

CHAPTERS

TEMPORARY MEMBERSHIP? THE FLAWS OF THE H-2A AGRICULTURAL TEMPORARY GUEST WORKER PROGRAM IN THE CRIMMIGRATION CONTEXT

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Human migration is not a novel concept; people have always been on the move. Reasons for migration vary: some move for economic opportunities, some to study, others to be with family. Climate disasters are forcing masses of people to migrate to more hospitable places. Arguably, the biggest motivation for global migration is to seek employment, particularly in agricultural labor. In response to the rise of global migration, many countries, including the United States, developed various employment programs to keep track of who entered the country and for how long. Often, these programs required workers to apply for a visa, which provided legal status. One such program is the H-2A Temporary Agricultural Guest Worker Program, which allows U.S. employers to petition for noncitizen workers to enter the country and perform seasonal agricultural labor. On paper the program appears to clearly outline responsibilities and expectations of both employers

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and employees, but the program's flaws leave H-2A workers particularly susceptible to employer abuses.

Both Congress and the Department of Labor attempted to update the H-2A program to address the constant, fluctuating demand for agricultural labor. In March 2021, lawmakers passed the Farm Workforce Modernization Act, which made various procedural changes to the H-2A program. More recently, on October 12, 2022, the Department of Labor added a final rule to the Federal Register that further amended the H-2A program. The rule attempted to strengthen worker protections and program integrity, modernize the application process, and expand employer access to the program.

Despite these efforts to strengthen the H-2A program and invest in worker protections, these limited changes are unlikely to remedy the problems that persist with temporary guest worker programs.

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I. INTRODUCTION

History shows that the concept of a temporary guest worker program is irreplaceable to the U.S. agricultural industry.¹ In the early 1900s, Mexican labor migration to the United States began in earnest as the American Southwest expanded large-scale agriculture.² Dependency on cheap, temporary labor has impaired the ability of the United States to maintain a stable agricultural workforce. This impairment is due in part to the U.S. economy's "nearly insatiable desire for a flexible, pliable, and inexpensive labor force supplied by immigration."³ The United States values the temporary guest worker program but does not value the individual worker. Indeed, the government values noncitizen workers merely for their labor, considers them replaceable, and forgets them once their labor contract expires. For example, in 1907, the U.S. Immigration Commission, also known as the Dillingham Commission, reported:

The Mexican migrants are providing a fairly adequate supply of labor . . . While they are not easily assimilated, this is of no very great importance as long as most of them return to their native land. In the case of the Mexican, he is less desirable as a citizen than as a laborer.⁴

While the United States emphasizes the importance of providing agricultural employers with these temporary guest worker programs, the government largely overlooks the individual worker.

Concerns with temporary guest worker programs remain. In June 2022, the Ninth Circuit heard arguments alleging that an Idaho dairy company exploited the nonimmigrant North American Free Trade Agreement (NAFTA) Professional (TN) visa permitting process to coerce six Mexican plaintiffs into providing menial labor.⁵ The Ninth Circuit concluded that a reasonable jury could find the dairy knowingly exploited the plaintiffs' labor through abusing the TN visa process.⁶ The court found that the dairy had pressured plaintiffs to provide labor considerably different from what the company had originally represented.⁷ This case sets the stage for this Chapter.

This Chapter establishes that the crimmigration regime⁸ and the H-2A temporary agricultural guest worker program⁹ are two irreconcil-

¹ Mary Lee Hall, *Defending the Rights of H-2A Farmworkers*, 27 N.C. J. INT'L L. & COM. REGUL. 521, 528 (2002).

² HIROSHI MOTOMURA, IMMIGRATION OUTSIDE THE LAW 38 (2014).

³ *Id.* at 31.

⁴ *Id.* at 39 (quoting Immigration Commission, Reports of the Immigration Commission: Abstracts of the Reports of the Immigration Commission with Conclusions and Recommendations and Views of the Minority, S. Doc. No. 61-747, at 690-91 (1911)).

⁵ *Martínez-Rodríguez v. Giles*, 31 F.4th 1139, 1143 (9th Cir. 2022).

⁶ *Id.*

⁷ *Id.*

⁸ The term "crimmigration," coined by scholar Juliet Stumpf in 2006, references the convergence of immigration and criminal law. Juliet Stumpf, *The Crimmigration Crisis*:

able systems because together they increase the risk of criminalization of H-2A workers. More specifically, this Chapter proposes that, in the context of immigration laws and several theoretical perspectives, the H-2A program's structure and inherent flaws enhance the risk that noncitizen workers, whom our society depends on, enter criminalized spaces. Part II of this Chapter discusses the H-2A Temporary Guest Worker program. Section A provides a brief historical overview of the H-2A program, discussing the program's origins in prior temporary agricultural schemes. Section B provides the general legal framework of the H-2A program, including procedural and substantive requirements for both employees and employers to apply for and obtain a valid H-2A visa. Section C poses four interconnected critiques of the H-2A program.

Part III analyzes two theoretical perspectives that relate to a more sweeping and relatively new theory synthesizing criminal and immigration law: crimmigration. Section A briefly introduces crimmigration theory. Section B provides an overview of "immployment" law¹⁰ and analyzes the H-2A program in this context. Finally, Section C discusses membership theory and its effects on an H-2A guest worker's societal status. Part III concludes that, while temporary guest worker programs attempt to protect noncitizens from entering the crimmigration paradigm, the H-2A program is fundamentally flawed and cannot be effective while this crimmigration regime exists.

II. THE H-2A TEMPORARY GUEST WORKER PROGRAM

A significant part of U.S. labor history involves bringing in foreign temporary workers, often through guest worker programs.¹¹ The need for guest worker programs often coincided with worker shortages during times of war.¹² The most notable example is the controversial Bracero Program administered by the U.S. government from World War II to 1964.¹³ The program established rules for temporary employment opportunities for Mexican farm workers to come to the United States and work specific agricultural jobs as long as they did not displace domestic workers doing the same jobs.¹⁴ The Bracero Program was the first joint

Immigrants, Crime, and Sovereign Power, 56 AM. U. L. REV. 367, 376 (2006). Part III, Section A provides a nuanced and detailed discussion of crimmigration theory.

⁹ 8 U.S.C. § 1188 (2018).

