Immigration and Nationality Act ("INA"), which created a broad class of temporary, non-immigrant "H" visas for admission of foreign workers to provide temporary or seasonal labor in sectors of the economy with shortages of U.S. workers.[8] Congress expressed a desire for the statute to protect "American labor against an influx of [foreign laborers] entering the United States for the purpose of performing skilled or unskilled labor where the economy of individual localities is not capable of absorbing them at the time they desire to enter this country." H. Rep. No. 1365, 82d Cong., 2d Sess. (1952), *reprinted in* 1952 U.S. Code Cong. & Ad. News 1653, 1705. At that time, the INA did not distinguish between agricultural and non-agricultural workers.[9] Instead, the INA provided generally for admission to the United States of a person "having a residence in a foreign country which he has no intention of abandoning . . . who is coming temporarily to the United States to perform . . . temporary services or labor, *if unemployed persons capable of performing such service or labor cannot be found in this country*."[10] And "[s]ince at least 1953, 'employers seeking to import foreign nationals to work in various crop activities . . . were required to pay not less than a wage established by DOL.[11]

In 1965, Congress amended the statute to the language now present in 8 U.S.C. § 1188(a)(1)(B), *permitting* foreign labor only if the Secretary of Labor finds that American labor will *not* be adversely affected by the entry. Pub. L. No. 89-236, 79 Stat. 911, 917-18 (1965). The reversal of the 1952 language in itself reveals a desire to strengthen protections for U.S. domestic workers, as does the legislative history. *See* S. Rep. No. 748, 89th Cong., 1st Sess. (1965), *reprinted in* 1965 U.S. Code Cong. & Ad. News 3328, 3333. The legislative history thus demonstrates that Congress has passed continually restrictive legislation regarding foreign labor, and has each time expressed a desire to protect U.S. workers and ensure that foreign labor does not supplant domestic labor. Failure to consider whether U.S. workers will be adversely affected would clearly thwart this Congressional intent, particularly when Congress specifically amended the statute to permit foreign labor only in the absence of an adverse effect.

The Immigration Reform and Control Act of 1986 ("IRCA") altered the H-2 program by distinguishing between agricultural (H-2A) and non-agricultural (H-2B) workers.[12] IRCA further required that employer H-2A visa petitions certify that (1) there are not enough qualified U.S. workers available to fill the seasonal agricultural positions, and (2) similarly employed U.S. workers' wages and working conditions will not be adversely affected.[13] Moreover, under IRCA, the Secretary of Labor must issue findings "that aliens not be admitted under [the H-2A program] unless there are not sufficient workers in the United States who are able, willing, and qualified to perform the labor or service needed and that the employment of the aliens in such labor or services *will not adversely affect the wages* and working conditions of workers in the United States similarly employed."[14]

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[6] *Id.*
[7] *See, e.g.*, Cong. Rsch. Serv., The Effects on U.S. Farm Workers of an Agricultural Guest Worker Program 4–5 (Dec. 28, 2009), https://perma.cc/M4P2-97G3.
[8] P.L. 82-414, 66 Stat. 163 (1952).
[9] *Id.*
[10] *Id.* (emphasis added).
[11] IFR, 90 Fed. Reg. at 47916 (quoting AEWR Methodology 1989, 54 Fed. Reg. at 28039).
[12] Pub. L. 99-603, 100 Stat. 3445.
[13] *Id.*
[14] *Id.* (emphasis added).

Court and agency interpretations of 8 U.S.C. § 1188 and the INA more broadly have also come to the conclusion that its purpose is to prevent domestic labor from being supplanted by foreign labor and ensure that the wages and working conditions of U.S. workers are not degraded. In 1974, the First Circuit described "the policy which permeates the immigration statutes" to be "that domestic workers rather than [foreign workers] be employed whenever possible." *Elton Orchards, Inc. v. Brennan*, 508 F. 2d 493, 500 (1st Cir. 1974). The D.C. Circuit has repeatedly come to the same conclusion. *See Mendoza v. Perez*, 754 F.3d 1002, 1017 (D.C. 2014) (". . . Congress was concerned about (1) the American workers who would otherwise perform the labor that might be given to foreign workers, and (2) American workers in similar employment whose wages and working conditions could be adversely affected by the employment of foreign laborers."); *Int'l Union of Bricklayers & Allied Craftsmen v. Meese*, 761 F.2d 798, 804–05 (D.C. 1985) ("The legislative history of [the INA] (as initially passed) clearly evinces a congressional purpose to keep American labor stalwart in the face of foreign competition in the United States . . . .").

The Ninth Circuit more generally concluded that "[a] primary purpose of the immigration laws, with their quotas and certification procedures, is to protect American laborers." *Int'l Longshoremen's & Warehousemen's Union v. Meese,* 891 F.2d 1374, 1379 (9th Cir. 1989). Similarly, and more recently, the Third Circuit described the H-2A program's labor certification process as "designed to vindicate the domestic national policy goal of preserving 'the wages and working conditions of workers in the United States.'" *Sun Valley Orchards, LLC v. U.S. DOL*, 148 F.4th 121 (3d Cir. 2025) (quoting 8 U.S.C. § 1188(a)(1)(B)). Existing DOL regulations reflect the same understanding. 20 C.F.R. § 655.0 concludes that "the purpose of the INA" is "that U.S. workers rather than [foreign workers] be employed wherever possible."

Unlike its H-2B counterpart, the H-2A program has no cap.[15] Without careful monitoring and consideration of the interests of U.S. workers, employers would have every incentive to hire as many H-2A workers at sub-market wages as possible.

Given that the statute's core purpose is to protect U.S. labor and ensure that U.S. workers' conditions are not degraded by the employment of foreign workers, the Department must without exception consider whether the Adverse Effect Wage Rate will have an adverse effect on U.S. workers. Moreover, placing greater importance on the availability of the workforce, or refusing to analyze the adverse effect on U.S. workers because of a labor shortage, would thwart Congress's intent, which was to restrict employers' ability to import workers when it comes at the cost of the employment and adequate working conditions of U.S. workers.

3. The Department's Prior Practices Recognize That the Adverse Effects on U.S. Workers Must Be a Primary Consideration in Its Rulemaking Processes

The Department has promulgated rules that exhibit an understanding of its statutory mandate to protect U.S. workers. Indeed, in the agency's own words, its creation of the Adverse Effect Wage Rate itself "is one of the primary ways the Department has historically met its statutory obligation to certify that the employment of H-2A workers will not have an adverse effect on the wages of agricultural workers in the United States similarly employed, while ensuring that employers can access legal agricultural labor."[16] Though the Department has adopted various methodologies over the years to

[15] Pub. L. 99-603, 100 Stat. 3445.
[16] IFR, 90 Fed. Reg. at 47916.

calculate the Adverse Effect Wage Rate, it has often taken care to also root that methodology in its statutory obligation to protect U.S. workers and to demonstrate—through various data sources, formats, and experts—its compliance.

Take, for example, the Department's 1989 Rule. U.S. DOL, *Labor Certification Process for the Temporary Employment of Aliens in Agriculture in the United States; Adverse Effect Wage Rate Methodology*, 54 Fed. Reg. 28037 (Jul. 5, 1989). The Department acknowledged its statutory mandate to protect U.S. workers from adverse effects brought on by its administration of the H-2A program, as well as the need to use the Adverse Effect Wage Rate with an enhancement factor should the Department be able to find affirmative evidence of past adverse effects and quantify those adverse effects. The Department conducted a variety of studies in an effort to do that, but was unable, at that time, to quantify any adverse effects. *Id.* at 28037. Still, it shows a post-IRCA understanding of the Department that it needed to make that analysis.

DOL rulemaking processes after 1989 similarly demonstrate that the Department understood its statutory mandate to focus on whether U.S. workers would be adversely affected when determining the methodology used to calculate the Adverse Effect Wage Rate. In 1989, the Department issued a regulation stating that employers that utilize the H-2A program must pay a wage that is the highest of (1) the AEWR, (2) the prevailing wage rate, (3) an agreed-upon collective bargaining wage, or (4) any applicable minimum wage.[17] The 1989 methodology based the AEWR on the "level of actual average hourly agricultural wages for each State, as surveyed by the U.S. Department of Agriculture."[18] The survey in question was the Agricultural (Farm) Labor Survey ("FLS"). In the 1989 Rule, DOL noted that this was "the best available data on hourly wages in the agricultural sector."[19]

For example, the 2010 Department rule, which recalculated the Adverse Effect Wage Rate, did so expressly in order to return wage determinations to the 1987/89 methodology, which used the FLS. *See* U.S. DOL, *Temporary Agricultural Employment of H-2A Aliens in the United States*, 75 Fed. Reg. 6884, 6896 (Feb. 12, 2010). In so doing, the Department analyzed wages before and after its 2009 rulemaking process to determine that the OES method of calculating the Adverse Effect Wage Rate created a risk that U.S. workers may experience wage depression. *Id.* at 6898. Throughout its rulemaking process, the Department relied on statistical analysis to determine how to calculate the Adverse Effect Wage Rate in order to best protect U.S. workers. As the agency stated, it viewed its methodology as "appropriately limit[ing] the importation of foreign labor to cases where the value of the labor need is more than marginal; the relatively higher willingness to pay . . . may serve to mobilize domestic farm labor . . . and obviate the need to rely on importation of foreign labor on an ongoing basis." *Id.* at 6899. Thus, although the agency did consider the needs of farmers, the agency also made an effort to ensure that U.S. workers would be hired and that their working conditions would not deteriorate due to the importation of foreign labor, consistent with its statutory mandate and purpose.

[17] *See* 20 C.F.R. 655.120(a). There was a previous version of the regulation that also relied on the Farm Labor Survey issued in 1987, 52 Fed. Reg. 20496 (June 1, 1987), but this rule was invalidated by a court in *AFL-CIO v. Brock*, 668 F. Supp. 31 (D.D.C. 1987). *See also* AEWR Methodology 1989, 54 Fed. Reg. 28037.
[18] AEWR Methodology 1989, 54 Fed. Reg. at 28038.
[19] *Id.* at 28041.

B. Even If 8 U.S.C. § 1188(a)(1) Is Ambiguous, Loper Bright Requires the Courts to Independently Assess the Adverse Effect on U.S. Workers Rather than Defer to Agency Interpretations

Even if the statute is ambiguous, the Supreme Court made clear in *Loper Bright Enterprises v. Raimondo* that courts will no longer defer to agency interpretations simply because they involve technical or policy questions. 603 U.S. 369 (2024). As a result of that decision, the Department must now demonstrate, with reasoned explanation and evidence, how its interpretation implements the statute's text and purpose.

As noted above, 8 U.S.C. § 1188(a)(1) authorizes the Department to certify that employing H-2A workers "will not adversely affect" similarly employed U.S. workers. That mandate requires a transparent, data-based methodology that measures and prevents wage and working condition depression. The Department cannot create or revise this methodology without clear statutory grounding and a documented rationale.

In *AFL-CIO v. Dole*, 923 F.2d 182, 185 (D.C. Cir. 1991), the court stated that when an agency changes long-standing policy, it must rely on more than "admittedly inconclusive data" and must offer a genuinely reasoned explanation for the shift. *Id.* at 185. Here, the Department has not adequately justified its departure from prior Adverse Effect Wage Rate methodology or explained why the new approach better effectuates the "no adverse effect" mandate. *See infra*, Section I(C).

Moreover, *Loper Bright* fundamentally changes the analytic landscape in the administrative-law context. Courts may no longer presume that the Agency's technical judgments are entitled to deference simply because of its expertise. The Department of Labor must now affirmatively show, through a robust and transparent reasoning, that its interpretation is the best reading of the statute and that its methodology actually prevents adverse effects on U.S. workers.

As will be further detailed below, the IFR fails to meet this standard. *See infra*, Section I(C). Its lack of empirical support, unexplained methodological changes, and insufficient connection to the statutory purpose demonstrate that the Department's interpretation is unlikely to withstand judicial review under the heightened scrutiny *Loper Bright* now requires.

C. The Department's Actions Are Unlawful, an Abuse of Discretion, Arbitrary and Capricious, and Not Supported by Adequate Rationale, Evidence or Satisfactory Explanation

As indicated above, the H-2A statute and regulations require the Department to make sure that U.S. workers are employed wherever possible. The H-2A statute requires the Department to determine whether there are U.S. workers available for H-2A jobs before allowing employers to bring foreign temporary workers. In order to determine if U.S. workers are available for the job, the Department must first ensure that the wages and working conditions they set as standards for H-2A jobs will not adversely affect the wages and working conditions of U.S. workers similarly employed. They must also make this determination to protect the wages and working conditions of those other U.S. workers similarly employed. The Department's setting of wage and other standards is critical to protect U.S. workers' ability to access these employment opportunities and to protect wages and working conditions of workers in H-2A and non-H-2A agricultural employment. The Department cannot expect U.S. workers to want to apply for H-2A jobs with substandard wages and working conditions. The Department's methodology to determine the Adverse Effect Wage Rate is critical to ensure that wages are not substandard such that U.S. workers will be employed wherever possible.

Implementing a drastic reduction of the Adverse Effect Wage Rates achieves exactly the opposite of what the H-2A statutes and regulations require. "Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The Department has failed to consider relevant factors that the statute requires it to consider, has relied on factors which Congress did not intend it to consider, and has offered an explanation for its decision that is both implausible and unsupported by the evidence before the agency. This rulemaking has failed its duty under the statute and its actions must be reversed.

1. The Department Acted Arbitrarily and Capriciously in Failing to Consider Relevant Factors

An agency acts arbitrarily and capriciously where it "fail[s] to consider . . . important aspect[s] of the problem" before it. *See id.* Here, the Department failed to consider how its drastic change in calculating the Adverse Effect Wage Rate would adversely affect U.S. workers, both in H-2A jobs and in non-H-2A jobs, which it is required to consider. *See supra,* Section I(A). The Department also failed to consider the evidence that employers have strong incentives to hire H-2A workers over U.S. workers despite a higher Adverse Effect Wage Rate, which is a crucial element in predicting whether the Adverse Effect Wage Rate will sufficiently prevent adverse effects on U.S. workers.

i) The Department's IFR's Drastic Change in Adverse Effect Wage Rate Methodology Will Have an Immediate, Direct Adverse Effect on U.S. Workers Working in H-2A Jobs as "Corresponding Workers."

The Department's assertions made to support this change essentially exclude the main group of workers intended to be protected through H-2A regulations and law—U.S. workers, both those who work in H-2A jobs and those who are similarly employed in areas of H-2A jobs. The Department failed to adequately assess or even recognize the unlawful adverse effect this drastic change of the Adverse Effect Wage Rate methodology will have on U.S. workers, including citizens and non-citizens with work permits, working in H-2A jobs as corresponding workers.[20]

In order to wave away its failure to evaluate the adverse effect of revising the Adverse Effect Wage Rate methodology, the Department makes vague assertions that evidence is lacking on whether U.S workers would take agricultural jobs. Even if the Department were correct that there is a lack of sufficient

[20] One analysis of the IFR found that under the 92% (Skill Level 1) - 8% (Skill Level 2) scenario "H-2A wages decline by $1.5 billion or 23 percent from the estimated 2025 H-2A wage bill of $6.6 billion to $5.1 billion in 2026. Georgia H-2A employers save the most, followed by employers in North Carolina, Texas, California and Louisiana[.]" Zachariah Rutledge et al., *OEWS AEWRs: New Opportunity or Old Problems* (Oct. 29, 2025).

numbers of qualified, eligible, and interested U.S. workers, the Department would nevertheless be obligated to evaluate the potential adverse effect of its revised methodology on existing U.S. workers, because evaluating potential adverse effects is an independently-required statutory condition. *See supra*, Section I(A)(1).

Moreover, the Department ignores the fact that there are many U.S. workers working in H-2A jobs who will be adversely affected by the new methodology used to calculate the Adverse Effect Wage Rate. The Department's own Foreign Labor Application Gateway (FLAG) system records show the large number of U.S. workers in H-2A jobs in its H-2A Disclosure Data. Case law demonstrates examples of U.S. workers applying for H-2A jobs.[21] H-2A employers often also hire non-H-2A farm labor contractors to find workers. Many of these workers, if not most of these workers, are citizens or non-citizens with work authorization. One of the recent findings from the National Agricultural Workers Survey ("NAWS") found that 58% of agricultural workers are authorized to work in the U.S., including 32% of agricultural workers who were born in the U.S. and 38% who are U.S. citizens.[22] (Note that the NAWS does not include H-2A workers.) This drastic reduction of H-2A wages adversely affects these U.S. workers by decreasing their wages by around hundreds of dollars each week. The Department acknowledges that almost all of the H-2A temporary foreign workers will be brought in at Skill Level I, which at 17% of the OEWS wages of those occupation groups, necessarily means U.S. workers, as corresponding workers and future corresponding workers, are immediately facing unlawful adverse action because of this change to the Adverse Effect Wage Rate methodology. The change has caused an immediate drop of U.S. workers seeking work under H-2A orders, as well as their earning potential, as U.S. workers will be less likely to apply for the H-2A positions.

Contrary to the statute's dictates, the Department failed to recognize that there are many U.S. workers working in H-2A jobs as corresponding workers or who would be interested in H-2A jobs if the jobs did not have substandard conditions. Although the Department cursorily acknowledges "the reliance interests" of U.S. workers, the Department only states that it has no evidence of willing and available U.S. workers. *See* IFR, 90 Fed. Reg. at 47,928. This ignores both (1) the existence of U.S. workers in corresponding employment and (2) that its directive to examine adverse effects is not limited to those workers who are willing, qualified, and able. *See, e.g., Overdevest Nurseries, L.P. v. Walsh*, 2 F.4th 977, 982 (D.C. Cir. 2021). And while the Department states that the "reliance interest" of U.S. workers "is far outweighed by the duty the Department has to address the now correcting labor market," this is not a relevant consideration, as discussed below. *See infra*, Section I(C)(2). The Department failed to assess the relevant consideration that is the adverse effect on this group of U.S. workers and irrationally failed to give any explanation as to how these workers would not be "adversely affected."

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[21] *Hernandez v. Siri & Son Farms, Inc.*, No. 6:20-cv-669, 2021 WL 4999022 (D. Ore. Sept. 30, 2021); *Ruiz Torres v. Mercer Canyons, Inc.*, 835 F.3d 1125 (9th Cir. 2016); *Bazan v. Coleman Industries, Inc.*, 2021 WL 4498645 at *3 (D. Ore. 2021); *Valerio Espinoza v. West Coast Tomato Growers, LLC*, 2016 WL 4468175 at *4 (S.D. Cal. 2016); *Guerra-Jimenez v. Servicios Agricolas Mex, Inc.*, 742 F.Supp.2d 1078, 1085–86 (D. Ariz. 2010). *See also* Anna Del Savio, *Jury awards $208k to U.S. citizen farmworker after organic grower abuses H-2A visa program*, Northwest Labor Press (Mar. 20, 2025), https://nwlaborpress.org/2025/03/jury-awards-208k-to-u-s-citizen-farmworker-after-organic-grower-abuses-h-2a-visa-program/.

[22] JBS International for the U.S. DOL, Findings from the National Agricultural Workers Survey (NAWS) 2021-2022: A Demographic and Employment Profile of United States Crop Workers, Research Report No. 17, p. 1 (2023) [hereinafter Findings from NAWS 2021–2022].

ii) The Department's IFR's Drastic Change in Adverse Effect Wage Rate Methodology Will Have an Immediate, Direct Adverse Effect on U.S. Workers Similarly Employed in Non-H-2A Agriculture in Violation of the Statutory Requirements of the H-2A Program

The Department similarly failed to address the adverse effect on U.S. workers employed in non-H-2A jobs. The Department's methodology change will also negatively impact other workers working in non-H-2A agricultural jobs, the majority of whom are documented. Many states, including Texas, California, Michigan, Oregon, Washington, Arizona, have thousands of domestic agricultural workers who often work year-round in seasonal and permanent employment. NAWS data shows that there are many U.S. workers who are currently working in agricultural jobs and are citizens or are non-citizens with work authorization. As mentioned above, NAWS found that the majority (58%) of agricultural workers in the U.S. are authorized to work.[23] This change in Adverse Effect Wage Rate methodology will unlawfully directly adversely impact the wages and working conditions of these workers.

The drastic decrease in the cost of participating in the H-2A program due to the tremendous wage decrease will cause more employers to start using the H-2A program. Indeed, the Department has indicated that this is their desired and expected outcome. Undoubtedly, this will mean these employers currently employing thousands of U.S. workers, most of whom, according to NAWS, are citizens and non-citizens with work permits, will apply for and hire temporary foreign workers instead of the U.S. workers they would have previously employed directly or through farm labor contractors. Generally, the Department will approve their applications for temporary foreign workers.[24] Because employers are not likely to expand their operations to keep prior U.S. workers, bringing in foreign temporary workers will act to replace their U.S. workers. See case law showing H-2A employers' reluctance to hire and keep U.S. workers.[25] This displacement will negatively impact long term employment. The NAWS shows that 48% of agricultural workers have worked for their current employer for five years or more, with 23% having worked for more than 10 years.[26] Thus, this Adverse Effect Wage Rate change will directly adversely affect wages and working conditions and mean that U.S. workers will not be hired in violation of the statute and in fact, will most likely face unlawful loss of their employment.

U.S. workers in companies that choose not to use the H-2A program will also have their wages and working conditions adversely affected due to this change of Adverse Effect Wage Rate methodology. As the new Adverse Effect Wage Rate Skill Level I, where Department acknowledges most workers will be hired, is structurally lower than average wages (when using either FLS or OEWS wages) surrounding non-H-2A employers will, in order to remain competitive, most likely need to reduce their workers' wages. Thus, the new Adverse Effect Wage Rate will create a downward pressure on wages, unlawfully

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[23] *See id.*

[24] A recent GAO report found that the U.S. DOL approved 97% of the applications on average from FY 2018 to FY2023 and approved 99.8% of jobs in employer applications. U.S. GAO, GAO-25-106389, H-2A Visa Program: Agencies Should Take Additional Steps to Improve Oversight and Enforcement, pp. 8, 11 (2024) [hereinafter GAO, H-2A Visa Program 2024].

[25] *Hernandez v. Siri & Son Farms, Inc.*, No. 6:20-cv-669, 2021 WL 4999022 (D. Ore. Sept. 30, 2021); *Ruiz Torres v. Mercer Canyons, Inc.*, 835 F.3d 1125 (9th Cir. 2016); *Bazan v. Coleman Industries, Inc.*, 2021 WL 4498645 at *3 (D. Ore. 2021); *Valerio Espinoza v. West Coast Tomato Growers, LLC*, 2016 WL 4468175 at *4 (S.D. Cal. 2016); *Guerra-Jimenez v. Servicios Agricolas Mex, Inc.*, 742 F.Supp.2d 1078, 1085–86 (D. Ariz. 2010). *See also* GAO, H-2A Visa Program 2024, *supra*.

[26] Findings from NAWS 2021–2022, *supra*, at 33.

creating an adverse effect on wages and working conditions. One study found that merely freezing the Adverse Effect Wage Rate for one year would reduce the growth of wages paid to non-H2A farmworkers by as much as $475 million[27]. Add to that then the undoubtedly more egregious with the additional impact of actually lowering the Adverse Impact Wage Rate.

An increase of H-2A employment will cause other adverse effects on the wages and working conditions of U.S. workers in non-H-2A agricultural employment. Many H-2A employers have shifted to paying an hourly rate in industries where a piece rate was generally paid. H-2A employers have made this shift generally to pay workers less. They are able to make this shift because their high level of control, as described below, allows them to demand a high level of productivity from workers without needing to pay a piece rate. Many other non-H-2A employers may be pressured to follow this practice due to economic pressures especially as growth of H-2A employment further expands as the Department clearly intends. We have heard many U.S. workers state that non-H-2A employers are increasing productivity standards to excessive rates to compete with H-2A employers. Increased productivity standards can be concerning if they lead to increased risk of work-related injury or illness. The Department is supposed to set standards to ensure these downward pressures do not occur. They have failed to do so and have failed to analyze how the new Adverse Effect Wage Rate methodology will interact with these existing pressures. This drastic reduction will escalate the downward pressures we have seen on wages and working conditions, especially for those who have traditionally earned a piece rate.[28]

Also, as we see more H-2A employers including requests for visas for foreign temporary workers to fill roles that should not be found to qualify as agricultural jobs—whose tasks are misrepresented so as to fall within the allowed parameters—the downward wage and working condition pressures caused by H-2A employment will be felt by U.S. workers in non-agricultural industries as well. Both the reduced wages stemming from the tiered skill levels and the rolling of higher paying work will lead to an increase in misclassification. Thus, the Department's actions are negatively impacting workers working in agriculture and across many industries.

iii) The Department's Adverse Effect Wage Rate Methodology Fails to Counteract the Ways the H-2A System Permits Employers to Unlawfully Prefer Foreign Temporary Workers over U.S. Workers and Will Achieve the Opposite Result by Increasing Reasons for This Unlawful Preference

In addition to evaluating the direct adverse effects caused by this change, the Department must also ensure that the methodology used to calculate the Adverse Effect Wage Rate effectively counteracts the many ways in which the H-2A system and its implementation has increased employers' unlawful preferences to hire H-2A foreign temporary workers. Many employers already unlawfully prefer foreign temporary workers over U.S. workers, and the current H-2A system unlawfully supports this preference. In creating its new methodology, the Department failed to consider the factors not directly related to wages that lead employers to prefer H-2A workers over temporary workers. Indeed, the Department's

[27] *See* Zachariah Rutledge et. al, *Adverse Effect Wage Rates and U.S. Farm Wages*, Amer. J. Agr. Econ. (June 9, 2025), https://onlinelibrary.wiley.com/doi/10.1111/ajae.12557.
[28] Recent NAWS data shows that 7% of agricultural workers are paid exclusively by piece rate. Findings from NAWS 2021–2022, *supra*, at 27.

changed methodology will unlawfully perpetuate and expand this preference, thus adversely affecting U.S. workers.

For instance, the Department failed to account for employers' preferences to hire young, male H-2A workers over U.S. workers, which exists regardless of the Adverse Effect Wage Rate. H-2A employers mainly hire young, male foreign temporary workers. A recent GAO report shows that from FY 2018 to FY 2023, 97% of the H-2A workers were male and 83% were under 41 years old.[29] NAWS data shows that U.S. farmworkers are more diverse than H-2A workers—including many older workers and female workers. According to NAWS, only 68% of agricultural workers are men, and 31% are over 44 years old.[30] An arguably wrongfully decided decision from the Fourth Circuit, *Reyes Gaona v. NCGA*, 250 F.3d 861 (4th Cir. 2001) found that U.S. anti-discrimination protections do not apply to recruitment outside of the United States. Thus, under some current case law, H-2A employers can focus their recruitment foreign efforts on young men screened against disability, thus overtly discriminating in ways impermissible under U.S. law and in a way not available to employers not using the H-2A program who only recruit workers within the U.S. Further, U.S. employers not using the H-2A program will face difficulties competing with the H-2A employers who are allowed to discriminate. Employers may presume greater productivity from a 25-year-old male, even if that is an invalid assumption, and that preference will act to harm U.S. farmworkers, who, as NAWS notes, are an aging population. H-2A law does not require U.S. workers to compete, as they only need to be minimally qualified. *See Bernett v. Hepburn Orchards, Inc.*, 1987 WL 16939 at *5 (D. Md. 1987). However, many U.S. workers already face unlawful barriers to obtaining and keeping H-2A employment because the H-2A employers prefer young, male workers over whom they have a high level of control. A 50-year-old female worker who has worked at a nursery in Oregon for thirty years, while able to contribute greatly based on her experience, will generally not be able to compete with a 20-year-old male. Several cases show examples of H-2A employers discriminating against and discouraging U.S. workers from H-2A employment.[31]

In addition to direct actions against workers applying for jobs, employers are able to discourage workers from H-2A employment by including terms in job orders that are not prevailing and not normal and accepted such as excess experience requirements, excess or vague productivity requirements, excessive lifting requirements, and mandatory arbitration clauses. Employers have been allowed to do so because of the Department's rubber stamping of applications without applying statutorily required scrutiny. In changing the Adverse Effect Wage Rate methodology, the Department failed to account for the fact that employers are already incentivized to hire H-2A workers regardless of the high wage rate, because hiring exclusively H-2A workers permits them to discriminate against older workers and female workers. Lowering the Adverse Effect Wage Rate will further incentivize employers to hire H-2A workers, which will have an adverse effect on older and female U.S. workers by reducing employment opportunities for these workers.

The Department also failed to account for other economic and non-economic reasons that employers already have an unlawful preference to hire H-2A workers regardless of the Adverse Effect Wage Rate. H-2A employers do not have to pay Social Security or FICA taxes for H-2A workers but do

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[29] GAO, H-2A Visa Program 2024, *supra*, at 14.
[30] Findings from NAWS 2021–2022, *supra*, at 27.
[31] *Avila Bernal v. Coleman*, No. 1:18-cv-88, 2019 WL 13268195 (W.D. Ky. June 17, 2019); *Hernandez v. Siri & Son Farms, Inc.*, No. 6:20-cv-669, 2021 WL 4999022 (D. Ore. Sept. 30, 2021); *Ruiz Torres v. Mercer Canyons, Inc.*, 835 F.3d 1125 (9th Cir. 2016).

have to pay those taxes for U.S. workers working in corresponding employment, thus creating lower costs to hire foreign temporary workers. 26 U.S.C. § 3121(b)(1); *Bernett v. Hepburn Orchards, Inc.*, 1987 WL 16939 at *5. In some states, employers do not have to pay unemployment taxes when employing H-2A foreign temporary workers.

H-2A workers almost never live with or near their families. U.S. workers often live with their families, including children, sometimes at the farm with them in migrant housing.[32] Thus, employers of U.S. workers sometimes need to allow U.S. workers to stay home to care for their sick children or to deal with child care disruption. U.S. workers may choose not to work the additional optional excess hours because of their family needs. While these U.S. workers are exercising their workplace rights, it causes employers to prefer not to hire workers with children and unlawfully prefer to hire the foreign, temporary workers. The Department must evaluate how to counteract these unlawful preferences and has failed to do so in its consideration.

Finally, the Department's IFR's Adverse Effect Wage Rate methodology fails to account for employers' unlawful preference for foreign temporary workers because of the high level of control employers are able to exert over these workers. H-2A temporary foreign workers are often recruited in their home countries by recruiters or labor contractors. Unfortunately, there is often abuse in this recruiting. Recruiters or supervisors often charge unlawful fees to get or keep H-2A jobs.[33] Although unlawful, recruiters tell workers to tell officials that no fees were charged. Workers often obey these and other demands because they are desperate for the jobs. As the Department noted, workers often can only earn minimal wages in their home countries and thus are willing to do whatever their employers request to allow them to get and keep the job.

Foreign temporary workers who come into the country on an H-2A visa are restricted by that visa to only work for the employer who hired them for the period of time of the contract. If workers are concerned that the job does not comply with promises made by the recruiter or that the job is unhealthy or unsafe, generally their only legal, practical option is to go back to their country without any guarantee or real chance of being rehired. While technically possible, it is extremely difficult for an individual worker to transfer to another H-2A position with another H-2A employer within the U.S. Thus, while many U.S. workers can leave an abusive employer and go to another job where the conditions are better, the foreign temporary workers almost always feel that they have no choice but to stay in the abusive job. Similarly, U.S. workers can seek work elsewhere during seasonal downtime, but H-2A workers are forced to remain with the employer on their visa. H-2A workers often live in employer-provided housing in remote, geographically isolated areas without their own transportation. They are often dependent on the employer to meet their basic needs, including medical care. They often are not aware of how the laws apply to them and what community resources might be available to them. Because of these and other factors, many foreign temporary workers work "scared," and desperate not to lose their jobs.[34] They often do not take sick days even when they are ill and are entitled to sick days under state law. They often work all hours offered (even if the law says they are not required to work more hours than those indicated in job

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[32] NAWS data found that 69% of agricultural workers have 1 or more children in their household. Findings from NAWS 2021–2022, *supra*, at 2.
[33] GAO, H-2A Visa Program 2024, *supra*, at 34 (finding that 9% of the violations found in Department investigations involved illegal charges and fees).
[34] *E.g.*, Teresa Cotsirilos, *The dark side of America's sheep industry*, High Country News (Oct. 2, 2023), https://www.hcn.org/issues/55-10/labor-the-dark-side-of-americas-sheep-industry/.

order—which are often posted as low estimates to reduce the "three-fourths guarantee"[35] exposure), because they understand that they must do so to keep doing their job and to be able to come back the next year. They often must race against other workers under vague, unknowable productivity standards because it is known that the "slowest" workers are unlawfully fired or not brought back the following year. These foreign temporary workers often do not report injuries for fear of losing their jobs. Indeed, many injured foreign temporary workers are not brought back the following season by H-2A employers.