¹⁰ The term "immployment," coined by scholar Kati L. Griffith in 2011, refers to the intersection between immigration and employment law. Kati L. Griffith, *Discovering "Immployment" Law: The Constitutionality of Subfederal Immigration Regulation at Work*, 29 YALE L. & POL'Y REV. 389, 394 (2011) [hereinafter Griffith, *Discovering Immployment Law*]. Part III, Section B provides a more nuanced discussion of immployment law.

¹¹ ANDORRA BRUNO, CONG. RSCH. SERV., R44849, H-2A AND H-2B TEMPORARY WORKER VISAS: POLICY AND RELATED ISSUES 1 (2017), <https://perma.cc/HYC4-ZG2V>.

¹² *Id.*

¹³ Michael Holley, *Disadvantaged by Design: How the Law Inhibits Agricultural Guest Workers from Enforcing Their Rights*, 18 HOFSTRA LAB. & EMP. L.J. 575, 583–85 (2001).

¹⁴ Alex Nowrasteh, *How to Make Guest Worker Visas Work*, CATO INST.: POL'Y ANALYSIS 2 (Jan. 31, 2013), No. 719 at 2, <https://perma.cc/EF8W-BKKM>.

agreement between Mexico and the United States aimed at regulating migrant labor.¹⁵ While the original purpose of the program was to address the labor shortages during World War II, farmers successfully lobbied to maintain the Bracero Program well after the war ended.¹⁶ Although the program officially ended in 1964,¹⁷ the role of the temporary agricultural worker did not. Mexican farm workers remain vitally important to the agricultural workforce in the United States,¹⁸ now adhering to a modern successor to Bracero: the H-2A agricultural worker program.¹⁹

A. *The Legal Framework of the H-2A Program*

H-2A is one of several nonimmigrant temporary guest worker visa categories in the United States.²⁰ Notably, however, apart from H-2B, H-2A is currently the only visa category that issues employment contracts for less than a year.²¹ This section breaks down the key procedural and substantive elements of the H-2A agricultural worker program, first describing the H-2A program's structural developments, then outlining the process of bringing in an H-2A worker to the United States, and finally describing the substantive elements necessary to qualify the employment as agricultural and temporary or seasonal in nature.

1. *Structure*

In 1952, the Immigration Nationality Act (INA)²² established the H-2 nonimmigrant visa category for foreign workers entering the United States to perform temporary services or labor.²³ More than thirty years later, the Immigration Reform and Control Act (IRCA)²⁴ amended the INA to separate the H-2 program into its current structure: the H-2A

¹⁵ Richard D. Vogel, *Transient Servitude: The U.S. Guest Worker Program for Exploiting Mexican and Central American Workers*, MONTHLY REV. (Jan. 2007), at 1, 4.

¹⁶ Laura-Anne Minkoff-Zern et al., *Protracted Dependence and Unstable Relations: Agrarian Questions in the H-2A Visa Program*, 93 J. RURAL STUD. 43, 44 (2022).

¹⁷ *Id.*

¹⁸ Sadikshya Nepal, *Primer: Evolution of the H-2A Visa Program*, BIPARTISAN POL'Y CTR. (Sept. 15, 2021), <https://perma.cc/7C8Q-8S5F>.

¹⁹ Holley, *supra* note 13, at 583, 583 n.56.

²⁰ *Temporary Worker Visas: Overview*, U.S. DEP'T. OF STATE—BUREAU OF CONSULAR AFFS., <https://perma.cc/R59Z-RLFK> (last visited April 16, 2023). Other recognized guest worker visas categories include: H-1B: person in specialty occupation; H-1B1: Free Trade Agreement (FTA) professional; H-2B: temporary non-agricultural worker; H-3: trainee or special education visitor; L: intracompany transferee; O: individual with extraordinary ability or achievement; P-1: individual or team athlete, or member of an entertainment group; P-2 & P-3: artist or entertainer (individual or group); and Q-1: participant in an international cultural exchange program. *Id.*

²¹ *Guestworker Programs*, FARMWORKER JUST., <https://perma.cc/ZP3J-DHTM> (last visited April 16, 2023).

²² 8 U.S.C. §§ 1101–1536 (2018).

²³ *Id.* § 1188; BRUNO, *supra* note 11, at 2.

²⁴ Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified in scattered sections of 8 U.S.C.).

agricultural worker program and the H-2B nonagricultural worker program.²⁵ H-2A agricultural work typically involves cultivating and harvesting fruits and vegetables, while H-2B employees work in seasonal industries, including hotels, forestry, seafood processing, cruise lines, landscaping, and construction.²⁶ Bringing H-2A and H-2B temporary workers into the United States is a multistep, multi-agency process.²⁷ While the H-2B visa category is subject to a statutory cap, the H-2A visa category remains uncapped.²⁸ The number of H-2A visas has risen dramatically since the inception of the H-2A program in 1986.²⁹ In the first year of the program, the Department of State issued forty-four H-2A visas; in fiscal year 2020, the department issued around 213,000 H-2A visas.³⁰

2. Administration: Bringing in an H-2A Worker

The U.S. Citizenship and Immigration Services (USCIS) of the Department of Homeland Security (DHS) and the Employment and Training Administration (ETA) of the Department of Labor (DOL) administer the H-2 programs.³¹ Bringing in H-2 workers is a four-step process. First, a U.S. employer must apply for temporary labor certification from the DOL's ETA.³² Scholars have referred to this requirement as satisfying a "labor market test," which is a more extensive process than in other similar programs.³³ For the government to issue a temporary labor certification, the Secretary of Labor must determine that (a) insufficient domestic workers are able, willing, qualified, and available at the time and place needed to perform the labor or services involved in the petition; and (b) the employment of the noncitizen in such labor or services will not adversely affect the wages and working conditions of domestic workers similarly employed.³⁴ Second, upon receiving a temporary labor certification, the U.S. employer must then submit a petition to the USCIS for a noncitizen to enter the United States to perform agricultural services of a temporary or seasonal nature.³⁵ Employers must submit a valid certificate with the H-2A petition, and the USCIS will defer to the DOL's findings regarding the availability of U.S. workers and the impact of employment on wages and working conditions of U.S.

²⁵ BRUNO, *supra* note 11, at 2.

²⁶ Kati L. Griffith, *U.S. Migrant Worker Law: The Interstices of Immigration Law and Labor and Employment Law*, 31 COMP. LAB. L. & POL'Y J. 125, 134–35 (2009) [hereinafter Griffith, *The Interstices of Immigration Law*].

²⁷ BRUNO, *supra* note 11, at 18–19.

²⁸ *Id.* at 10.