Because of this high level of control, foreign temporary workers hired by H-2A employers often do not report violations because of fear of retaliation and blacklisting, either losing their jobs during the season or not being brought back the following season. The H-2A system's facilitation of employers' high level of control over workers often leads to high rates of violations of the law in H-2A employment.[36] There is a culture of non-compliance in many H-2A jobs. There are also high rates of labor trafficking related to H-2A employment.[37] High rates of abuse, including trafficking, are likely to increase with the Department's change in methodology. The Department has failed to determine how setting the Adverse Effect Wage Rate methodology will help to address these abuses.

The increased hiring of foreign temporary workers under a system that permits a high level of control by employers creates, strengthens, and perpetuates a culture of compliance that leads to greater violations and abuse in the agricultural industry. This creates difficulties for neighboring employers to compete without following the abusive H-2A employers' practices leading to adverse effects on the wages and working conditions of U.S. workers similarly employed. The Department's failure to account for employer preferences for foreign temporary workers which is related to their ability to have a high level of control over these workers in this rulemaking is arbitrary, capricious, and an abuse of discretion. The Department's actions are hurting, not helping, U.S. workers.

Also, while the statute requires that the Department assess the impact that the H-2A standards will have on the wages and working conditions of U.S. workers similarly employed, we encourage the Department to also recognize that U.S. workers spend and invest their earnings in the states and rural communities where they live. Increasing employment of foreign temporary workers and diminishing the number of U.S. workers in these jobs decreases the investment in these rural communities, negatively impacting the vibrancy and sustainability of these communities. Other community support structures such as migrant health centers, migrant education, migrant and seasonal head start, schools, and churches will be hurt when agricultural worker families who live and work in rural communities are displaced by H-2A workers.

iv) The Department Failed to Consider, Assess and Measure the Interplay Between Wages/Adverse Effect Wage Rate and Working

[35] Employers must guarantee to offer H-2A workers and workers in corresponding employment at least three quarters (75%) of the hours specified in the H-2A contract. 20 C.F.R. § 655.122(i).
[36] A recent GAO report found that 84% of investigations found one or more H-2A violations. Of those that had at least one violation, 45% had over 5 violations and 39% had violations of other labor laws. These investigations were primarily directed by the agency (87%) rather than being initiated by worker complaints showing worker reluctance to complain. GAO, H-2A Visa Program 2024, *supra*, at 29–35.
[37] Centro de los Derechos del Migrante, Ripe for Reform: Abuses of Agricultural Workers in the H-2A Visa Program (2020), https://cdmigrante.org/wp-content/uploads/2020/04/Ripe-for-Reform.pdf [henceforth CDM, Ripe for Reform].

Conditions When Setting the Adverse Effect Wage Rate Methodology. This Failure Is Unlawful, an Abuse of Discretion, Arbitrary and Capricious, and Lacks Rationale

The Department notes that the increase of the Adverse Effect Wage Rate did not result in an increase of U.S. workers applying for these jobs. This is an insufficient justification to lower the Adverse Effect Wage Rate. The Department must analyze and assess many factors in order to ensure that U.S. workers are hired wherever possible and wages and working conditions are not negatively affected based on statutory mandates and 20 C.F.R. § 655.0. In our experience, workers evaluate a combination of factors in determining which jobs to apply for, including both wages and working conditions. The Department admits this by recognizing that some U.S. workers do not see these jobs as viable alternatives even under previous Adverse Effect Wage Rate methodology because of the difficult conditions agricultural workers face including remote locations, physically demanding work, lack of advancement opportunities, and health and safety risks.

With evidence of the many U.S. workers (who are authorized to work) working in H-2A jobs and those who are interested in working in these jobs, if there are not substandard wages and working conditions, it is irrational to acknowledge these reasons as to barriers for U.S. worker employment and then turn to a drastic reduction of wages as a solution. Instead, the statute mandates that the Department ensure that the standards, including a combination of wage and working conditions standards, do not adversely affect the wages and working conditions of employment of U.S. workers and ensure that U.S. workers are hired wherever possible. The Department has failed to articulate how substantially lowering wages for U.S. corresponding workers and foreign temporary workers working in H-2A employment will ensure that U.S. workers are hired whenever possible.

Based on the Department's own description of why U.S. workers may not see H-2A jobs as a viable alternative, the Department must look at *both* wages and working conditions in assessing what standards are required. For example, we often see U.S. workers choosing non-H-2A employment over H-2A agricultural employment, mainly because of the substandard, excessively demanding work conditions with H-2A employment. Similarly, DOL's economic analysis, which is premised on adding 119,000 new H-2A workers, failed to account for the domestic workers who will choose to exit the agricultural sector because of the IFR (as well as the many unauthorized agricultural workers who have been or will be deported. Prevailing wage and practice surveys are one part of the H-2A system that was designed to help the Department measure and assess the wages *and* working conditions of non-H-2A employers to ensure that the H-2A standards will not depress them. However, the Department has failed to ensure that states conduct prevailing wage and practice surveys to measure conditions of work. The Department is not able to adequately assess what it must under its statutory mandate without this information. It is irrational to then use its failure to say that it does not have the information needed to make the determination. It must take the steps to obtain the information necessary. In addition to ensuring that states conduct prevailing wage and practice surveys, the Department must then use the information to set minimum work condition standards to help ensure that U.S. workers are hired whenever possible. For the factors identified, there are more constructive solutions, such as encouraging the building of agricultural worker community-based housing to ease isolation; enhancing health and safety protections in the agriculture industries and implementing programs to support advancement opportunities in the agricultural industry. The Department admits that current standards deter U.S. workers from applying for

H-2A jobs. Instead of further lowering already poor incentives, as this change in the Adverse Effect Wage Rate methodology does, the Department must create a meaningful methodology for work standards to ensure that there is not a depression of wages/working conditions for other workers and to accurately determine availability of U.S. workers for H-2A jobs.

2. The Department Relied on Factors Congress Did Not Intend for It to Rely on When Issuing the IFR

The Department also relied on irrelevant factors to justify its rulemaking, thereby rendering the IFR arbitrary and capricious. *See Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43 ("Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.").

The Department bases its need for this change in methodology mainly on alleged crises caused by the current Administration's changes in immigration enforcement and trade policy, and in its own decision to eliminate the Farm Labor Survey and other sources of data. But these factors are not among those contemplated by Congress for the Department to consider in its rulemaking. It is instead statutorily restricted to considering only the need for foreign labor and the adverse effect that foreign labor could have on domestic workers. For this reason, the Department is not justified in considering its "duty . . . to address the now correcting labor market."[38] To the extent the Department views the Administration's self-made changes as creating a labor crisis, it is nonetheless required to anticipate and prevent adverse effects of addressing that shortage through the H-2A program, which it has not. *See supra*, Section I(A)(1).

3. The Department's Offered Explanation for the IFR Is Implausible and Unsupported by Evidence

Even if the Department had centered its justification for the IFR only on those considerations prescribed by Congress, it still failed to adequately explain its rule by lacking evidence demonstrating a lack of adverse effects on domestic workers, as it is statutorily required to do. *See also supra*, Section I(A)(1).

i) The Department's Attempted Explanations as to Why This Drastic Reduction of the Adverse Effect Wage Rate Is Needed Is Not Supported by Evidence and Unlawfully Fails to Adequately Assess the Adverse Effect This Change Could Have on U.S. Workers Similarly Employed

The Department states this change in the Adverse Effect Wage Rate methodology is needed because the current Adverse Effect Wage Rate methodology is unworkable and that the program is a regulatory dead end. The Department failed to articulate any satisfactory explanation or evidence to support this overly broad and vague conclusion. For example, the Department asserts, without support, that grower profit margins are thin. The Department also refers to an "informal survey of growers"

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[38] *See* IFR, 90 Fed. Reg. at 47928.

without specifying how many growers were surveyed, what type of agriculture was sampled, or what comments were actually shared. It also states without support that this change is needed to restore usability of the H-2A program. All of the above assertions lack evidence or sufficient explanation. They are also applying the wrong measure. The H-2A statutory requirements state the Department must ensure that U.S. workers are hired wherever possible. While the H-2A program exists to permit employers to utilize the program to apply for permission to bring in foreign temporary workers to work for them, they may only do so if U.S. workers are not available, and that can only be measured if the H-2A standards are set correctly to ensure no adverse impact on wages and working conditions of U.S. workers. The emphasis is on measuring impact on workers, which the Department failed to do. The priority is protecting U.S. workers. The Department focused its attempted analysis almost exclusively on employers' profitability which is not authorized by statute, rule, or case law.[39]

Even if the above assertions about usability of the program for agricultural employers were the correct measure, *the assertions are not factually true*. From FY 2018 to FY 2023, the annual number of applications approved for the H-2A visa program increased significantly, by 80%, from 11,319 to 20,379. In that same period, the Department approval of H-2A jobs increased from 242,762 to 378,513, or 56%.[40] This current use and substantial growth of the program in recent years supports the conclusion that the program has been workable, viable, and probably profitable for many agricultural employers for many years. The relatively slower growth this past year is minor in the context of the substantial growth in recent years and insufficient to conclude that it is unworkable for agricultural employers.

ii) The Department's Conclusion That the Previous, Longstanding Adverse Effect Wage Rate Methodology Produces Adverse Effect Wage Rates That Are Too High Is Irrational and Lacks Any Support or Evidence

The Department states "[u]nreasonably high FLS-based Adverse Effect Wage Rates were only workable because agricultural employers could turn to low-priced [immigrants without work permits] but that is no longer the case."[41] This statement is not logical or rational. Any increase in Adverse Effect Wage Rates is due to an increase in the wages employers are paying to workers in those agricultural industry codes. As most H-2A jobs are not paying more than Adverse Effect Wage Rate, the increase is due to mainly non-H-2A employers, indicating their ability to pay these wages. The Department is arguing that the solution to a decreased supply of labor is to reduce wages, which is not rational.

The Department has implemented a methodology for calculating the Adverse Effect Wage Rate that violates the statute because it clearly will have an adverse effect on the wages and working conditions of U.S. workers similarly employed. The drop in the Adverse Effect Wage Rate under the IFR

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[39] The Department's assessment of the whether this change will have an adverse effect on workers *only* looked at the adverse effect on H-2A foreign workers, and wrongly concluded that this change will not have an adverse impact on foreign workers despite losing hundreds of dollars each week of work because they will be able to work more jobs within the year based on the growth of the H-2A program. This conclusion is wrong for several reasons. First, many H-2A foreign workers are already working at least 10 months during the year and so will not be able to make up the large amount of wages that will be lost with this change. Second, many H-2A foreign workers most likely do not have a way to find other H-2A jobs or have any guarantee that they will find other jobs. There is no mechanism to help them do so.
[40] GAO, H-2A Visa Program 2024, *supra*, at 8–11.
[41] IFR, 90 Fed. Reg. at 47924.

immediately and directly lowers the wages for thousands of U.S. workers working as corresponding employees or who might want to work as corresponding workers. The Department failed to acknowledge this and failed to articulate any satisfactory explanation as to how a significant drop in the Adverse Effect Wage Rate could be considered not to have an adverse effect on these workers.

D. To Comply with Statutory and Regulatory Mandates, the Department Must Reverse Its Adverse Effect Wage Rate Methodology and Take the Following Steps to Adequately Consider, Measure and Prevent Adverse Effects of Employment of Foreign Temporary Workers.

The Department has failed to adequately and comprehensively set effective standards to prevent adverse effects through the IFR's new Adverse Effect Wage Rate methodology. To comply with the law, including 8 U.S.C. § 1188 and 20 C.F.R. § 655.0, the Department must reverse this change and strengthen H-2A program standards to ensure that employment of foreign temporary workers does not adversely affect the wages and working conditions of U.S. workers such that U.S. workers are hired wherever possible by H-2A agricultural employers

Additionally, the Department must reinstate the Farm Labor Survey to gather the data needed to determine appropriate standards for agricultural workers.

The Department must also ensure that states conduct prevailing wage and practice surveys for all significant agricultural products including gathering detailed information about wages including piece rates, experience requirements, mandatory arbitration clauses, mandatory drug testing, productivity standards, lifting requirements, etc. As part of these surveys, we encourage the Department to survey agricultural workers, especially U.S. workers, to determine what standards, including wages and working conditions, would permit U.S. workers to be hired wherever possible in H-2A jobs. The H-2A program relies on the premise that no job orders are approved that result in an adverse effect, and that cannot adequately be monitored without the state surveys.

The Department must study and determine effective ways to reduce employer preference for hiring foreign temporary workers over U.S. workers, including how to reduce high level of control, reduce fear of retaliation to encourage workers to speak up to permit enforcement of H-2A and other labor laws, reduce culture of non-compliance and reduce incidents of trafficking. The Department should also do more to ensure that job orders do not contain terms designed to prevent or deter U.S. workers from applying for H-2A positions.

Given these considerations, the Department must not implement the IFR. Finally, we ask the Department to enact the pre-Immigration Reform and Control Act of 1986 ("IRCA") wage enhancement to account for the depression of wages and working conditions that has already occurred due to long-term flawed assessments, setting and enforcement of H-2A standards, and unlawful employer preference.

II. Occupational Employment and Wage Statistics Survey (OEWS) and Farm Labor Survey: Relying Solely on the OEWS Is Untenable Where the Department Admits That the OEWS Is Unready for Use in Determining Farm Occupations and Will be Unready to Do So for Three Years

The H-2A program's adverse effect standard helps to ensure that agricultural employers respond to fundamental market incentives to improve wages and working conditions before turning to a foreign labor source. The Adverse Effect Wage Rate requirement appropriately "reflects a longstanding concern that there is a potential for the entry of foreign workers to depress the wages and working conditions of domestic agricultural workers."[42] In the IFR and in prior rulemakings, the Department has repeatedly noted that the potential for wage depression in the H-2A context is particularly stark because the program is uncapped, giving employers "access to a potentially unlimited number of foreign workers."[43] Adverse effect is the omnipresent reality of the H-2A program—a system in which growers can tell any U.S. workers with the temerity to request higher wages that they can immediately be replaced by foreign workers, many of whom would happily take the job at a far lower rate.

With the Administration's dismantling of the U.S. Department of Agriculture ("USDA") Farm Labor Survey ("FLS"), the IFR switched from the FLS to the Department's Occupational Employment and Wage Statistics ("OEWS") to set the hourly Adverse Effect Wage Rate. Following the passage of the IRCA, which provided a pathway to citizenship for certain unauthorized individuals and prohibited the hiring of unauthorized workers by employers, the Department used the FLS to determine the earnings of crop and livestock workers and set the hourly Adverse Effect Wage Rate.

Calculating a wage level that prevents adverse effects to U.S. workers requires accurate, detailed, and up-to-date data on farmworker wages. We acknowledge the challenges that the Department faces in obtaining this data and offer our perspective on the survey the Department must now rely on, the OEWS, including a comparison to the data collected by the FLS.

A. The Department's History of the FLS and the OEWS

In 2008, the Department temporarily stopped relying on the FLS. This change contributed, along with an attempt to use skill levels, to a "precipitous drop" in farmworker wages.[44] The Department swiftly reversed course, admitting that U.S. farmworker wages had "been adversely impacted to a far more significant extent than anticipated."[45] The Department returned to using the FLS to set one Adverse Effect Wage Rate per state or region in 2010, and continued to use that methodology for years.

In 2019, the Department attempted a method similar to the 2025 IFR, in that it would use occupation-specific statewide hourly Adverse Effect Wage Rates, but using the FLS for the farm category

[42] Temporary Agricultural Employment of H-2A Aliens in the United States; Final Rule, 75 Fed. Reg. 6883, 6891 (Feb. 12, 2010).
[43] IFR, 90 Fed. Reg., at 47947; Adverse Effect Wage Rate Methodology for the Temporary Employment of H-2A Nonimmigrants in Non-Range Occupations in the United States, 86 Fed. Reg. 68174, 68176 (Dec. 1, 2021); Temporary Agricultural Employment of H-2A Aliens in the United States; Final Rule, 75 Fed. Reg. at 6895.
[44] Temporary Agricultural Employment of H-2A Aliens in the United States, 74 Fed. Reg. 45905, 45911 (proposed Sept. 4, 2009).
[45] *Id.*

occupations while using OEWS to set Adverse Effect Wage Rates for non-field-and-livestock occupations such as truck drivers and carpenters. In 2020, when the USDA attempted to cancel the FLS by publishing a suspension notice in the Federal Register, the federal court in *United Farm Workers v. Perdue* found the cancellation of the survey unlawful and ordered USDA to reinstate it immediately. No. 1:20-cv-01452-DAD-JLT (E.D. Cal. Oct. 28, 2020) (vacating the entire 2020 rule). The court recognized the Department's reliance on the FLS for setting the Adverse Effect Wage Rate.

In 2023, the Department published a new rule regarding Adverse Effect Wage Rate methodology, which used data from the OEWS. The 2023 Adverse Effect Wage Rate rule applied the FLS findings for the standard hourly wage for field and livestock workers to the following six SOC codes that make up the field and livestock category, which are: Farmworkers and Laborers, Crop, Nursery and Greenhouse Workers (SOC 45-2092); Farmworkers, Farm, Ranch, and Aquacultural Animals (SOC 45-2093); Agricultural Equipment Operators (SOC 45-2091); Packers and Packagers, Hand (SOC 53-7064); Graders and Sorters, Agricultural Products (SOC 45-2041); and All Other Agricultural Workers (SOC 45-2099). For any state or territory that lacked FLS field and livestock findings (i.e., Alaska and Puerto Rico), the Department relied on the OEWS data for the combined field and livestock SOCs ("Combined SOCs").[46]

For occupations other than the Combined SOCs, such as truck drivers, farm supervisors, construction workers, and others, the Adverse Effect Wage Rate was the statewide annual average gross hourly wage for the relevant SOC as reported by the OEWS survey. If no statewide OEWS data was available, the Adverse Effect Wage Rate for that state/region was the OEWS national annual average hourly wage for the SOC code. If the job duties on the H-2A application (including the job order) did not fall within a single occupational classification, and the occupations involved were subject to different Adverse Effect Wage Rates, the Department determined the applicable Adverse Effect Wage Rate at the highest Adverse Effect Wage Rate for the applicable occupational classifications. Employer-interests filed multiple lawsuits that ultimately led to the 2023 rule being vacated, but only after the Administration ceased defending the rule.[47]

B. The USDA Farm Labor Survey

Federal law instructs the United States Secretary of Agriculture to procure and preserve information concerning agriculture, including "by the collection of statistics" and "any other appropriate means within his power."[48] Since 1910, the Secretary of Agriculture has satisfied that statutory mandate in part by conducting the Agricultural Labor Survey, ultimately referred to as the Farm Labor Survey (FLS).[49]

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[46] "Note that two-thirds of the 955,000 U.S. workers in the Big 5 "farm occupations" are hand packers, most of whom are employed in nonfarm warehouses. This means that the hand packer wage has the highest weight in many states. Inclusion of hand packers lowers the OWES-based AEWR in most states." OEWS AEWRs: New Opportunity or Old Problems. See also https://cis.org/Report/DOL-Reduces-Wages-H2A-Workers (last visited Nov. 24, 2025).

[47] Judgment, Teche Vermilion Sugar Cane Growers Ass'n Inc. v. Su, No. 6:23-cv-00831-RRS-CBW (W.D. La. Aug. 21, 2025), ECF No. 87.

[48] 7 U.S. Code § 2204.

[49] USDA, Farm Employment Estimates, 1910 Census: Volume 5, Agriculture (1913).

For decades, the Department of Labor has relied upon data from the FLS to determine the Adverse Effect Wage Rate. The FLS surveyed roughly 16,000 farms and ranches twice a year on multiple subjects, including the number of hired farm workers, the gross wages paid to workers, and their total hours worked.[50] The USDA conducted the survey in cooperation with state agriculture departments using a combination of mail, telephone, and in-person interview methods, and the survey is limited to those operations with value of sales of $1,000 or more.[51] As the Department has recognized in multiple rulemakings on the H-2A program, the FLS was the best available source of data on the wages of the majority of U.S. farmworkers.[52]

The FLS had several advantages over other data sources. First, it was a direct survey of farm employers, where the USDA undertook outreach to those farm employers in a variety of formats to ensure a higher response rate. Second, the survey reported results for each year. As wages rise in the agricultural industry, any outdated data that is used to set the Adverse Effect Wage Rate will distort the labor market by dragging current market-rate wages down toward prior years' rates. The FLS did not report results in every state, but that could be supplemented by the OEWS where needed. Although an Adverse Effect Wage Rate based on the FLS still lagged behind the current market by around a year, the FLS was the most up-to-date data source available and was preferable to data sources like the OEWS that average wages over multiple years. Third, the FLS came closer to capturing seasonal peaks in farmworker wages by measuring wages at four points during the year: January, April, July, and October.[53]

C. The Bureau of Labor Statistics' Occupational Employment and Wage Statistics

The IFR proposes relying largely on the OEWS as a data source for farmworker wages to calculate the Adverse Effect Wage Rate. The OEWS—formerly known as the OES—is a twice-annual mail survey of non-farm employers. It provides estimates of the number of jobs in certain occupations and of the wages paid to workers in those jobs at the national level, the state level, and for metropolitan statistical areas (MSAs), metropolitan divisions, and nonmetropolitan areas. However, for the reasons stated below, the OEWS is not a preferred substitute for the FLS and, as the Department acknowledges,[54] will need to be revised, a process that will require three years before proper data is ready for determination of hourly Adverse Effect Wage Rates.

The OEWS is limited to non-farm employers, which in the agricultural sector generally refers to farm labor contractors ("FLCs"). While farms increasingly rely on FLCs for certain kinds of work, such as construction or equipment operation,[55] the majority of field and livestock workers are still directly

[50] USDA, Nat'l Agric. Statistics Service, Farm Labor Methodology and Quality Measures (Nov. 24, 2021), https://www.nass.usda.gov/Publications/Methodology_and_Data_Quality/Farm_Labor/11_2021/flqm1121.pdf.
[51] *Id.* at 23.
[52] Adverse Effect Wage Rate Methodology for the Temporary Employment of H-2A Nonimmigrants in Non-Range Occupations in the United States, 86 Fed. Reg. at 68178; Temporary Agricultural Employment of H-2A Aliens in the United States; Final Rule, 75 Fed. Reg. at 6898.
[53] USDA, Nat'l Agric. Statistics Service, Farm Labor Methodology and Quality Measures, *supra*, at 1.
[54] The Department concedes that the survey will need revisions to cover farm establishments. IFR, 90 Fed. Reg. at 47947.
[55] Adverse Effect Wage Rate Methodology for the Temporary Employment of H-2A Nonimmigrants in Non-Range Occupations in the United States, 86 Fed. Reg. at 68181.

hired by farms rather than FLCs.[56] Moreover, FLC wages for many field and livestock workers are lower than those paid by farms, which taints the data. The Department's own studies have indicated that FLCs and other employers in the farm support services field, on average, paid wages that were 14% lower than those paid by farm operators.[57]

Further, the OEWS survey sample is drawn from the database of businesses reporting to the state unemployment insurance ("UI") programs.[58] Many farmworkers are ineligible for unemployment benefits, which may exempt agricultural employers from paying premiums (based on various factors, including employing fewer workers, depending on the state), which means the OEWS does not survey them. The most recent NAWS found that only 45% of farmworker respondents reported having unemployment insurance coverage at their current farm job. While 69% of respondents reported having periods of unemployment in the past year averaging 17 weeks without employment, only 22% of respondents reported that they had received unemployment insurance benefits during at least one of their periods of unemployment.[59]

The OEWS wage estimates also present a greater risk of distorting current market rate wages because of the time period that is surveyed. The OEWS only collects data at two points in the year: May and November.[60] As a result, it is unlikely to capture wages from peak harvest season, when there is more competition for farm labor and wages are typically higher. For example, the frost date, before which there is limited planting, runs through May in some northern states. Similarly, even for the relatively southern state of North Carolina, the frost date signaling the end of the crop season occurs before November in many places.[61]

The OEWS estimates rely on data that stretches back further in time, averaging wage rates across three years.[62] This means that a 2025 Adverse Effect Wage Rate based on May 2024 OEWS wage findings would be influenced by wage data from as far back as 2021. Significantly, this means that, even if the Department immediately takes action to revise the OEWS to cover agricultural employers to begin use in the May 2026 survey, more accurate OEWS estimates based on agricultural employers will not be ready until May 2030. This is because the data would need to be aggregated from 2026–29, and would not be published until 2030. Even though the OEWS should correct for inflation during that period, as wages for farmworkers steadily rise, reliance on lagging data to set the Adverse Effect Wage Rate places significant downward pressure on wages in the current labor market, particularly if there is not accounting for the several year gap created by the discontinuation of the FLS and immediate conversion to the OEWS prior to making adjustments that the Department concedes are needed.

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[56] The latest NAWS (which does not include H-2A workers) showed that in 2021–22, 78% of farmworkers worked directly for a farm employer. *See* NAWS Report, (Sept. 2023), p. 25.
[57] Temporary Agricultural Employment of H-2A Aliens in the United States; Final Rule, 75 Fed. Reg. at 6898.
[58] *Occupational Employment and Wage Statistics: Overview*, U.S. Bureau of Labor Stat., https://www.bls.gov/oes/oes_emp.htm (last visited on Nov. 16, 2025).
[59] Findings from NAWS 2021–2022, *supra*.
[60] *Occupational Employment and Wage Statistics: Overview*, U.S. Bureau of Labor Stat., https://www.bls.gov/oes/oes_emp.htm (last visited on Nov. 16, 2025).
[61] North Carolina State University Extension: Average First and Last Freeze Dates, https://gardening.ces.ncsu.edu/weather-2-2/average-first-and-last-frost-dates/ (last visited Nov. 16, 2025).
[62] *Id*.

The OEWS does not capture skill level within occupational codes. Further, the IFR did not provide that it would change the H-2A job order applications to account for the need to assign different skill levels, nor have H-2A job order applications been updated to provide for an accurate analysis of skill levels. The IFR does not explain how a State Workforce Agency (SWA) can reasonably assess skill levels given the amount of information provided on the current forms. This casts doubt on the reasonableness of the IFR's scheme of varying wages within a single Standard Occupational Classification ("SOC") code (*see* Section IV, *infra*). It also runs counter to the O*NET determination that all farmworker and laborer jobs would fall within Zone 1.[63] The Department's O*NET system is used to classify occupations into job zones based on the amount of prior training or experience required to perform those jobs. Further, the OEWS wages are gross pay (including piece rate pay) but excludes overtime. While many farmworkers are exempt from overtime requirements, states such as California and Washington do cover farmworkers in their overtime requirements.[64]

The IFR notes that the OEWS is better able to capture data at the local level. It is true that the OEWS, with its metropolitan and non-metropolitan data, captures local data that the FLS did not, and that data should be used where a particular occupation's wages are higher than the Adverse Effect Wage Rate, so as not to create an adverse effect on U.S. workers. However, at the local level, the OEWS wage findings are more suited to the intended function of the prevailing wage protection in the H-2A program. The Department should consider the ability to better assess prevailing wages with OEWS data that can be used to supplement SWA findings under the prevailing wage methodology.[65] As noted in *Torres Hernandez*, prevailing wages are necessarily higher than Adverse Effect Wage Rates, and the need to protect U.S. workers with accurate prevailing wage determinations will be all the more crucial given the IFR's reduced Adverse Effect Wage Rate wages.[66] And while we feel that the localized OEWS data is better suited for the prevailing wage system, we recognize that the OEWS may, in some instances, provide some broad geographical protection of Adverse Effect Wage Rates, if the Department looks to the highest of all OEWS wage rates for the metropolitan and non-metropolitan areas within a state or region. This would reflect the reality that many U.S. workers are willing to travel within their states or regions to seek out higher wages, and that they would not have the opportunity to do so if higher local wages are not protected.

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[63] O*Net Online: Farmworkers and Laborers Crop Nursery and Greenhouse (45-2092.00), https://www.onetonline.org/link/summary/45-2092.00 (last visited on Nov. 16, 2025).
[64]` California, Industrial Welfare Comm'n, Order No. 14-2001, Regulating Wages, Hours and Working Conditions in the Agricultural Occupations (2001), https://www.dir.ca.gov/Iwc/IWCArticle14.pdf; 2021 Wash. Sess. Laws ch. 249.
[65] The SWA prevailing wage studies, if properly conducted, should provide even more granular and accurate detail than the OEWS, as they may be tailored to both regions and specific crops and tasks.
[66] *Torres Hernandez v. Su*, No. 23-25582, 2024 WL 2559562 at *1 (9th Cir. May 24, 2024).

III. The Application of Tiered Skill Levels is Not Rational For the H-2A Program and Will Act to Depress Farmworker Wages.

Since the Bracero program in the 1940s, the Department has played a major role in regulating the entry of temporary foreign agricultural workers into the United States. Throughout, the Department's charge has been two-fold: to see that U.S. workers are hired wherever possible, and to ensure that the admission of temporary foreign workers does not depress the wages and working conditions of domestic farmworkers.[67] These objectives are necessarily interrelated. If the wages are set too low, few domestic workers will be hired "since U.S. workers cannot be expected to accept employment" at substandard wages.[68] Importantly, these central tenets are inviolable, even if they result in economic hardship for farm employers because "[t]o recognize a legal right to use alien workers upon a showing of business justification would be to negate the policy which permeates the immigration statutes, that domestic workers rather than aliens be employed wherever possible."[69]

In regulating the wages of Mexican workers imported through the post-war Bracero program, the Department initially required payment of the local prevailing wage for the occupation and activity.[70] As the Bracero program was winding down, the Department issued the first Adverse Effect Wage Rates with respect to those foreign agricultural workers admitted through the H-2 program established by the INA.[71] As the Secretary of Labor emphasized, a "primary consideration" in issuing the regulations is that "foreign workers … in no event, will be admitted under circumstances adversely affecting domestic wage levels."[72]

Over the ensuing years, in computing the Adverse Effect Wage Rate, the Department has largely hewed to the principle proclaimed by the Labor Secretary in 1964, i.e., that foreign agricultural workers would not be admitted at wage rates that would depress those of U.S. farmworkers similarly employed. The interim final regulation represents a radical departure from this decades-long tradition. Through its unwarranted introduction of skill levels into the Adverse Effect Wage Rate formulation, the IFR reduces the earnings of farmworkers, including U.S. farmworkers employed by H-2A growers and contractors, by billions of dollars, a fact freely acknowledged by the Department.

While the H-2A regulations require H-2A employers must offer the highest of four wages,[73] the Adverse Effect Wage Rate has become the "primary wage rate under the H-2A program because it is

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[67] *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 596 (1982).
[68] 20 C.F.R. § 655.0(a)(2).
[69] *Elton Orchards, Inc. v. Brennan*, 508 F.2d 493, 500 (1st Cir. 1974); 20 C.F.R. § 655.0(a)(3). As explained further within this comment, neither the Immigration and Nationality Act nor the Immigration Reform and Control Act of 1986 permit the Department in its administration of the agricultural guestworker program to "balance" the interests of domestic farmworkers against those of their employers.
[70] AEWR Methodology 1989, 54 Fed. Reg. at 28039.
[71] *Id*. The Adverse Effect Wage Rates served purposes distinct from prevailing wages. While the prevailing wage is designed to protect local wages paid, the Adverse Effect Wage Rate sets a state-wide wage floor to prevent wage disparities over larger geographic areas. *United Farm Workers v. U.S. DOL*, 509 F.Supp.3d 1225, 1230 (E.D. Cal. 2020).
[72] 29 Fed. Reg. 19101 (Dec. 30, 1964).
[73] The Adverse Effect Wage Rate, the Prevailing Wage Rate, the agreed-upon collective bargaining wage, or the federal or state minimum wage. 20 C.F.R. § 655.120(a)(1).

higher than the other wages in most circumstances" and, as DOL recognized in the IFR,[74] determines the wages of over 90% of the farmworkers working for H-2A program employers.[75] This trend is likely to continue and perhaps increase, as fewer states conduct the surveys required to establish prevailing wage rates as possible alternatives to the Adverse Effect Wage Rates.[76]

The Department's decision to base the Adverse Effect Wage Rates on data from the OEWS rather than the discontinued FLS has negative effects on farmworker wages. However, if the IFR had adopted a process similar to that used with respect to the H-2B program, establishing the Adverse Effect Wage Rate at the arithmetic mean of the wages within the occupation,[77] the resulting rates in most states would have fairly approximated the 2025 rates based on the FLS, particularly if the OEWS survey could be adjusted to account for agricultural employers. However, the IFR imposes a skill level regime that it earlier rejected with regard to the H-2B program and which will drastically reduce the earnings of most farmworkers hired by H-2A employers.

The Department states that it agreed with the "many stakeholders" (which almost certainly were largely H-2A employers and/or their representatives) who urged adoption of a multi-tiered system of the sort mandated by Congress with regard to the H-1B program. But in fact, the multitude of differences between the two programs make application of these skill levels to the H-2A system entirely inappropriate.