²⁹ Nepal, *supra* note 18.

³⁰ *Id.*

³¹ See BRUNO, *supra* note 11, at 3.

³² Assurances and Obligations of H-2A Employers, 20 C.F.R. § 655.135 (2021).

³³ Griffith, *The Interstices of Immigration Law*, *supra* note 26, at 135.

³⁴ 8 U.S.C. § 1188 (a)(1) (2018).

³⁵ BRUNO, *supra* note 11, at 3.

workers.³⁶ Third, upon approval of a petition, the foreign worker then must apply for a visa from the Department of State.³⁷ Finally, if the foreign worker successfully receives their visa, they must next seek admission at a U.S. port of entry from the DHS.³⁸

3. Substantive Employment Requirements

The approval of an H-2A petition requires not only fulfilling these various procedural elements, but also fitting the guest worker's proposed duties into the narrow definition of agricultural, seasonal, and temporary work. According to DOL regulations, agricultural labor includes, among other things, "all service performed . . . [o]n a farm, in the employ of any person, in connection with cultivating the soil, or . . . raising or harvesting any agricultural or horticultural commodity."³⁹ Seasonal work applies to a certain time of year associated with an event or pattern and requires heightened labor levels from those normally necessary for ongoing operations.⁴⁰ Finally, temporary work occurs when an employer needs to fill a position that will, except in extraordinary circumstances, last no longer than one year.⁴¹ Although the DOL may extend H-2 visas for up to three consecutive years, it does so sparingly.⁴² Both the H-2A and H-2B programs contain statutory requirements that the noncitizen attempting to enter the United States maintains their foreign residency and demonstrates they have no intent to abandon that residency.⁴³ Essentially, H-2A and H-2B guest workers cannot permanently immigrate to the United States.

B. Critiques of the Program

Since the inception of the H-2A program, countless scholars have expressed their disapproval of the program's procedural and substantive structure.⁴⁴ This pushback is most notable in four main critiques. The

³⁶ Special Requirements for Admission, Extension, and Maintenance of Status, 8 C.F.R. § 214.2(h)(5)(ii) (2023).

³⁷ BRUNO, *supra* note 11, at 3.

³⁸ *Id.*

³⁹ Overview of this Subpart and Definition of Terms, 20 C.F.R. § 655.103(c)(1)(i)(A) (2023) (Agricultural or horticultural commodities include: "raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and fur-bearing animals and wildlife.").

⁴⁰ *Id.* § 655.103(d).

⁴¹ *Id.*

⁴² *Id.*

⁴³ 8 U.S.C. § 1101 (a)(15)(H)(ii)(a)–(b).

⁴⁴ See generally Hall, *supra* note 1 (discussing issues with the H-2A program); Griffith, *Discovering Immigrant Law*, *supra* note 10; Sovereign Hager, *Farm Workers and Forced Labor: Why Including Agricultural Guest Workers in the Migrant and Seasonal Worker Protection Act Prevents Human Trafficking*, 38 SYRACUSE J. INT'L L. & COM. 173 (2010); Bryce W. Ashby, *Indentured Guests—How the H-2A and H-2B Temporary Guest Worker Programs Create the Conditions for Indentured Servitude and Why Upfront Reimbursement for Guest Workers' Transportation, Visa, and Recruitment Costs is the Solution*,

first critique addresses the fundamentally flawed legal relationship between employer and employee—essentially, an employee’s immigration status is tied to their employer, thus creating a dynamic in which the employee is susceptible to exploitation.⁴⁵ The second critique notes that the employee often has to be the primary enforcer of their workplace protections.⁴⁶ This dynamic exposes the lack of legal protections and exacerbates the vulnerability of noncitizen employees, who are often unfamiliar with the legal system in their host country.⁴⁷ The third critique addresses the failure to enforce protections outlined in the H-2A program to noncitizen workers.⁴⁸ The final critique addresses how the exclusion of agricultural workers in several federal employment laws poses legal obstacles for H-2A workers to receive their workplace protections.⁴⁹

The issues raised in these four critiques are interrelated and due, in part, to a growing phenomenon: the resolution of immigration issues with criminal punishment. This section addresses each critique in turn.

1. Immigration Status Tied to an Employer

First, the H-2A program ties the worker’s immigration status to their employer.⁵⁰ Employers and employer agencies petition for specific noncitizens to come work for them.⁵¹ While H-2A visa regulations guarantee workers certain labor protections under both federal law and DOL regulations, pervasive employer control severely limits workers’ access to these guarantees.⁵² Once a worker has arrived in the United States, they cannot switch employers because their H-2A visa ties their legal

38 U. MEM. L. REV. 893 (2008); Matthew Lister, *Justice and Temporary Labor Migration*, 29 GEO. IMMIGR. L.J. 95 (2014); Kati L. Griffith, *Laborers or Criminals? The Impact of Cimmigration on Labor Standards Enforcement*, CORNELL UNIV. SCH. OF LAB. AND RELS. (Jan. 4, 2014) <https://perma.cc/UWF5-ZZJB> [hereinafter Griffith, *Laborers or Criminals*]; Lisa Guerra, *Modern-Day Servitude: A Look at the H-2A Program’s Purposes, Regulations, and Realities*, 29 VT. L. REV. 185 (2004); Elizabeth Johnston, *The United States Guest-worker Program: The Need for Reform*, 43 VAND. J. TRANSNAT’L L. 1121 (2010); Motomura, *supra* note 2; Jennifer Gordon, *Transnational Labor Citizenship*, 80 S. CAL. L. REV. 503 (2007).

⁴⁵ See Kati L. Griffith & Shannon M. Gleeson, *The Precarity of Temporality: How Law Inhibits Immigrant Worker Claims*, 39 COMPAR. LAB. L. & POL. J. 111, 112–13 (2017); Hall, *supra* note 1, at 522; Johnston, *supra* note 44, at 1130; Gordon, *supra* note 44, at 558.

⁴⁶ See Griffith & Gleeson, *supra* note 45, at 111.

⁴⁷ See *id.* at 112.

⁴⁸ Guerra, *supra* note 44, at 195.

⁴⁹ *Id.* at 186.

⁵⁰ See Griffith & Gleeson, *supra* note 45, at 112; Guerra, *supra* note 44, at 205; Christopher Ryon, *H-2A Workers Should Not be Excluded From The Migrant and Seasonal Agricultural Worker Protection Act*, 2 MARGINS 137, 138 (2002).