At the outset, it is important to note that while Congress has mandated that a multi-tiered system of skill levels be used with regard to the H-1B program, there is no such requirement with regard to the H-2 programs. The INA and the IRCA contain no mention of the use of skill levels with respect to the importation of foreign agricultural workers, either in the statutes themselves or in their respective legislative histories.

And while a multi-tiered wage schedule may be appropriate in some situations for skilled guestworker programs, it is ill-suited for the H-2 programs. Unlike skilled guestworkers, who fill occupations that require a spectrum of skills, experience, and responsibility, the vast majority of H-2A workers perform temporary or seasonal crop work, which is largely homogeneous in nature. The H-1B program admits a variety of specialized workers including architects, engineers, scientists, doctors, teachers, and lawyers. These skilled occupations involve a range of skills and experience levels that may make it appropriate to subdivide the general occupation into multiple wage levels that vary according to the level of judgment, experience, and skill required.

The opposite, however, is true of much of temporary agricultural work. The required "abilities" for this work include endurance, good coordination, manual dexterity, hand steadiness, and speech recognition. Although workers may improve these abilities over time—for example, by becoming faster, more durable, or more dexterous—improvement in these abilities does not change the worker's wage level. This is because the skills used by the worker in performing his or her job remain the same: planting,

[74] IFR, 90 Fed. Reg. at 47955.
[75] *United Farm Workers v. U.S. DOL*, 509 F.Supp.3d 1225, 1230 (E.D. Cal. 2020).
[76] *Garcia v. Stewart*, 531 F.Supp.3d 194, 201 (D.D.C. 2021) (40 states have not conducted a prevailing wage survey in years). Recent regulatory changes have made it markedly more difficult for state workforce agencies to conduct prevailing wage surveys that will be accepted by the Department. *See* 20 C.F.R. § 655.120(c).
[77] 20 C.F.R. § 655.10(b)(2).

picking, and tending crops. An unskilled farmworker is not transformed into a "skilled" worker by becoming a faster unskilled worker.[78]

Workers employed in most of the jobs for which H-2A applications are filed far more closely resemble H-2B unskilled temporary non-agricultural workers rather than the educated and often credentialed H-1B visa holders. In 2010, when considering the use of skill levels in evaluating H-2B jobs, the Department noted that most job opportunities have few or no skill requirements and that by artificially stratifying wages, the skill levels inappropriately allow employers to force much of the wage-earning workforce into a lower wage.[79] Because most H-2B jobs, similar to the vast majority of temporary farm labor jobs, require minimal skill to perform, have few special skill or experience requirements, and do not generally have career ladders, they typically end up being classified in the lowest wage level cohort (Skill Level I under the IFR), because the jobs themselves do not require the employer to seek workers with higher skill levels. The Department found that use of a tiered wage system with H-2B workers had a depressive effect on the wages of U.S. workers in similar jobs.[80] That same year, the Department found that "the notion of meaningful skill differences among agricultural workers is unfounded. Most of the occupations and activities relevant to the H–2A program involve skills that are readily learned in a very short time on the job, skills peak quickly, rather than increasing with long-term experience, and skills related to one crop or activity are readily transferred to other crops or activities."[81]

There is no reason to think that classification of H-2A jobs as Skill Level I will not occur following the IFR's incorporation of skill levels into the H-2A program. Indeed, the IFR's economic analysis is premised on the assumption that 92% of H-2A jobs will be classified as Skill Level I.[82] The vast majority of the post-October 2, 2025 H-2A applications that the Department has reviewed have been classified as Skill Level I.[83] This includes numerous applications that have included experience requirements of three months or more, and up to six months, despite the indication in the Department's Federal Register notice that jobs with such experience requirements would be classified as Skill Level II.[84] With so many H-2A jobs being classified as Skill Level I, a rate well below the average wage paid farmworkers as measured by both the FLS and the OEWS survey, this is likely to lead to the same sort of wage depression that prompted the Department to discontinue the use of skill levels in the H-2B program.[85]

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[78] Federal courts have repeatedly noted the unskilled nature of much farm labor. *See, e.g.*, *Castillo v. Givens*, 704 F.2d 181, 191 (5th Cir. 1983) ("It is such a simple task that even children can do it–it requires no aptitude, no training, no skill, and no experience"); *Torres-Lopez v. May*, 111 F.3d 633, 644 (9th Cir. 1997) (piece work in agriculture requires no great initiative, judgment or foresight); *Charles v. Burton*, 169 F.3d 1322, 1332 (11th Cir, 1999) (vegetable picking is unskilled work); *Rueda v. A. Olivarez Harvesting, LLC,* 2019 WL 7905730 at *4 (W.D. Tex. 2019) (packing and packaging produce is repetitive, rote and unskilled); *Morales-Garcia v. Higuera Farms, Inc.*, 2021 WL 6774327 at *18 (C.D. Cal. 2021) (hand harvesting, cultivating and packing strawberries does not require significant initiative, judgment or foresight); *Reyes-Trujillo v. Four Star Greenhouse, Inc.*, 2021 WL 103636 at *10 (E.D. Mich. 2021) (greenhouse work, including choosing, packing, trimming and transporting plants normally does not require specialized skills or advanced training and is considered unskilled); *Barrientos v. Taylor*, 917 F.Supp. 375, 383 (E.D.N.C. 1996) (cutting and housing tobacco is unskilled work).

[79] Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program, 75 Fed. Reg. at 61580.

[80] *Id.* at 61580–81.

[81] Temporary Agricultural Employment of H-2A Aliens in the United States; Final Rule, 75 Fed. Reg. at 6900.

[82] IFR, 90 Fed. Reg. at 47955.

[83] *See* attached Exhibit J, H-2A Level 1 Jobs U.S. Worker Recruitment.

[84] IFR, 90 Fed. Reg. at 47943.

[85] Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program, 75 Fed. Reg. at 61580–81.

The wage levels imposed by the IFR are arbitrary, are not supported by any OEWS data and generally are unrelated to the worker's job performance. As was the case with the skill levels that the Department ultimately discontinued using with respect to the H-2B program, the two tiers set out in the IFR are simple mathematical manipulations of the overall OEWS data.[86] The same skill levels were once utilized by the Department in evaluating H-2B applications.[87] The Department eventually ceased employing the two-tiered method because there were no studies to substantiate its assumption that H-2B jobs actually paid workers different wages based on different skill levels, let alone data to justify its assumption that the lowest 1/3 of the surveyed wages represent the wages of entry level works or that the highest 2/3 of wages represented skilled workers. For all the Department knew, the range of surveyed wage rates for any given occupation produced by the OES (now OEWS) survey had nothing at all to do with different skill levels and simply reflected the geographic location, the industry, or the fact that some employers tend to pay better than others for the same job. For all the Department knew, the mean of the lowest 1/3 of the data, the Level I entry level wage, was simply the average of the worst-paying employers in the occupation and area of employment.

The use of these identical skill levels is equally inappropriate with respect to H-2A workers. There is no reason to believe that any wage differentials in the OEWS data have any relationship to the experience or skill of the worker. The actual OEWS survey instrument does not solicit data concerning the skill level of the workers whose wages are being reported.[88] And because the Skill Level assigned is based on the duties of the job, rather than the job applicant, a novice cucumber picker will receive the same entry level Skill Level I wage for harvesting work as a co-worker with 20 years of experience harvesting cucumbers for the same farmer.

IV. The Majority Duties Standard Encourages Misclassification and Lower Wage Rates for Work That Would Otherwise Pay Higher Rates

A. The IFR Could Be More Carefully Drafted to Ensure That Workers Are Paid the Appropriate Wage Rates for Their Work

The Department stated in the IFR, as part of its explanation for this proposed change, that it wishes to adopt a "majority duties standard" modeled after the Fair Labor Standards Act ("FLSA").[89] The IFR stated that the primary purpose of this test is to assess the majority of the job tasks in order to determine the "character of the employee's job as a whole."[90] While we commend the IFR in so far as it would help ensure that workers are appropriately paid higher wage rates for jobs more fitting of higher

[86] As the Department noted in 2010 with regard to another set of skill levels, "[t]he OES wage levels are not determined by surveying the actual skill level of workers, but rather by applying an arithmetic formula. These are arbitrary percent cut-offs of the distribution of earnings within the occupations. Therefore, the associated occupational skill levels are not well defined, and H–2A wage differences do not accurately reflect meaningful differences in skills or job complexity." Temporary Agricultural Employment of H-2A Aliens in the United States; Final Rule, 75 Fed. Reg. at 6900.

[87] U.S. DOL, General Administration Letter (GAL) No. 2-98 (Oct. 31, 1997); *Comité de Apoyo a los Trabajadores Agricolas (CATA) v. Solis,* 2010 WL 3431761 at *17 (E.D. Pa. 2010) (under the GAL, "DOL applied the mean of the lowest one-third of wage rates in a given occupation to the lower skill level and the mean of the upper two-thirds of applicable wage rates to determine wages for the higher skill level).

[88] IFR, 90 Fed. Reg. at 47936.

[89] *Id.* at 47939.

[90] *Id.* at 47939–40.

wage rates per the OEWS SOC codes, the IFR's language is more likely to cause confusion and administrative burden than it is likely to ensure that workers are paid the appropriate wage rate.

Adopting a brand-new standard with pre-existing forms, while utilizing the currently proposed language, is ripe to create a barrage of confusion and misclassification. The IFR, as currently drafted, states:

> For all other occupations… The occupational classification and applicable Adverse Effect Wage Rate shall be determined based on the majority (meaning more than 50 percent) of the workdays during the contract period the worker will spend performing the agricultural labor or services, including duties that are closely and directly related, and the qualifications on the job order.[91]

The classification rests entirely on a "workdays" standard to determine if a worker is performing job duties associated with agricultural labor.

The Department cites the FLSA as a reference point in regard to its "primary duties test" standard.[92] However, the proposed rule's use of "workdays" shares a stronger similarity to the FLSA's "man-days" standard for its small farm exemption. Under the FLSA, a worker is exempted from certain protections if their employer, "did not, during any calendar quarter during the preceding calendar year, use more than five hundred man-days of agricultural labor."[93] The law further states that a "man-day" should be calculated as "any day during which an employee performs any agricultural labor for not less than one hour."[94] The Department's language for determining "workdays" lacks the same kind of clarity. The Department offers no definition for "workdays." Is any amount of time considered sufficient to meet a workday? Is a workday defined the same as a man-day? In a day where job tasks are divided between combined field and livestock category and tasks under non-combined SOC codes, would that count as a workday in the tally for a combined wage rate under the rule or for non-combined wage rates? The default should be the higher paying SOC code for the time spent on that task.

The rule also suggests that "closely and directly related" job duties and "qualifications on the job order" should be used to make determinations under the majority duties standard. Yet no definition is provided here either. What is a "closely and directly related" task? The Department tautologically suggests that higher wage-rate tasks connected with agriculture are presumptively jobs that are agricultural in nature.[95] Driving a truck for eight hours and then unloading sugarcane for fifteen minutes would then, presumably, be considered "closely and directly related" enough to be the lower paying combined rate? What if the majority of "workdays" carry this ratio of driving to unloading? By any reasonable assessment, the worker would be primarily providing work as a truck driver.[96] However, with

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[91] *Id.* at 47963.
[92] *Id.* at 47939.
[93] 29 U.S.C. § 213(a)(6).
[94] 29 U.S.C. § 203(3)(u).
[95] IFR, 90 Fed. Reg. at 47942 ("where the duties performed for the majority of the workdays during the contract period, including those duties closely and directly related, and qualifications presented in the job order are sufficiently comparable to agricultural work performed on or off farm (*e.g.,* workers primarily engaged in harvesting sugarcane and will also transport the cut cane off farm to a mill for processing), the CO and SWA will assign one SOC code contained within an agricultural-related major occupational grouping").
[96] *See Light Truck Drivers*, O*NET OnLine, https://www.onetonline.org/link/details/53-3033.00 (last visited Nov. 18, 2025).

the current H-2A forms, if a job order reflects tasks associated with multiple SOC codes, the rule fails to provide more than a superficial assessment of the proper method for the OFLC and the SWA to determine the appropriate SOC code. The Department suggests that the use of O*NET relevance and importance scores, for example, 78 and 3.3 for the job task of "load agricultural products into trucks, and drive trucks to market or storage facilities."[97] Yet, this does not take into account the time spent conducting this task, or whether the tasks could be completed by other employees without a higher-paying SOC code at stake.

There is the additional concern that the rolling in of the non-combined tasks to a lower combined-rate will provide a mask for non-agricultural work to be approved on a field and livestock order. What if the eight hours the truck driver spends driving are spent on public roads, crossing state lines, or involve overnight stays at motels? With the non-capped H-2A program, the incentive to portray non-agricultural jobs as agricultural has long been a problem. The IFR does not account for the increased risk of misclassification.

The Department suggests that it will utilize the "existing…H-2A job order form to specify the majority duties."[98] Yet the existing form is inadequate to shoulder such a task. For many H-2A jobs, a worker may be expected to handle a long list of job tasks during the duration of a job period. The current forms do not compel information regarding the actual percentage of time, or time per day, associated with each of these tasks. The current forms do not correlate real-life job tasks with common vernacular to the official O*NET job tasks associated with particular SOC codes. There is little to no synchronization between the proposed rule's majority duties standard, and the information needed to follow it, with the rubric provided in the existing job forms.

The current deficiency of the H-2A job order forms leaves the CO and SWA with the requirement to determine the SOC code by comparing the tasks listed in the job order to the O*NET taxonomy. On-the-ground job tasks listed in a job order may or may not succinctly match uniform O*NET codes. Even presuming that a CO or SWA were to properly identify all of a job's O*NET tasks, the rule inadequately provides a method for the CO and SWA to calculate the appropriate SOC code. A particular SOC code for a job can include over twenty or more O*NET tasks. Should the CO and SWA add together the "relevance" and "importance" scores or should they subtract them from conflicting O*NET tasks? What is the appropriate threshold to determine which SOC code applies if multiple job tasks are identified from multiple SOC codes? For example, how should they interpret a job order that lists ten tasks associated with Shuttle Drivers and Chauffeurs 53-3053, but two tasks associated with the five primary agricultural SOC codes? How can the CO and SWA make this decision without knowing the time allocations for each task?

Where job tasks overlap between SOC codes, the Department suggests that the CO and SWA should "consider other factual qualifications presented in the job order…that can provide context for determining which SOC code or codes best represent the employer's job opportunity."[99] If a job order lists a series of tasks, but it is unclear how much time will be dedicated to each task, will the CO and SWA reach out to the employer for clarification? Are job orders audited to see if the OFLC is adequately reviewing the job orders? Did the IFR account for the additional resources required for these inquiries? The Department suggests that, "the CO will continue to evaluate each job opportunity on a case-by-case

[97] IFR, 90 Fed. Reg. at 47942.
[98] *Id.* at 47940.
[99] *Id.*

basis, considering the totality of the information in an H-2A application and job order, to determine the appropriate SOC code."[100] The IFR suggests that the CO and SWA should rely on the utilization of context clues in order to determine such an important matter as the appropriate pay rate for, as the Agency predicts: 502,000 workers.[101] How could the COs or SWAs possibly conduct "case-by-case" reviews for that many applications without causing a significant administrative burden?

The Department states that, "[t]he adoption of a majority duties standard in this IFR will be administratively feasible and not impose unnecessary recordkeeping burdens on employers."[102] The Department states that it will not impose an unnecessary burden because the Department will create a forthcoming "frequently asked questions" guide that will "help employers understand how to use the existing H-2A job order form to specify the majority duties, including those closely and directly related duties, and then distinguish those from other duties that the worker(s) are expected to perform during the period of employment."[103] As of November 19, no such FAQ guide has been posted, despite job orders covering thousands of workers getting approved.[104] This is a heavy lift for a forthcoming FAQ guide. It is difficult to imagine an FAQ guide that could prevent the unduly burdensome time and recordkeeping that will be necessary to complete a "case-by-case" review of each job order. The suggestion, alone, that additional guidance is necessary is an acknowledgment that the currently proposed rule is insufficient to provide clarity for employers and certifying officers. At best, the IFR will create confusion and indiscriminate application of the rule across substantially similar job orders. At worst, it will cause misclassification and displacement of U.S. workers.