⁵¹ BRUNO, *supra* note 11, at 3.

⁵² Alice Browning, *The H-2A Agricultural Temporary Workers’ Visa Program Violates the First Amendment Right to Peaceable Assembly*, AM. U. J. GENDER, SOC. POL’Y & L., <https://perma.cc/M9YB-3G5Y> (last visited Feb. 26, 2023).

immigration status to their specific employer.⁵³ The lack of visa portability exacerbates the imbalance of bargaining power between employer and worker.⁵⁴

Additionally, workers are hesitant to assert their labor rights for fear of blacklisting, in which employers notify other employers of a worker's "poor behavior" and that worker risks refusal of future employment.⁵⁵ As an example, a group of sugarcane growers in Florida operated a "no return list" to avoid rehiring workers they deemed undesirable for speaking up and attempting to assert their rights.⁵⁶ Clearly, an employer's power extends beyond hiring and firing. If the employer terminates the H-2A worker's contract, the worker immediately loses legal immigration status and may risk deportation.⁵⁷ H-2A workers depend on their employer for their visa and their livelihood.⁵⁸

2. Workers: Primary Enforcers of their Rights

Second, while some government-initiated enforcement exists,⁵⁹ the primary enforcers of U.S. workplace law are the employees themselves.⁶⁰ Some scholars refer to employees as "private attorneys general," given workers' central roles in ensuring employer compliance.⁶¹ Other scholars refer to this dynamic as "bottom-up enforcement," as opposed to top-down government enforcement.⁶² This employer-employee dynamic imposes particular barriers for workers to receive protections outlined in the H-2A program. Several aspects of the program help explain why H-2A workers are especially vulnerable in a bottom-up enforcement system. To start, bringing a complaint through the H-2A pro-

⁵³ Griffith, *The Interstices of Immigration Law*, *supra* note 26, at 137–38; GARRY G. GEFERT, *H-2A Guestworker Program: A Legacy of Importing Agricultural Labor*, in *THE HUMAN COST OF FOOD: FARMWORKERS' LIVES, LABOR, AND ADVOCACY* 113, 133 (Charles D. Thompson & Melinda F. Wiggins eds., 2002); Hall, *supra* note 1, at 527.

⁵⁴ Griffith, *The Interstices of Immigration Law*, *supra* note 26, at 137–38; Hall, *supra* note 1, at 529.

⁵⁵ Griffith, *The Interstices of Immigration Law*, *supra* note 26, at 137–38; Ryon, *supra* note 50, at 138.

⁵⁶ GEFERT, *supra* note 53, at 133.

⁵⁷ Browning, *supra* note 52; Hall, *supra* note 1, at 529.

⁵⁸ ETHAN NEWMAN, *NO WAY TO TREAT A GUEST: WHY THE H-2A AGRICULTURAL VISA PROGRAM FAILS U.S. AND FOREIGN WORKERS* 25 (Farmworker Just. ed., 2012), <https://perma.cc/3NMR-SMST>.

⁵⁹ David Weil, *Creating a Strategic Enforcement Approach to Address Wage Theft: One Academic's Journey in Organizational Change*, 60 *J. OF INDUS. RELS.* 437, 438 (2018), <https://perma.cc/3EDS-6593>.

⁶⁰ See Griffith & Gleeson, *supra* note 45, at 111–12.

⁶¹ *Id.*; Llezlie Green Coleman, *Exploited at the Intersection: A Critical Race Feminist Analysis of Undocumented Latina Workers and the Role of the Private Attorney General*, 22 *VA. J. SOC. POL'Y & L.* 397, 400, 421 (2015) (referring to employees as private attorney generals); Griffith, *The Interstices of Immigration Law*, *supra* note 26, at 160; Kathleen Kim, *The Trafficked Worker as Private Attorney General: A Model of Enforcing the Civil Rights of Undocumented Workers*, 2009 *U. CHI. LEGAL F.* 247, 308 (2009).

⁶² See Griffith & Gleeson, *supra* note 45, at 112; Charlotte S. Alexander & Arthi Prasad, *Bottom-Up Workplace Law Enforcement: An Empirical Analysis*, 89 *IND. L.J.* 1069, 1070–71 (2014).

gram is complicated.⁶³ Workers must file complaints through the DOL's Job Service Complaint System,⁶⁴ which contains several lengthy processes for filing complaints involving fraud or misrepresentation, work contracts, and hiring and firing discrimination.⁶⁵ Moreover, H-2A workers are often unfamiliar with the U.S. legal system and have few ties to people who can help.⁶⁶ Language barriers heighten these challenges.⁶⁷

⁶³ Holley, *supra* note 13, at 594 (“H-2A workers only have a remote possibility of protecting their employment rights because they have no connection to effective institutions to enforce those rights. There are two aspects to this disconnection. First, the material conditions of their employment render H-2A workers inherently vulnerable. Second, federal statutes, regulations and case law, rather than compensating for this exceptional vulnerability, aggravate it by largely excluding H-2A workers from the judicial system.”); Administrative Provisions Governing The Wagner-Peyser Act Employment Service, 20 C.F.R. §§ 658.400–658.426 (2022) (demonstrating the multitude of layers of properly filing a complaint through the H-2A program, including outlining procedural responsibilities of employers and employees and how to properly file a complaint; distinguishing the different procedures for state and local level complaints; and noting the decision-making process in state hearings and what happens when a complaint rises to the federal level).

⁶⁴ 20 C.F.R. §§ 655.185, 658.400–658.426; *Work Authorization for Non-U.S. Citizens: Temporary Agricultural Workers (H-2A Visas)*, U.S. DEPT. OF LAB., <https://perma.cc/9PY5-EK53> (last updated Dec. 2016).

⁶⁵ Job Service Complaint System; Enforcement of Work Contracts, 20 C.F.R. § 655.185(a)–(b) (2022). The relevant filing regulations read as follows:

(a) *Filing with DOL*. Complaints arising under this subpart must be filed through the Job Service Complaint System, as described in 20 CFR part 658, subpart E. Complaints involving allegations of fraud or misrepresentation must be referred by the [State Workforce Agency (SWA)] to the [Certifying Officer (CO)] for appropriate handling and resolution. Complaints that involve work contracts must be referred by the SWA to WHD for appropriate handling and resolution, as described in 29 CFR part 501. As part of this process, WHD may report the results of its investigation to the [Office of Foreign Labor Certification (OFLC)] Administrator for consideration of employer penalties or such other action as may be appropriate.”);

(b) *Filing with the Department of Justice*. Complaints alleging that an employer discouraged an eligible U.S. worker from applying, failed to hire, discharged, or otherwise discriminated against an eligible U.S. worker, or discovered violations involving the same, will be referred to the U.S. Department of Justice, Civil Rights Division, Immigrant and Employee Rights Section, in addition to any activity, investigation, and/or enforcement action taken by [the Employment and Training Administration (ETA)] or a SWA. Likewise, if the Immigrant and Employee Rights Section becomes aware of a violation of the regulations in this subpart, it may provide such information to the appropriate SWA and the CO.

Id. See also GEFPERT, *supra* note 53, at 133 (describing the ineffectiveness of the reporting process).

⁶⁶ GEFPERT, *supra* note 53, at 133 (“According to [a 1997] GAO report, ‘H-2A guest-workers may be less aware of U.S. laws and protections than domestic workers, and they are unlikely to complain about worker protection violations . . . fearing they will lose their jobs or will not be hired in the future.’” (internal citation omitted)).

⁶⁷ Holley, *supra* note 13, at 595.

3. Inadequate Enforcement of H-2A Protections

Third, while in theory the program's regulations protect H-2A workers' rights, in practice, enforcement of these rights is rare.⁶⁸ The DOL has the primary authority to monitor and enforce H-2A program regulations;⁶⁹ 20 C.F.R. § 655.135 outlines assurances and obligations of H-2A employers,⁷⁰ which include, among other duties, abiding by non-discriminatory hiring practices⁷¹ and complying with applicable laws.⁷²

In particular, the DOL's Wage and Hour Division (WHD) ensures payment of required wages, transportation, meals, and housing.⁷³ The WHD also has the authority to investigate and ensure that employers fulfill their obligations outlined in the H-2A regulations.⁷⁴ Violations of H-2A workers' rights are both systemic and rampant,⁷⁵ indicating that the DOL is not adequately enforcing these standards and thus failing to deter employers' unlawful practices.⁷⁶ And even upon encountering a program violation, the DOL is often reluctant to impose a penalty.⁷⁷

Moreover, while the H-2A program prohibits employer retaliation against workers who attempt to assert their legal rights,⁷⁸ a 2015 report

⁶⁸ *Id.* at 615; Guerra *supra* note 44, at 186–87, 200; Browning, *supra* note 52.

⁶⁹ U.S. GOV'T ACCOUNTABILITY OFF., GAO-15-154, H-2A AND H-2B VISA PROGRAMS: INCREASED PROTECTIONS NEEDED FOR FOREIGN WORKERS 11 (2015).

⁷⁰ 20 C.F.R. § 655.135 (2021) (stating that “[a]n employer seeking to employ H-2A workers must agree as part of the *Application for Temporary Employment Certification* and job offer that it will abide by the requirements of this subpart and make . . . [the] additional assurances” described in this subpart (emphasis in original)).

⁷¹ Assurances and Obligations of H-2 Employees, 20 C.F.R. § 655.135(a) (2021) (“*Non-discriminatory hiring practices.* The job opportunity is, and through the period set forth in paragraph (d) of this section must continue to be, open to any qualified U.S. worker regardless of race, color, national origin, age, sex, religion, handicap, or citizenship status. Rejections of any U.S. workers who applied or apply for the job must be only for lawful, job-related reasons, and those not rejected on this basis have been or will be hired. In addition, the employer has and will continue to retain records of all hires and rejections as required by § 655.167.”).

⁷² *Id.* § 655.135(e) (“During the period of employment that is the subject of the *Application for Temporary Employment Certification*, the employer must comply with all applicable Federal, State, and local laws and regulations, including health and safety laws.”).

⁷³ U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 69, at 12.

⁷⁴ *Id.*

⁷⁵ NEWMAN, *supra* note 58, at 11 (noting the “harsh (and frequently illegal) working conditions” of H-2A workplaces); *Id.* at 21–22 (providing interviews with workers who have experienced significant violations of their rights under the H-2A program).

⁷⁶ *See id.* at 7 (noting that the DOL “frequently approves illegal job terms in the H-2A workers’ contracts”).

⁷⁷ GEFFERT, *supra* note 53, at 133 (describing the DOL’s reluctance to impose penalties through a court case where the plaintiff showed that nearly every East Coast H-2 apple grower paid their employees less than the wage rate required by the DOL, yet the DOL did not impose penalties on the growers (citing *Frederick City Fruit Growers Ass’n v. McLaughlin*, 703 F. Supp. 1021 (D.D.C. 1989))).

⁷⁸ Discrimination Prohibited, 29 C.F.R. § 501.4(a) (2022) (“A person may not intimidate, threaten, restrain, coerce, blacklist, discharge, or in any manner discriminate against any person who has: (1) Filed a complaint under or related to 8 U.S.C. 1188 . . . ; (2) Instituted or caused to be instituted any proceedings related to 8 U.S.C. 1188 or the regulations in this part; (3) Testified or is about to testify in any proceeding under or related to 8 U.S.C. 1188 or to the regulations in this part; (4) Consulted with an employee of

by the U.S. Government Accountability Office (GAO) asserts that a lack of enforcement exists in practice.⁷⁹

4. *Exclusion of Agricultural Workers from Federal Employment Laws*

Finally, several federal employment laws exclude agricultural workers, aggravating the exceptional vulnerability of H-2A workers.⁸⁰ For example, the Fair Labor Standards Act (FLSA)⁸¹ excludes farm workers on large farms from maximum hours and overtime protections outlined in the Act.⁸² The National Labor Relations Act (NLRA),⁸³ which provides workers the right to organize and collectively bargain, also excludes agricultural employees.⁸⁴ Further, the Migrant and Seasonal Agricultural Protection Act (AWPA or MSPA),⁸⁵ created to respond directly to worker abuses in the agricultural industry,⁸⁶ excludes H-2A guest workers.⁸⁷ Since enforcement of H-2A program protections is rare,⁸⁸ these federal employment laws would provide a safeguard for H-2A workers. Accordingly, these agricultural worker exclusions are significantly harmful to H-2A noncitizen workers.