B. The Proposed Rule Should Not be Written in a Way that Encourages Displacement of U.S. Workers

As described above, the IFR's standard for "majority…of the workdays" invites ambiguity and confusion.[105] Additionally, the IFR is likely to result in U.S. worker displacement in the workforce because it provides incentive for employers to hire foreign visa workers for lower wage jobs that U.S. workers would otherwise be available to fill. Additionally, the proposed rule encourages the hiring of multiple foreign visa workers at lower rates instead of hiring U.S. workers at higher pay rates by allowing employers to bifurcate higher pay rate tasks between multiple workers while paying lower wages.

The IFR, as written, permits employers to allocate significant allotments of higher wage-rate work—nearly half of a worker's tasks—to be couched within a job order. Further, the failure to define workday, as noted above, could result in the majority of time spent on non-farm activities still being designated as a minority of workdays. Lower-rate misclassification already occurs under the current H-2A rules.[106] However, H-2A employers must assert that H-2A jobs are primarily agricultural in nature. Under

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[100] *Id.*
[101] *Id.* at 47957.
[102] *Id.* at 47940.
[103] *Id.*
[104] *Frequently Asked Questions*, U.S. DOL Empl. & Training Admin, https://www.dol.gov/agencies/eta/foreign-labor/faqs/print (last visited Nov. 20, 2025).
[105] IFR, 90 Fed. Reg. at 47963.
[106] *See Molina-Aranda v. Black Magic Enters., LLC,* 983 F.3d 779, 785 n.4 (5th Cir. 2020) ("if the [Defendants] had truthfully represented that they sought truck drivers, the Department of Labor likely would not have provided the necessary certifications because the prevailing wage rate for truck drivers is high enough that domestic workers would be available to perform the job.").

the IFR, though, employers are given tacit license to couch higher wage labor within a broad, self-identified 49% allocation of a job's overall tasks. The rule must make clear that H-2A jobs are inherently agricultural in nature. The IFR's reliance on a "closely and directly related" standard is too broad to prevent H-2A visa workers from providing significant work in higher wage work that U.S. workers are equipped and interested in providing. The IFR, as written, will continue the downward wage trend and displacement of U.S. workers.

This trend was noted in an amicus brief filed in the Seventh Circuit decision, *Vanegas v. Signet Builders, Inc*., which found that employers bear the burden of demonstrating that jobs are agricultural under the FLSA.[107] In the amicus brief filed by the owner of an Illinois-based construction business, MCCI, the owner described how their business could not compete against the vast increase in competition from farm labor contractors who hired lower-wage foreign workers for construction tasks.[108] The company noted in its brief that the amount of farm labor contractors increased by 420% in the U.S. in less than ten years.[109] The company provided construction work but they could not compete with job bids by farm labor contractors that were able to quote lower wage foreign workers who were ostensibly working in agriculture.[110] MCCI ultimately was forced to close primarily due to their inability to compete against foreign agricultural workers.[111]

Employers should not be incentivized to parcel this work out to lower wage-rate temporary foreign visa workers while displacing U.S. workers. For example, the expected H-2A 2025 wage rate for Michigan, after housing deduction, is $12.46 per hour.[112] In contrast, the 2025 median wage rate in Michigan for Farm Equipment Mechanics and Service Technicians, SOC 49-3041, is $24.48 per hour—nearly twice the proposed rule's Adverse Effect Wage Rate wage rate before overtime.[113] The 2025 median wage rate in Michigan for Construction Laborers, SOC 47-2061, is $23.40 per hour before overtime.[114] For Light Truck Drivers, SOC 53-3033, the median wage rate is $19.47 per hour.[115] For Heavy and Tractor-Trailer Truck Drivers, SOC 53-3032, the median wage rate is $26.51 per hour.[116] The reduction in Adverse Effect Wage Rate along with the broad definition in the majority duties standard will encourage some employers to avoid hiring U.S. workers at these higher wages.

In some states, there are non-combined SOC code rates that are lower than the combined SOC rate. The IFR should have made clear that the combined SOC code wage rate acts as a floor, so that employers cannot cherry pick the lower rate using the majority duties rule.

[107] *Vanegas v. Signet Builders, Inc.*, 46 F.4th 636, 646 (7th Cir. 2022).
[108] Brief of Mary J. Wilson as Amicus Curiae, filed Dec. 7, 2021, *Vanegas v. Signet Builders, Inc.*, 46 F.4th 636, 646 (7th Cir. 2022).
[109] *Id.*
[110] *Id.*
[111] *Id.*
[112] The Michigan state minimum wage rate is currently two cents higher, at $12.48 per hour and will rise to $13.73 in 2025. *See Michigan Minimum Wage Rate 2025 Increase Schedule*, Dep't of Labor & Econ. Opportunity (Oct. 1, 2024), https://www.michigan.gov/leo/news/2024/10/01/michigan-minimum-wage-rate-2025-increase-schedule.
[113] *Michigan Labor Market Information*, MI Dep't of Tech., Mgmt & Budget, https://milmi.org/datasearch/OEWS (last visited Nov. 18, 2025).
[114] *Id.*
[115] *Id.*
[116] *Id.*

As part of its reasoning for the IFR, the Department states, "that qualified and eligible U.S. workers will not make themselves available in sufficient numbers, even at current wage levels, to fill the significant labor shortage in the agricultural sector."[117] Aside from the fact that U.S. workers currently fill most of the agricultural positions in many states, this fails to address the displacement of workers who are working in jobs *outside of* agricultural labor, as in the jobs listed above. The commentary states that combining higher wage-rate tasks into the IFR's presumption of lower wage rate work is of no concern because the majority of workdays standard will ensure that workers are primarily performing agricultural labor.[118] Yet the IFR shows no concern at all for the displacement of workers who have made a career of performing higher wage rate tasks such as truck driving or construction. By allowing higher wage jobs to encompass almost half of the job tasks (and even potentially the majority of time given the undefined workday) for the reduced Adverse Effect Wage Rate jobs, employers will be incentivized to redistribute higher wage-rate work among lower paid foreign nationals. This had been a concern already even prior to the IFR.[119] The IFR will only exacerbate this issue by including the ostensible suggestion that as much as nearly half of the work in an H-2A job order need not be provided in agricultural-specific tasks. This will harm both U.S. workers as well as employers who seek to hire U.S. workers.

C. We Applaud the IFR's Attempt to Ensure that Workers Are Paid the Appropriate Wage Rate for Non-Agricultural Jobs, but Concerns Need to be Addressed

As described above, the IFR, as written, is ripe for confusion and misclassification. However, we do support the Department's initiative to continue to ensure that workers who are primarily performing tasks in which the market pays a higher rate should be paid at that market rate. We have seen on too many occasions where H-2A and corresponding workers are assigned tasks outside of the primary agricultural SOC codes and should be entitled to higher pay rates, yet the employer continues to pay them the agricultural Adverse Effect Wage Rate. The IFR and supporting comments make clear that for "mixed job opportunities . . . using the Adverse Effect Wage Rate for the higher paid SOC code is necessary to prevent adverse effects on the wages of workers in the United States similarly employed resulting from inaccurate SOC code assignment."[120]

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[117] IFR, 90 Fed. Reg. at 47959.

[118] *Id.* at 47943 ("where the work tasks presented in an employer's job order require workers to be engaged in agricultural work for the majority of the workdays during the contract period and perform driving duties using any of the types of equipment identified without the requirement for formal education, training, or credentialing and possess three months or less of related experience, the CO and SWA will, absent additional job details that might indicate otherwise, assign one of the five SOC codes comprising field and livestock worker occupations (combined), as applicable, that best represents the employer's job opportunity and subject to a single Adverse Effect Wage Rate").

[119] *See Hanekom v. Kuchenbecker Excavating, Inc.*, No. C23-3046-LTS-KEM, 2024 U.S. Dist. LEXIS 104379, at *11 (N.D. Iowa June 12, 2024) (describing how "instead of working as physical laborers, the defendants forced [plaintiffs] to work as heavy truck drivers [and] [r]ather than being paid the prevailing wage of $20 per hour for heavy truck drivers, or even the $13.72 promised in their contracts, plaintiffs alleged that they were paid far less and sometimes not at all.").

[120] IFR, 90 Fed. Reg. at 47941 (quoting 88 Fed. Reg. 12779).

V. The Housing Deduction Will Promote Discrimination Against U.S. Workers, Unfairly Enriches Employers at the Expense of Workers, and Is Calculated Using a Flawed Method

A. The Stated Purpose of the IFR Is Flawed

The Department presents its "housing adjustment" as promoting fairness to domestic workers who have to pay for their own housing.[121] However, the cumulative effect of the deduction to H-2A worker wages to account for the value of their free housing and the significant reduction in the general Adverse Effect Wage Rate will further impoverish domestic farmworker families.

Reducing the wage offered to foreign workers provided with housing does not benefit domestic workers. The IFR states that "local domestic farmworkers, who may want to seek out temporary agricultural jobs where H-2A workers will be employed, are competing in an uneven playing field as they must accept employment under at least the same terms of the work contract—often at the same wage."[122] However, instead of increasing U.S. workers' value in the job market, the deduction skews the job market toward H-2A workers and reduces the likelihood of employer-provided housing being made available to U.S. workers. U.S. workers will not have more money to pay their housing costs as a result of this deduction; to the contrary, local workers will be left with fewer job opportunities and lower wages, as employers employ more H-2A workers and reduce the amount of housing that is available to families and/or domestic workers. Farmworker families already exist at the poverty level.[123] Domestic farmworkers will continue to suffer from a lack of housing affordability, made worse by fewer jobs and more competition for limited housing from growers renting the housing for their H-2A workers.[124] Perhaps if the housing deduction were an upward adjustment for domestic farmworkers that could be used to pay for their own housing, the rationale would have some basis. Another option would be to provide domestic workers with a housing credit. As it stands, this "adjustment" benefits only employers and not domestic farmworkers.

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[121] *See id.* at 47926 ("Under this IFR, the Department is implementing a standard downward adjustment to the hourly Adverse Effect Wage Rates that accounts for the compensation disparity U.S. workers face when H-2A workers are being paid for work performed under the same work contract but, **unlike most U.S. workers**, receive additional non-wage compensation in the form of free housing.") (emphasis added).

[122] *Id.* at 47947.

[123] Findings from NAWS 2021–2022, *supra*, at ch. 8. *See also* Briar & MacCormack-Gelles, *The needs of farmworkers in Washington State: Final Report*, Washington State Institute for Public Policy (2025), Ex. 15, Exhibit H, at 1–67 ("Three-quarters of domestic farmworkers struggle to afford food 'sometimes' or more frequently."); Aileen Hymas, *Commissioners press OSHA over farmworker housing standards*, Columbia Gorge News (June 4, 2024), https://www.columbiagorgenews.com/news/commissioners-press-osha-over-farmworker-housing-standards/article_f8c3b6a4-227a-11ef-908b-1b204449280e.html ("According to Oregon Housing and Community Services, the average farmworker income in Oregon is $20,000 to $24,000 per year, which is between 25-37% of the state's median family income. Thirty-one percent of farmworkers live under the poverty line, more than twice the general population at 14%.").

[124] *See* Housing Assistance Council, Rural Research Brief, Exhibit D, at 1–34. North Carolina Migrant Housing Financing Need and Feasibility Study (May 2008) noted the need to increase the supply of migrant housing. Exhibit G, at 1–20.

1. U.S. Workers Will Be Harmed by the Housing Deduction

Not only will U.S. workers not benefit from the housing deduction, but they will actually be harmed by it. First, the deduction from H-2A workers' wages will make it cheaper for employers to employ H-2A workers than U.S. workers, thereby reducing the work opportunities and housing available to domestic farmworker families. It discourages the use of housing for U.S. workers and makes it more cost effective for employers to limit housing to H-2A workers. By the Department's own calculations, the housing deduction alone is estimated to result in an annualized transfer from H-2A workers to H-2A employers of approximately $1.28 billion per year and total 10-year transfers of $12.66 billion.[125] None of that benefit will go to U.S. farmworkers, who will universally be viewed as far more expensive to hire and house than H-2A workers who pay for housing.

Second, the mention of the housing deduction or lower rates that result from the application of the deduction will deter U.S. workers from applying for H-2A jobs. While the IFR recognizes that there are some U.S. workers living in employer-provided housing, it discounts them as being "uncommon"[126] and makes assumptions that only a small group of corresponding farmworkers live in employer-provided housing. However, that is simply not the reality in some states, such as Oregon, where U.S. workers have a long history of migrating or traveling interstate and intrastate for intensive hand-harvest seasons. During this time, they live in employer-provided housing, largely at no charge to the workers, consistent with Oregon's regulatory provision Or. Rev. Stat. § 653.035. The employers and their employees, over many years, have built relationships that have ensured large numbers of workers migrate to the worksite for the harvest periods. Attracting experienced workers loyal to the farms and employers requires provision of housing at no cost to the employees. For example, many Oregon growers who submitted comments during a recent state rulemaking process regarding agricultural labor housing stated that large portions of their seasonal workforce are made up of families who travel from other states or parts of Oregon annually to participate in harvest.[127]

The job orders themselves also point to U.S. workers' existence at H-2A camps. For example, the job orders filed in fiscal year 2024 had an aggregate of a total of 487,411 workers needed with only 384,865 workers certified.[128] Whereas the Department of State data for fiscal year 2024, indicated that only 315,328 H-2A visas were approved.[129] Therefore, it is likely that at least 172,083 U.S. workers were working for H-2A employers. Even if only 10% of those U.S. workers live in employer-provided housing, as suggested by the NAWS, that still means over 17,000 of domestic workers are relying on free H-2A employer-provided housing.[130]

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[125] IFR, 90 Fed. Reg. at 47956.
[126] *Id.* at n.175.
[127] *See, e.g.*, Exhibit C, at 15–18, 19–20, 28–31 and 37–38.
[128] *See* FY 2024 USDOL H-2A Disclosure Data, https://www.dol.gov/agencies/eta/foreign-labor/performance (last visited Nov. 21, 2025).
[129] U.S. Dep't of State, Bureau of Consular Affairs, Nonimmigrant Visa Statistics, Nonimmigrant Worldwide Issuance and Refusal Data by Visa Category, FY2024 NIV Workload by Visa Category, https://travel.state.gov/content/dam/visas/Statistics/Non-Immigrant-Statistics/NIVWorkload/FY%202024NIVWorkloadbyVisaCategory.pdf.
[130] Further, the Department's reliance on NAWS data for this purpose is questionable because NAWS samplings do not include crop workers on an H-2A visa. Findings from NAWS 2021–2022, *supra*, at 5.

However, the IFR will topple this arrangement by encouraging employers to recruit and hire H-2A workers instead, something that the agricultural employers in Oregon have not engaged in widely in the past two decades or more. Further, U.S. workers will be discouraged from applying for these jobs if the job orders and recruitment fail to make it clear that U.S. workers have access to free employer-provided housing without any wage deductions.

The Department has chosen to move forward too quickly, causing confusion and potentially unlawful advertising to U.S. workers. For example, in Michigan, at least nineteen new agricultural jobs have been posted to the intrastate clearance system using the following language about the deduction:

> "A compensation adjustment of -$1.32 per hour may be applied for workers receiving free employer-provided housing."[131]

The posting does not clearly distinguish that the deduction is only applicable to H-2A workers. Similarly, job orders have been circulated for other states, such as Washington, with similar offer rates below the state minimum wage.[132] Therefore, even though the IFR states in a footnote that "the Department will not apply the deduction to the Adverse Effect Wage Rate for non-H-2A workers, even if these workers reside in employer-provided housing,"[133] jobs are being posted for domestic recruitment with language that at least gives the appearance that a wage deduction may be applied. As a result, domestic workers seeking employment with "free employer-provided housing," will be discouraged from applying.

2. The Deduction Inappropriately Shifts Costs of Housing from Employers to H-2A Workers

The housing deduction fails to account for the fact that many large employers have already built large supplies of housing for H-2A workers over the past decades of using the H-2A program, some built with the assistance of low interest loans and other subsidies from public sources. The longstanding practice of employers providing housing to their employees for free is a fiction. That housing has already been offset by the comparatively low wages paid to farmworkers that offset the low cost of maintaining the housing. Allowing employers to get the benefit of the wage deduction of hundreds of dollars per month, regardless of whether they have commensurate expenses, results in an unlawful windfall for those employers.[134]

Moreover, the Department's determination that H-2A workers are paid more than U.S. workers purely on the basis of free housing is flawed, because it ignores the other cost savings enjoyed by employers when employing H-2A workers, such as not having to pay unemployment or social security taxes for H-2A workers. 26 U.S.C. § 3121(b)(1); *see Bernett v. Hepburn Orchards, Inc.*, 1987 WL 16939 at *5 (D. Md. 1987). On that note, unlike U.S. workers in many states, H-2A workers are not eligible to claim unemployment benefits during the off-season when they have no work. The Department also fails to factor in the fact that H-2A workers will never be eligible to collect social security benefits based on the wages they earn in the United States. It also fails to acknowledge the well-known benefit that

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[131] *See, e.g.*, Exhibit B, at 42–147.
[132] *Infra*, Section V(B)(C).
[133] IFR, 90 Fed. Reg. at n.175.
[134] Deductions are not reasonable if they include a profit for the employer or any affiliated person. 20 C.F.R. § 655.122(p)(2).

employers gain by having a captive workforce available onsite, reliant on the employer for transportation to/from the fields, and unlikely to have family or ties to the community that would reduce their available number of hours.