Immigration scholar Emily B. White succinctly addresses the interplay of these three critiques and highlights the tension between protecting noncitizen worker rights on paper and enforcing these rights in practice:

Past experiences with guest worker systems, from the Bracero [P]rogram to the modern H-2A [V]isa program, show us that guest workers are uniquely susceptible to employer abuse. When an employee is dependent on an employer to maintain his immigration status, this exacerbates the

a legal assistance program or an attorney on matters related to 8 U.S.C. 1188, or to this subpart[.] . . . or (5) Exercised or asserted on behalf of themselves or others any right or protection afforded by 8 U.S.C. 1188 or the regulations in this part.”)

⁷⁹ See U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 69, at 56 (noting that although “DOL’s Office of Foreign Labor Certification collects detailed information, such as phone numbers and addresses, on employers who have been debarred[.] . . . the agency neither uses all of this information to screen new employer applications nor shares it with [the Department of Homeland Security] and [the Department of] State for their screening processes[.]” which constrains these agencies’ ability to “[i]dentify[] and investigat[e] exploitative employment situations”); *see also* Guerra, *supra* note 44, at 187.

⁸⁰ Holley, *supra* note 13, at 588.

⁸¹ 29 U.S.C. §§ 201–204, 206, 207, 209–219 (2018).

⁸² Marc Linder, *Farm Workers and The Fair Labor Standards Act: Racial Discrimination in The New Deal*, 65 TEX. L. REV. 1335, 1335 (1987); 29 U.S.C. § 213(a)(6) (2018); Ryon, *supra* note 50, at 141–43.

⁸³ 29 U.S.C. §§ 151–169 (2018).

⁸⁴ Ryon, *supra* note 50, at 140. *See* 29 U.S.C. § 152(3) (“The term ‘employee’ . . . shall not include any individual employed as an agricultural laborer.”).

⁸⁵ 29 U.S.C. §§ 1801–03, 1811–15, 1821–23, 1831–32, 1841–44, 1851–56, 1861–63, 1871–72.

⁸⁶ Hager, *supra* note 44, at 190.

⁸⁷ Guerra, *supra* note 44, at 186; Ryon *supra* note 50, at 138; Hager, *supra* note 44, at 173, 179, 190.

⁸⁸ *See* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 69; *see also supra* text accompanying notes 68–77 (describing inadequate enforcement of the H-2A program).

imbalance of power between employee and employer. It becomes easier to subordinate and control the employee. Thus, even if guest workers are given full protection under federal employment discrimination laws, those protections may be merely symbolic in practice. Individuals who are operating in a foreign system are more likely to be unaware of their legal rights, unaware of how to protect their rights, or simply too scared of the consequences they may face if they lodge complaints against their employer.⁸⁹

Many scholars who critique the H-2A program also propose solutions and improvements.⁹⁰ Some notable proposals include the following: extending the duration of the initial H-2 visa,⁹¹ providing workers with the option to move from one employer to another upon entry to the United States,⁹² and requiring employers to pay upfront for H-2 program related costs workers incur as part of the labor certification process.⁹³ Overall, scholars seem to call for a more comprehensive and accessible guest worker program to complement the temporary nature of modern migrant flows.⁹⁴ Part III discusses why, in the context of crimmigration, these proposals are insufficient to address the program's problems.

III. CRIMMIGRATION IN THE H-2A CONTEXT

Crimmigration theory posits that people with more precarious immigration status will always exist in a more criminalized space, or at least be more susceptible to those spaces.⁹⁵ People with more vulnerable status, such as temporary guest workers, are more likely to be subject to criminalization than workers who may be in the same type of jobs but have a more stable immigration status.⁹⁶ For example, if a U.S. citizen worker and a H-2A worker commit the same crime, they likely face very

⁸⁹ Emily B. White, *How We Treat Our Guests: Mobilizing Employment Discrimination Protections in a Guest Worker Program*, 28 BERKELEY J. EMP. & LAB. L. 269, 271–72 (2007) (footnotes omitted).

⁹⁰ See generally Ashby, *supra* note 44; Hager, *supra* note 44; White, *supra* note 89; Philip Martin, *Guest or Temporary Foreign Worker Programs*, 39 COMPAR. LAB. L. & POL'Y J. 189 (2017); Johnston, *supra* note 44; Leticia M. Saucedo, *Immigration Enforcement Versus Employment Law Enforcement: The Case For Integrated Protections In The Immigrant Workplace*, 38 FORDHAM URB. L.J. 303 (2010).

⁹¹ Nowrasteh, *supra* note 14, at 7–8.

⁹² Martin, *supra* note 90, at 199; NEWMAN, *supra* note 58, at 9.

⁹³ Ashby, *supra* note 44, at 897.

⁹⁴ See, e.g., Nowrasteh, *supra* note 14, at 4.

⁹⁵ See Stumpf, *supra* note 8, at 376 (“Immigration law today is clothed with so many attributes of criminal law that the line between them has grown indistinct. Scholars have labeled this the ‘criminalization of immigration law.’”).

⁹⁶ See *id.* at 381 (“Criminal and immigration law primarily serve to separate the individual from the rest of U.S. society through physical exclusion and the creation of rules that establish lesser levels of citizenship Whether a noncitizen violates immigration law that has been defined as criminal, or a crime that is a deportable offense, both incarceration and deportation may result.”).

different consequences.⁹⁷ Although they both risk punishment for the crime they commit, only one will be subject to deportation.

This Part explores the H-2A visa category against the backdrop of three theoretical perspectives: 1) crimmigration in Section A; 2) immigration, a theory that applies crimmigration in the employment context, in Section B; and 3) membership theory in the crimmigration context in Section C. Ultimately, this Part concludes that the H-2A program cannot be legally effective while crimmigration, as applied to immigration law and membership theory, is in place.

A. Crimmigration Theory

In 2006, scholar Juliet Stumpf coined the term “crimmigration,” a new theoretical approach integrating immigration with criminal law.⁹⁸ This concept highlights the trend of criminalizing immigration law, traditionally a civil process.⁹⁹ This shift began in 1929, when unlawful entry became a misdemeanor and unlawful re-entry a felony.¹⁰⁰ Ever since, the number and type of immigration-related actions that carry criminal consequences have soared.¹⁰¹ Notably, starting in 1986, working without authorization in the United States became illegal and subject to prosecution.¹⁰² That year, Congress passed legislation punishing employers with criminal fines, and even imprisonment, for knowingly hiring undocumented workers.¹⁰³

The effects of these employer sanctions, however, appear to have had the unintended consequences of increasing the vulnerability of the migrant workforce.¹⁰⁴ As a result of the new legislation, the workplace has become a focus of immigration regulation¹⁰⁵ and a regular part of immigration enforcement activity performed by Immigration and Customs Enforcement (ICE), the agency responsible for enforcing immigration laws.¹⁰⁶ This activity, however, centers disproportionately around workers.¹⁰⁷ In 2009, ICE made over 1,100 arrests in workplace enforcement efforts; only 135 of those were of employers or their agents.¹⁰⁸ En-

⁹⁷ *Id.*

⁹⁸ *Id.* at 376.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 384; 8 U.S.C. § 1325 (1996) (“Improper entry by alien”); *Id.* § 1326 (1996) (“Reentry of removed aliens”).

¹⁰¹ Stumpf, *supra* note 8, at 384.

¹⁰² 1986: *Immigration Reform and Control Act of 1986*, LIBR. OF CONG., <https://perma.cc/FFL6-A62Y> (last visited Mar. 24, 2023); Saucedo, *supra* note 90, at 306.

¹⁰³ Stumpf, *supra* note 8, at 384; Saucedo, *supra* note 90, at 306.

¹⁰⁴ Saucedo, *supra* note 90, at 307.

¹⁰⁵ *Id.* at 306.

¹⁰⁶ *Id.* at 307.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* (citing *Worksite Enforcement Overview*, ICE OFFICE OF INVESTIGATIONS, <https://perma.cc/QX5Y-2N4J> (last visited Mar. 23, 2023)).

forcement actions have resulted in very few employer sanctions, penalties, or prosecutions.¹⁰⁹

B. Intersectionality of Crimmigration and Immployment Law

The rise in crimmigration affects practically all aspects of life for noncitizens, including employment. In 2011, scholar Kati Griffith coined the term “immployment” to address the intersection of employment law and immigration law, while acknowledging the effects of the rise of crimmigration.¹¹⁰ By inserting crimmigration into the employment arena, the theory of immployment highlights the particular threat of losing fundamental workplace rights that many noncitizen workers face.¹¹¹ This section outlines important aspects of immployment law in the H-2A context, first outlining the concept of claimsmaking, second describing crimmigration’s impact on long-standing federal employment protections, and finally tying crimmigration and immployment to the H-2A program.

1. Claimsmaking

In *The Precarity of Temporality*, Griffith proposes that immployment law is central to analyzing what inhibits employees from asserting their legal rights, or “claimsmaking,” particularly in the H-2 workers context.¹¹² Claimsmaking is the process in which an employee brings a legal claim against their employer to a court or executive agency.¹¹³ The employee first “names” the violation suffered, then “blames” the perpetrator, often their employer, and then makes a legal “claim.”¹¹⁴ This process allows employees to convert knowledge of their legal rights to an actual claim against their employer in an attempt to acquire a legal remedy.¹¹⁵ At this final “claiming” stage lies the greatest potential for crimmigration to affect an employee’s ability to enforce workplace protections.¹¹⁶

Griffith outlines three significant barriers to employee claimsmaking that are amplified in a crimmigration context: 1) an employee’s perception of the difficulties of finding a new job if terminated from their current one; 2) an employee’s feeling of powerlessness when an employ-

¹⁰⁹ *Id.* at 308.

¹¹⁰ See generally Griffith, *Discovering Immployment Law*, *supra* note 10 (noting the term “immployment” and the intersection of criminal justice and immigration enforcement systems).

¹¹¹ See Griffith, *Laborers or Criminals*, *supra* note 44, at 90.

¹¹² Griffith & Gleeson, *supra* note 45, at 113.

¹¹³ *Id.* at 118 (“Relevant workplace law agencies include the U.S. Department of Labor, the National Labor Relations Board . . . and their state and local equivalents.”).

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ See *id.* (Describing the importance of the third, “claimsmaking,” phase).

ment dispute arises; and 3) an employee's resulting lack of incentive to make a claim against their employer.¹¹⁷

2. Effects on Long-Standing Workplace Protections

In addition to creating barriers to claimsmaking, crimmigration threatens to negatively affect long-standing workplace protections for noncitizen workers.¹¹⁸ Generally, these protections apply to employer-employee relationships, regardless of immigration status.¹¹⁹ These protections originate from various statutes, including NRLA, FLSA, AWPA, the Occupational Safety and Health Act (OSHA),¹²⁰ and the Civil Rights Act.¹²¹ In *Laborers or Criminals? The Impact of Crimmigration on Labor Standards Enforcement*, Griffith highlights three fundamental ways in which crimmigration may affect long-term labor protections.¹²²

First, crimmigration provides an incentive for employers to engage in employment discrimination.¹²³ Congress attempted to combat this discrimination by including explicit anti-discrimination hiring protections in IRCA,¹²⁴ and forbidding employer retaliation against employees who make, or who intend to make, IRCA discrimination complaints.¹²⁵ Congress even created the Office of Special Counsel for Immigration-Related Unfair Employment Practices within the DOJ to enforce IRCA's anti-discrimination protections.¹²⁶ However, studies and interviews with employers suggest that these IRCA protections actually encourage—rather than discourage—employment discrimination.¹²⁷ When facing criminal liability for hiring undocumented workers, employers may avoid hiring “foreign-sounding” or “foreign-looking” applicants, even those with proper work authorization.¹²⁸

Second, crimmigration can lead to novel forms of employer retaliation.¹²⁹ Employers can call, or threaten to call, immigration enforcement officers if an employee tries to assert their labor rights.¹³⁰ Because of these new threats, employer retaliation poses more significant problems beyond a loss of employment. Employer retaliation, along with employee

¹¹⁷ *Id.* at 119.

¹¹⁸ Griffith, *Laborers or Criminals*, *supra* note 44, at 90.

¹¹⁹ *Id.*

¹²⁰ 29 U.S.C. §158 (2018); 29 U.S.C. § 218(c) (2018); 29 C.F.R. §§ 500.70–500.81 (2023); 29 U.S.C. §§ 651–675, 677–78 (2018).

¹²¹ 42 U.S.C. §§ 2000a to 2000h–6; Griffith, *Laborers or Criminals*, *supra* note 44, at 89–90.

¹²² Griffith, *Laborers or Criminals*, *supra* note 44, at 93.

¹²³ *Id.* at 96.

¹²⁴ Griffith, *Discovering Immployment Law*, *supra* note 10, at 417–18.

¹²⁵ *Id.* at 418.

¹²⁶ *Id.* at 419.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ Griffith, *Laborers or Criminals*, *supra* note 44, at 95.