Finally, cost-shifting is improper when housing fails to meet the health and safety standards. The rule fails to consider non-compliant housing; however, there is longstanding precedent that deductions from wages and housing credit shall not be available if the housing is "in violation of any Federal, State, or local laws, ordinance or prohibition."[135] Thus, if an H-2A worker is housed in substandard housing, they should be entitled to back wages equivalent to the "housing credit" that was taken in the form of a wage deduction. However, the IFR fails to account for what happens if the employer turns a profit from the deduction, which would be unlawful and require increased enforcement resources that also are not accounted for.

3. The Housing Deduction Is Unfair to H-2A Workers

The housing deduction is also unfair to H-2A workers and contradicts the regulations set forth in 20 C.F.R. § 655.122.[136] It is inconsistent with the requirement that employers "provide to H–2A workers at least the same level of minimum benefits, wages, and working conditions which must be offered to U.S. workers" set forth in 20 C.F.R. § 655.122(a);[137] and it skirts the regulation at 20 C.F.R. § 655.122(d)(1) that requires employers to provide housing at no charge to H-2A workers. Significantly, the IFR fails to address the fact that H-2A workers, who leave their families to work on a temporary visa, must still maintain their home abroad and pay those costs. With the IFR, they are now expected to pay for housing in two locations. Whether the cost of housing is transferred to the employer from the H-2A worker as a "compensation adjustment" or via a "charge to the worker" or "otherwise deduct[ed] housing costs from the wages," the result is still a significant drop in the workers' wages.[138]

Also, it unfairly reduces the wages and transfers the housing costs to H-2A workers who choose not to live in employer-provided housing. While the IFR states that "the statewide downward compensation adjustments to the applicable Adverse Effect Wage Rates that can only be applied to H-2A workers who are provided with housing at no cost pursuant to 20 C.F.R. § 655.120(b)(3) of this IFR[.]"[139] However, in its example, it states that the deduction would be listed in Field A.8e or Addendum A of the job order for "any H-2A worker(s) employed under the associated temporary agricultural labor certifications."[140]

[135] 29 C.F.R § 531.31. *See also* U.S. DOL, Wage & Hour Div., Field Assistance Bulletin No. 2015-1 (Dec. 17, 2015), https://www.dol.gov/agencies/whd/field-assistance-bulletins/2015-1.
[136] *See* 20 C.F.R. § 655.122(a) ("This does not relieve the employer from providing to H–2A workers **at least the same level** of minimum benefits, wages, and working conditions which must be offered to U.S. workers consistent with this section."); 20 C.F.R. § 122(d)(1) (" The employer must provide housing at no cost to the H–2A workers. . .").
[137] *See also Clarke v. Gardenhour Orchards, Inc.*, 1987 WL 48234 at *3 (D. Md. 1987) (holding that a grower must offer the same housing benefits to U.S. workers as it offers to H-2A workers).
[138] Calling the offset an "adjustment" rather than a "deduction" fails to remedy the fundamental unfairness of the housing costs being charged. *See Ramos-Barrientos v. Bland*, 661 F.3d 587, 597–98 (11th Cir. 2011), *In re Otamot, Inc.*, 29 WH Cases 1176 (1989), and *In re Otamot, Inc.*, 1990 WL 656083 (DOL Off.Adm.App.).
[139] IFR, 90 Fed. Reg. at 47926.
[140] *Id.*

As a result, it appears that employers will be allowed to pay these H-2A workers the downwardly reduced Adverse Effect Wage Rate regardless of whether or not they live in the employer-provided housing. For example, in Michigan, where the deduction would result in a wage rate below the state minimum wage, several job postings on the state's recruitment site have already included language that: "H-2A workers must be offered a wage of at least $12.48 per hour, reflecting Michigan's minimum wage — the highest applicable rate"[141] without regard to whether the H-2A worker is residing in the housing (or the fact that the highest applicable rate in Michigan would be the 2026 minimum wage of $13.73 per hour). Instead, they go on to state: "A compensation adjustment of -$1.32 per hour may be applied for workers receiving free employer-provided housing;"[142] which, if applied to either the H-2A offer rate of the Michigan minimum wage or to the domestic workers in corresponding employment, would be in violation of the IFR. While the State of Michigan is taking action to remove the compensation adjustment language, it has created an additional administrative burden and does not alleviate the potential harm that may have already been done in the recruitment of domestic migrant workers, such as the many workers in Michigan whose seasonal work and housing recently ended. Again, another example that the Department has moved forward too quickly, causing confusion, inaccurate disclosures to U.S. and H-2A workers, and a high potential for wage violations as well as the extreme administrative burden on the state workforce agencies as well as the Department.

H-2A workers who are injured on the job sometimes need to remain for urgent medical care, particularly if it would be unsafe for them to travel home. With the IFR, a bed occupied by a worker who does not pay for housing, due to being unable to work, may be seen as a liability, giving the employer further incentive to remove injured workers from housing. The IFR does not account for this.

The regulation does not require employers to offer H-2A workers a choice of living in their housing (and having housing deducted from their wages) or finding alternative housing elsewhere. Some H-2A workers have family members who live in the United States. For example, there are H-2A workers who have married U.S. citizens, who have U.S. citizen children and/or other family members, who own homes in the United States.[143] These workers often opt to live with their family members offsite, rather than reside in employer provided housing. Thus, a wage reduction unfairly penalizes them and their U.S. family members by reducing their wages based on non-existent housing costs to the employer.

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[141] *See, e.g.*, Exhibit B, at 36–41, 42–147. Note that these job orders, despite including a work period in 2026, include the 2025 Michigan minimum wage of $12.48 per hour instead of the relevant 2026 Michigan minimum wage of $13.73 per hour.
[142] *See, e.g.*, Exhibit B, at 36–41, 42–147.
[143] H-2A workers may also choose to bring their family members on H-4 visas and find their own off-site housing for their families. For example, in fiscal year 2024, the Department of State issued 139,874 H-4 visas to dependents of H nonimmigrant workers (which include H-1B, H-1B1, H-2A, H-2B, and H-3 visas). U.S. Dep't of State, Bureau of Consular Affairs, Nonimmigrant Visa Statistics, Nonimmigrant Worldwide Issuance and Refusal Data by Visa Category, FY2024 NIV Workload by Visa Category, https://travel.state.gov/content/dam/visas/Statistics/Non-Immigrant-Statistics/NIVWorkload/FY%202024NIVWorkloadbyVisaCategory.pdf. The report does not break out the H-4 visas by type of H nonimmigrant worker visa. In fiscal year 2024, the Department of State issued 677,598 visas to H nonimmigrant workers.

B. The Calculation of the Housing Deduction is Flawed

1. The Statewide Average of Fair Market Rents (FMR) for a Four-Bedroom House Set Forth by Housing and Urban Development Is Not an Accurate Method for Determining the Value of Farmworker Housing

The Department is basing its valuation of the housing provided to H-2A workers on the value of a four-bedroom house with two workers in each bedroom, as calculated by HUD. However, HUD regulations are significantly different from the regulations that control H-2A housing. Also, the types of housing and the living conditions of farmworkers do not compare to those set forth by HUD.

For example, a typical HUD subsidized four-bedroom unit in Oregon has four bedrooms with closets, two full bathrooms, a full kitchen, living room, patio and heating and air conditioning as well as access to washers and driers in common areas. HUD housing requires that each individual dwelling unit have a “living room and a kitchen area with a sink, cooking appliance, refrigerator, food preparation area, and food storage area;" 24 C.F.R. § 5.703(d)(4). For example, there is no communal housing (barracks, etc.) under the HUD program, let alone tent housing with outside cooking facilities that are used to house some H-2A workers. Not only does HUD prohibit communal cooking facilities, food storage, and living rooms, HUD regulations also prohibit communal bathroom facilities, all of which are commonplace in farmworker housing and permissible under the OSHA standards. HUD regulations state: "*The unit* must include *its own bathroom* or sanitary facility that is in proper operating condition and usable in privacy. *It must contain a sink, a bathtub or shower, and an interior flushable toilet*." 24 C.F.R. § 5.703(d)(2) (emphasis added). HUD regulations mandate that each individual housing unit “must have hot and cold running water *in both the bathroom and kitchen*, including *an adequate source of safe drinking water* in the bathroom and kitchen.” 24 C.F.R. § 5.703(d)(1) (emphasis added).

In contrast to the HUD regulations, OSHA’s “Temporary Labor Camp” regulations—which have remained largely unchanged for over 50 years, since 1974—contain no requirements for individual dwelling units. 29 C.F.R. § 1910.142. There is not even a requirement under the OSHA regulations to provide mechanical refrigeration. 29 C.F.R. § 1910.142(b)(9) (“Sanitary facilities shall be provided for storing and preparing food”).

In fact, under the OSHA regulations, “cots” and “wall lockers” are all that are necessary in labor camps, not beds nor closets. 29 C.F.R. § 1910.142(b)(3). In terms of lighting and electricity, labor camps need only provide one “ceiling type light fixture” and one “wall-type convenience outlet.” 29 C.F.R. § 1910.142(g). There are no requirements for electrical outlets every six feet, let alone GFI protected outlets in kitchens and bathrooms.

OSHA standards only require H-2A agricultural employers to provide one sink for every six persons and one shower head for every 10 persons residing in the labor camp. 29 C.F.R. § 1910.142(f)(1). And, under OSHA labor camp regulations, a communal toilet facility does not have to be within the sleeping area and can be up to 200 feet “from the door of each sleeping room.” 29 C.F.R. § 1910.142(d)(4).

The requirements related to water are also strikingly different. OSHA water requirements merely require an “*adequate and convenient water supply* . . . in each housing location for drinking, cooking, bathing, and laundry purposes.” 29 C.F.R. § 1910.142(c)(1) (emphasis added). Agricultural employers only need to provide *one drinking fountain for every 100 occupants in the labor camp*. 29 C.F.R. § 1910.142(c)(4) (emphasis added). In terms of cooking facilities, labor camp operators must only provide one stove for every 10 persons. 29 C.F.R. § 1910.142(b)(10).

As a final example of the absurdity of comparing HUD housing to farmworker housing, OSHA's labor camp standards do not even require mechanical laundry facilities. Instead, as long as there is one "laundry tray or tub for every 30 persons" that is considered sufficient. 29 C.F.R. § 1910.142(f)(1)(iii).[144]

Agricultural employers have fought against proposed changes that would have brought minimum standards for labor camps closer to those required by HUD. For example, in Oregon employers opposed increasing worker access to indoor toilets or running water at sinks near food preparation areas.[145] Employers opposed a revision of its OSHA housing regulations that would have increased space requirements to 50 square feet per person instead of 40 square feet per person.[146] Employers opposed changing state regulations to require provision of mechanical laundry facilities.[147]

Furthermore, the HUD housing that the Department is relying upon to set the value of H-2A housing presumes normal rights of tenancy, such as the unencumbered right to have visitors for lawful purposes, quiet enjoyment of the premises, privacy, and full eviction rights. However, H-2A job orders often come with conditions such as restrictions on use of air conditioners,[148] visitors, presence of alcohol on the premises, and other activities that are generally permitted in one's own housing.[149] This is especially remarkable at a time when the Department is rescinding the right for H-2A workers to have visitors, including key service providers.[150] Also, occupants of the HUD four-bedroom homes used by the Department to set the housing value, generally do not have exit and entry impeded by locked gates, video and sound recording devices that capture activities taking place at the housing sites, or employers/supervisors living on or near the premises and monitoring their activities, as are often present at housing sites utilized for the H-2A program.

The actual housing provided to H-2A workers varies tremendously from farm to farm, and the contrast in minimum required square footage, number of workers per bedroom, and the presence of basic appliances such as washing machines and indoor flush toilets to HUD standards is dramatic. In Washington State, farmworkers are legally housed in large army tents on cement slabs with cots (not beds with mattresses) and outside cooking facilities that are nothing more than a tiny, enclosed metal cage with

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[144] In *In re Otamot, Inc.*, 29 WH Cases 1176 (1989) the Administrative Law Judge for the Department examined what is reasonable cost under 29 C.F.R. § 531.2 and determined that in cases where the reasonable cost exceeds the fair rental value of the housing and facilities combined, the fair rental value should be determined to be the reasonable cost. 29 C.F.R. § 531.3(c). The ALJ then found the fair rental value of the farmworker housing in question to be zero on grounds that the condition of migrant housing resulted in little to no potential market for renters.

[145] *See* comments by Oregon growers submitted in response to proposed changes to OR OSHA's Agricultural Labor Housing rules in Exhibit C, at 2–8.

[146] *See id.*, at 2–8, 28–31, 37–38.

[147] *See id.*, at 11–12.

[148] *See* Exhibit B, at 16–35.

[149] *See, e.g.*, Exhibit B, at 16–35. ("6.No loud music or parties after dark … 14.No consumption of alcohol or illegal substances are permitted … 3.No guest allowed staying overnight … 5.No food is allowed to be stored in bedrooms … Your housing unit can be and will be inspected by a company representative weekly or monthly by the Department of Health.").

[150] Recission of Final Rule: Improving Protections for Workers in Temporary Agricultural Employment in the United States, 90 Fed. Reg. 28919, 28924 (proposing the rescission of 20 C.F.R. § 655.135(n)).

a small gas burner. Even housing that meets OSHA standards can rely on portable toilets, no air conditioning, and wash tubs for doing laundry, or can be old motel rooms without kitchens or open barracks with large numbers of workers housed in rows of bunk beds, sharing group showers and toilets with no privacy barriers. Housing consisting of multiple bunk beds within a large room with maybe a storage locker[151] and no privacy is a far cry from a four-bedroom house with only two people to a room.[152]

In other words, there is simply no comparison between the market value of labor camps provided by H-2A employers, which are communal and have the most threadbare regulations under OSHA, and individual housing, apartments and homes supplied under the HUD regulations. They can only be described as apples and oranges.

2. It Is Arbitrary and Capricious to Tie Housing Valuation to Wages Earned

The methodology proposed to account for the housing benefit received by H-2A workers is also flawed; because it is based on the H-2A workers' wages, meaning the more an H-2A worker works, the higher the transfer in value to the employer. Since the deduction is tied to the workers' compensation, the value transfer will increase with each additional hour that an H-2A worker works, even though the monthly value of the housing does not similarly rise and even though the worker's housemate may be paying a different rate. As a result, a worker who is working 60 hours per week contributes twice as much for their housing as a worker working 30 hours per week.

In fiscal year 2024, job orders had weekly hours ranging from 34 hours to 96 hours per week.[153] Over 43% of job orders had weekly hours above 40.[154] Likewise the average duration of work (in weeks) varies significantly from one job order to another. Therefore, it is improper to use a 40-hour workweek and 26-week contract duration to set a statewide deduction.[155]

Further, H-2A workers who come to the U.S. to work for short, intense work periods (such as the Christmas tree workers) will pay more for their housing per month than workers who work an average of 30 hours per week over many months. Likewise, a worker housed in a tent in the state of Washington will have the same deduction as a worker living in a bunkhouse, mobile trailer, hotel room, or single unit apartment. The cost is not proportional to the housing benefit.

Given the significant reduction to H-2A workers' wages as a result of this housing deduction, employers will perceive domestic migrant workers who receive housing as less desirable because they cannot "charge" them or reduce their wages for housing in the same way as H-2A workers. Similarly, employers may begin to perceive the H-2A workers who are not contributing to the costs of housing due to a work downturn, as a burden, which could incentivize employers to force them to leave the housing or terminate them prior to the end of the contract.

The failure to place a cap on the monthly total reduction of an H-2A workers' wages is improper. The Department has failed to place a cap on the monthly total reduction of H-2A workers' wages. These

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[151] Washington State requires that housing operators provide each worker with a storage locker, but many states, including Wisconsin and Michigan do not. Wash. Admin. Code § 246-358-135.
[152] *See* Exhibit A, at 15–17 and 19–27.
[153] FY 2024 USDOL H-2A Disclosure Data, https://www.dol.gov/agencies/eta/foreign-labor/performance (last visited Nov. 21, 2025).
[154] *Id.*
[155] *See* IFR, 90 Fed. Reg. at n.196.

flaws illustrate that this deduction is more about finding a way to lower H-2A worker wages for the benefit of employers than it is about reimbursement of housing value. The Department itself estimates that the combined effect of the new Adverse Effect Wage Rate methodology and the housing deduction will result in an annual transfer of approximately $2.46 billion from H-2A workers to employers. This massive shift underscores the notion that this policy is designed primarily to reduce employer labor costs rather than to reflect a legitimate valuation of housing.

3. Adverse Effect Wage Rates to Be Lower than the State Minimum Wage Is Improper

The Adverse Effect Wage Rate chart published in the federal register shows Adverse Effect Wage Rates for tier 1 farmworkers well below the state minimum wage in multiple states. While the IFR states that the state minimum wage should be used, it appears employers are using the new Adverse Effect Wage Rate to justify an offer of wages below many states' minimum wages. The housing deduction will reduce H-2A worker wages even lower. It is incomprehensible how the Department can claim that allowing growers to offer an Adverse Effect Wage Rate that is less than the state minimum wage for agricultural jobs will not have an adverse effect on domestic worker wages, given that the minimum wage is generally the wage floor. In footnote 89, the IFR even states: "While a failure to publish an AEWR is problematic, in its own right, as a failure of the Department to satisfy a regulatory mandate, it would also lead to Federal or State minimum wages being the next highest rate in many instances." However, the reduced AEWRs do just that, especially after calculating the housing deduction. For example, in Washington State, H-2A Clearance orders that offered a wage of $19.82 in 2025 are now eligible for an Adverse Effect Wage Rate of $16.53 in 2026 before the housing deduction, despite the state 2026 minimum wage of $17.13. Likewise, at least eight states will have a higher state minimum wage than the skill level I AEWR prior to the housing deduction, at least 14 states will have a higher 2026 minimum wage than skill level I AEWR after the housing deduction, and at least 3 states (California, Connecticut, and Washington) will have a higher state minimum wage than skill level II AEWR after the housing deduction. We are concerned that the IFR did not adequately state the continued need to offer and pay higher rates listed in 655.120(a), including the prevailing wage rate or state minimum wage if it is higher than the Adverse Effect Wage Rate, which will lead to wage and hour violations. These illegally low wage offers will discourage domestic workers from applying for these jobs and eventually suppress the wages and working conditions of domestic workers. See the attached Washington State proposed clearance order submitted this month. See also Michigan examples, with confusing language that seems to suggest a deduction that would bring H-2A workers' wages below the state minimum wage.

Also, the Department fails to account for state laws that make a deduction for housing unlawful. For example, such deductions would likely violate state laws in Oregon.[156] Other states, such as Minnesota and California, place limits on the amount that can be deducted or credited from the minimum

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[156] Under Oregon law, employers can make deductions from minimum wage for the "fair market value of lodging, meals or other facilities or services furnished by the employer for the private benefit of the employee." Or. Rev. Stat. § 653.035. Oregon regulations further define when lodging is considered for "required" by the employer and therefore not for the employee's private benefit, including when "[t]he provision of lodging or other facilities or services is necessary in order for the employer to maintain an adequate work force at the times and locations the employer needs them." Or. Admin. R. 839-020-0025.

wage for housing, which the Adverse Effect Wage Rate deductions in the IFR may exceed in some cases.[157]

4. The Deduction to the "H-2A Minimum Wage" Is Improper

A housing deduction for the Adverse Effect Wage Rate is improper. The Adverse Effect Wage Rate is the H-2A program's "minimum wage."[158] There is longstanding precedence established that deductions, charges for employer-provided housing, housing credits, downward adjustments, or reductions to workers' pay by any other name cannot lower a worker's wages below the minimum wage--such as those set forth in the Fair Labor Standards Act and state minimum wage laws--unchecked. For example, the Department's housing credit requires the following before an employer can apply a "housing credit" toward a workers' minimum wage:

a. The lodging is regularly provided by the employer or similar employers;
b. The employee voluntarily accepts the lodging;
c. The lodging is furnished in compliance with applicable federal, state, or local law;
d. The lodging is provided primarily for the benefit of the employee rather than the employer; and
e. The employer maintains accurate records of the costs incurred in furnishing the lodging.[159]

H-2A housing necessarily fails this test, since it is well established that H-2A housing is primarily for the benefit of the employer. Employers have admitted such in public forums[160] as well as in job orders.[161] In *Bobadilla-German v. Bear Creek Orchards, Inc.*, 641 F.3d 391 (9th Cir. 2011), the Ninth Circuit held that a grower could not deduct the cost of lodging from employees' wages because the grower "would not have been able to maintain its workforce in the absence of on-site housing." *Id.* at 394. To reach this conclusion, the Ninth Circuit relied on testimony that the migrant labor force would not return if the employer did not provide housing, that the local housing market could likely not accommodate the number of workers needed and that the employer benefitted from having the workers available when needed to transport them to work. *Id.* at 395–96. The New Jersey Department of Labor, in a Consent Agreement and Stipulation, determined that migrant labor camp housing is primarily for the benefit of the employer, and, therefore, credits and deductions for such housing shall be prohibited." The NJDOL applied this conclusion to all migrant labor camp housing. In the IFR, the Department did not address whether there are state law claims as a result of the housing deduction.[162]

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[157] *See* Minn. R. 5200.0070; California Industrial Welfare Comm'n, Minimum Wage Order MW-2025, https://www.dir.ca.gov/Iwc/MW-2025.pdf.
[158] *See* IFR, 90 Fed. Reg. at 47925 (referring to Adverse Effect Wage Rates as the "H-2A program's minimum wage policy").
[159] DOL, Wage & Hour Div., Field Assistance Bulletin No. 2015-1 (Dec. 17, 2015), https://www.dol.gov/agencies/whd/field-assistance-bulletins/2015-1.
[160] Drawing from the latest comments about the importance of labor housing as a necessity for attracting and maintaining workers in Oregon we draw your attention to a selection of testimony by Oregon growers expanding on the need for domestic workers they have counted on both locally and interstate for their harvest and production. Exhibit C, at 1–44.
[161] *See, e.g.*, Exhibit B, at 16–35 ("This housing is being offered to [sic] from your employer as an extra benefit from this company.").
[162] *Comite de Apoyo a los Trabajadores Agricolas v. Bramucci*, Docket A-5989-91T3, Sup. Ct. NJ App Div. (1992).

It also fails when employers fail to maintain the property in compliance with applicable federal, state, or local laws. Farmworker housing is notorious for its unsafe and substandard conditions.[163] "The vast majority (over 70%) of federal labor standards investigations of farms conducted by the Wage and Hour Division (WHD) of the U.S. Department of Labor detect violations—things like wage theft and inadequate housing, as well as other violations of laws designed to protect farmworkers."[164] Likewise, in *Soler v. G & U, Inc.*, 768 F. Supp. 452 (S.D. N.Y. (1991), the court reduced the permissible charge for farmworker housing based on "functional utility" and determined that, if the housing violates health and safety or is not licensed, employers cannot charge for the housing at all.

The IFR fails to clarify whether H-2A workers would be required to use the employer-provided housing, or may choose to live elsewhere. Many may choose to do so given the wage deduction. If employers require the workers to live in the employer-provided housing, then the deduction is not based on a voluntarily accepted lodging, which prevents a housing credit from being taken against the minimum wage.

Further, H-2A workers should not be required to bear the burden of the housing when the transfer of value from employee wages to the employer cost of the housing exceeds the fair market value as well as the costs of the housing. Necessarily, any deductions to farmworker wages should be reduced after considering the compliance of the housing with relevant standards (including the "functional utility" based upon the HUD regulations), the cost of the housing, and the benefit to the employer. However, the IFR fails to limit payment of the deduction to employers whose housing complies with applicable housing standards, thereby undermining this key policy protection for workers.

5. The Department's Valuation Methodology Lacks Transparency

The IFR states that the Department is establishing a downward annual Adverse Effect Wage Rate compensation adjustment factor for each state computed as an equivalent hourly rate "based on the weighted statewide average of fair market rents for a four-bedroom housing unit available from HUD. The hourly deduction is capped at 30% of the Adverse Effect Wage Rate. The 30% cap allegedly ensures that the adjusted Adverse Effect Wage Rate will be set at a level that best approximates the maximum value they may be provided by employers related to their housing. It appears that the 30% is not related to

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[163] Daniel Costa & Philip Martin, *Record-low number of federal wage and hour investigations of farms in 2022*, Econ. Policy Institute (Aug. 22, 2023), https://www.epi.org/publication/record-low-farm-investigations/#epi-toc-6; Rachel Mintz, *Study: Women farmworkers in Michigan face unique work challenges*, Michigan Public (Mar. 5, 2025), https://www.michiganpublic.org/social-justice/2025-03-05/study-women-farmworkers-in-michigan-face-unique-work-challenges; CDM, Ripe for Reform, *supra* ("recent data from the U.S. DOL reveals starkly that both the federal and state government have not allocated adequate resources to do even one inspection of every labor camp in a state"; "nine out of ten migrant farmworkers did not reside in licensed housing"; "Inspection reports showed black mold, raw sewage and pest infestations, as [well] as broken doors and windows, and defective plumbing and electrical wiring."; "All of the workers interviewed for this report lived in employer-provided housing. Seven percent of those interviewed were charged for the housing they were provided, in clear violation of H-2A regulations. A larger number of workers—45% of those interviewed— described overcrowded and even dangerous conditions, which is also unlawful."; "Twenty workers described the housing as severely overcrowded—the single largest complaint about the housing. Others complained about inadequate ventilation, oppressive heat, pests, inadequate cooking and bathroom facilities, and general squalor.").

[164] Daniel Costa et al., *Federal labor standards enforcement in agriculture*, Econ. Policy Institute (Dec. 15, 2020), https://www.epi.org/publication/federal-labor-standards-enforcement-in-agriculture-data-reveal-the-biggest-violators-and-raise-new-questions-about-how-to-improve-and-target-efforts-to-protect-farmworkers/#epi-toc-17.

the value of the housing benefit, but rather the maximum percentage of a worker's income that HUD considers to be affordable. But this cap does not prevent the wage deduction from exceeding the actual value of the housing, especially if the housing value is exaggerated and inflated.

The Department fails to explain other steps taken to arrive at the deduction, such as why they decided to use the 50th percentile of gross rents, and why they use the HUD population-weighted FMRs for all housing covering all areas (urban and rural) in each state. This means that the city of San Francisco is part of the California valuation and the city of Seattle is part of the Washington State valuation. The Department fails to explain how any of these statistical determinations is appropriate for the reality of employer provided farmworker housing. The fact that in some states when you take the total number of units and the total number of workers, there is an average of 8 workers per unit, does not necessarily mean that most workers are living in 8 worker units. It certainly does not mean that they are living in homes with 4 bedrooms as opposed to barracks or motels. *See* Housing Assistance Council, Rural Research Brief, Exhibit D, at 1–34 (finding that H-2A workers are more likely to live in dormitory or barrack-style accommodations than non-H-2A workers). The 2019–2020 NAWS data revealed that farmworkers in dormitory or barrack-style living arrangements are the most likely to experience substandard living conditions, with nearly 54% reported living in overcrowded conditions.[165]

VI. The Department Promulgated the IFR Without Following the APA's Required Notice-and-Comment Procedures and Failed to Support That the Good Cause Exemption Was Needed

The Department failed to comply with the notice-and-comment requirements of the Administrative Procedure Act ("APA") by using an interim final rulemaking without good cause. The APA requires that the public receive notice of a proposed rulemaking and that the public has the opportunity to provide comment prior to a finalized rulemaking. The APA allows an agency to bypass the required notice-and-comment procedure when the agency "for good cause" finds that compliance with ordinary rulemaking procedures would be "impractical, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(B). Sufficient good cause is not present in the IFR.

The Department's use of an Interim Final Rule, which became immediately effective on October 2, 2025, caused immediate disruption to farmworkers, whose wages have been lowered with no notice and with no ability to comment. The "good cause" justifications on which the Department relies do not support the finding that a notice and public procedure are "impracticable, unnecessary or contrary to the public interest." 5 U.S.C. § 553(b)(B).

The Department relies on two arguments to justify denying the public the right to notice and to provide comment. The Department claims that the IFR was required (1) because of a shortage of labor allegedly created by increased immigration enforcement, and (2) because the FLS is no longer available. Neither supports a finding that public notice and procedure is impracticable, unnecessary, or contrary to the public interest.

First, the Department relies on the "current and imminent labor shortage" allegedly caused by reduced availability of undocumented farmworkers, which is the intentional result of the Administration's

[165] Housing Assistance Council, Rural Research Brief, Exhibit D, at 27.

immigration policy. This alleged labor shortage is not a rational basis for reducing H-2A worker wages and does not support a good cause exemption finding. To the extent there was a labor shortage, the Department could have simply authorized more H-2A applications under the pre-existing Adverse Effect Wage Rates. There was no rational reason to reduce the Adverse Effect Wage Rates, much less through an expedited IFR. In fact, offering the labor pool less money in wages is not a rational way to respond to a labor shortage. As the Department has stated: "a basic principle of economic supply-and-demand theory is that in market economies, shortages signal that adjustments should be made to maintain equilibrium." and "[t]herefore, compensation should rise to attract more workers where employers are experiencing a shortage of available workers in a particular region or occupation." 80 Fed. Reg. 62958, 62992 (Sept. 16, 2025) There was no reason to reduce Adverse Effect Wage Rates, and indeed, basic economic theory would hold that in times of labor shortages, the answer is to offer more money, not less.

Second, the government's own intentional cessation of the FLS does not create an urgency required to skip the notice and comment period. The active Adverse Effect Wage Rates in place prior to the IFR would still be valid through a normal notice and comment period, and could have continued to have been used, eliminating the need for any emergency action.

Not only is the good cause exemption unjustified, but it is causing actual harm. The IFR creates confusing and often undefined changes without having first altered forms as needed or even provided the promised FAQs that might help employers submit proper job orders. The resulting harm from this lack of preparation could have been minimized by allowing for a notice and comment period for a proposal rule rather than the immediately effective IFR.

VII. Conclusion

The Department has failed to set out a convincing rationale for making such a dramatic change in long-standing wage policy on such short notice. Lowering the cost of employing H-2A workers will cause serious wage reductions to an already low-income population (both local and H-2A workers). This is the first time since the program was introduced that a rulemaking regarding H-2A workers will have their wages reduced to offset the purported cost of their housing. Yet there is no evidence that H-2A workers have been overpaid under the previous methodology. The fact that employers' use of the H-2A program has increased steadily in the past twenty years under the prior wage and benefit structure also raises serious questions as to the need for the Department to transfer program costs from Employers to workers in order to preserve agricultural production. The Administrative Procedure Act requires more from the Department of Labor when making such a major shift, especially one that harms agricultural workers, a sector that this agency has a responsibility to protect.

For these reasons, we urge the Department to rescind its IFR on the Adverse Effect Wage Rate methodology immediately. The rule is arbitrary, capricious, and inconsistent with the Department's mandate to protect workers. As the Department considers future rulemaking, we recommend that the pre-IFR Adverse Effect Wage Rate remain in effect, with annual raises consistent with the average increase of the Adverse Effect Wage Rate over the last three years, until there is future rulemaking based on a reissued FLS. If a reissued FLS is not possible then we recommend that the Department use the average wage rates provided in the OEWS. Further, we urge the Department to eliminate the tiered skill levels and pay workers according to the highest SOC code available for the time spent on those tasks.

Sincerely,

Farmworker Justice

Association of Farmworker Opportunity Programs (AFOP)
Centro de los Derechos del Migrante, Inc. (CDM)
Columbia Legal Services
Community Council of Idaho, Inc.
Economic Policy Institute
FarmSTAND
Farmworker Association of Florida
Farmworker Legal Services
Health Outreach Partners
Justice at Work PA
Justice in Motion
Legal Aid Justice Center
Legal Aid of North Carolina's Farmworker Unit
Legal Aid Services of Oregon
Michigan Immigrant Rights Center
North Carolina Justice Center
Northwest Center for Alternatives to Pesticides
Northwest Justice Project
Northwest Workers' Justice Project
Oregon Law Center
Pennsylvania Farmworker Project
Pine Tree Legal Assistance
Texas RioGrande Legal Aid, Inc.
The Coming Clean Network
United Farm Workers
UFW Foundation
Worker Justice Center of New York