¹³⁰ *Id.*

blacklisting, effectively bars a noncitizen worker from bringing a legal complaint against their employer.¹³¹

Finally, crimmigration creates a climate of fear in migrant communities, which in turn disincentivizes employees from coming forward when they experience even the most severe abuses of workplace protections.¹³² Faced not only with possible deportation, but with criminal sanctions as well, noncitizen workers are less inclined to speak up or take part in union activities with fellow employees who have a more secure immigration status.¹³³

3. *Crimmigration and Immployment in the H-2A Context*

Several problems exist within the H-2A program that lead to crimmigration in the immployment context. Claimsmaking is an important tool for an employee's worker protections, but the structure of the H-2A program jeopardizes a noncitizen's ability to make claims. While a noncitizen may know their working conditions are far from ideal, they may not have sufficient connections to other workers to compare their situations and "name" the workplace violations.¹³⁴ Even if they do encounter other workers in similar situations, difficulties may arise when determining who is to "blame." Multiple employers may create harsh working conditions, and those most responsible may not interact with the noncitizen workers on a daily basis.¹³⁵ Even if a noncitizen can name the violation and blame the perpetrators, many H-2A workers likely lack the knowledge of and means to navigate the legal system.¹³⁶ The

¹³¹ See Browning, *supra* note 52, n.8 (stating that fear of retaliation and blacklisting are "widespread" and "constant" among H-2A workers); Kara E. Stockdale, *H-2A Migrant Agricultural Workers: Protected from Employer Exploitation on Paper, Not in Practice*, 46 CREIGHTON L. REV. 755, 756 (2012) (explaining the protections afforded to an H-2A worker exercising their rights but also the risks to employees seeking to enforce their rights under those protections); NEWMAN, *supra* note 55, at 11, 31; U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 69, at 37–38.

¹³² Griffith, *Laborers or Criminals*, *supra* note 44, at 96.

¹³³ *Id.* at 96–97.

¹³⁴ See Guerra, *supra* note 44, at 206 (describing how H-2A workers frequently come from the same village or family but upon arrival are separated to work at different farms, often many miles apart, without reliable transportation or ways to communicate).

¹³⁵ See *Tijerina-Salazar v. Venegas*, No. PE:19-CV-00074-DC, 2022 WL 1927007, at *1 (W.D. Tex. June 3, 2022) (Plaintiff is an H-2A worker who claims multiple Defendants engaged in visa fraud to reduce labor costs and exploit the Plaintiff's labor.); *Garcia-Celestino v. Ruiz Harvesting, Inc.*, 843 F.3d 1276, 1280–81 (11th Cir. 2016) (In a case involving H-2A employees, Defendants are Consolidated Citrus, a large citrus producer; Ruiz Harvesting, Inc ("RHI"), a company hired by Consolidated Citrus to serve as one of the company's labor contractors; and Basiliso Ruiz, owner of RHI. Different RHI and Consolidated Citrus supervisors were present during harvesting.).

¹³⁶ See HUMAN RIGHTS WATCH, UNFAIR ADVANTAGE: WORKERS' FREEDOM OF ASSOCIATION IN THE UNITED STATES UNDER INTERNATIONAL HUMAN RIGHTS STANDARDS 47–48 (2000), <https://perma.cc/WLK4-48TW> (Human Rights Watch found that the H-2A program provides for a particularly restricted labor force. Associations that bring in H-2A workers to the United States often tell workers that "farmworker unions and Legal Services attorneys are their enemies" to prevent them from seeking outside help. Additionally, H-2A workers are often "denied the right to receive visitors through restrictive clauses

noncitizen thus cannot reach the final “claim” stage of the claimsmaking model, the stage at which they would have any chance of obtaining a legal remedy for the violation of their workplace rights.

Even if a noncitizen has the means to successfully assert a claim against an employer, the grave consequences for noncitizens who lose their job go beyond mere unemployment.¹³⁷ The risk of losing immigration status brings crimmigration to the forefront of the H-2A program. The fear of losing immigration status likely influences many H-2A workers to keep quiet and complacent.¹³⁸ As mentioned above, the H-2A program in the crimmigration context can negatively impact long-standing workplace protections that should not depend on immigration status.¹³⁹

The crimmigration regime highlights power imbalances between H-2A employers and employees, thereby accentuating exploitation of the individual worker, and reveals the employer discrimination incentives at play in an H-2A setting. First, an employer may avoid hiring a foreign sounding or foreign looking employee, even if the noncitizen has valid work authorization, for fear they may be undocumented.¹⁴⁰ Hiring an undocumented worker could result in criminal sanctions for that employer.¹⁴¹

Employers discriminate not to avoid hiring undocumented workers, but rather to exploit—potential future noncitizen guest workers. In the H-2A program, employers knowingly hire Mexican workers, which is evident in the employers’ filing of specific employment petitions.¹⁴² Some employers, when explaining why they prefer hiring noncitizen workers over citizen workers, claim that these foreign workers are more dependable.¹⁴³ Scholars suggest employers conflate the word “dependable” with vulnerable.¹⁴⁴ Employment through the H-2A program is low-skilled, physically demanding, and often dangerous work; many consider this work undesirable.¹⁴⁵ The program attracts workers in desperate situa-

in their housing arrangements,” and thus are unable to communicate with farm worker advocates. Human Rights Watch recommends that the H-2A program allow workers, among other things, “to have access to legal services and to the justice system, as they desire.”; *State v. Shack*, 277 A.2d. 396, 373 (N.J. 1971) (“*The Report of the Governor’s Task Force on Migrant Farm Labor* (1968) noted that ‘one of the major problems related to seasonal farm labor is the lack of adequate direct information with regard to the availability of public services,’ and that ‘there is a dire need to provide the workers with basic educational and informational material in a language and style that can be readily understood by the migrant.’”).

¹³⁷ See *supra* Section II.B (critiquing the H2-A program).

¹³⁸ See *supra* Sections II.B.1, III.B.2 (describing enforcement challenges).

¹³⁹ See *supra* Section III.B.2 (describing issues around employee-based enforcement of workplace law under the H2-A program).

¹⁴⁰ Griffith, *Laborers or Criminals*, *supra* note 44, at 94.

¹⁴¹ See *supra* Section III.B.2.

¹⁴² See BRUNO, *supra* note 11, at 2 (describing the petition process); Guerra, *supra* note 44, at 203 (noting that U.S. growers recruit in Mexico).

¹⁴³ See Holley, *supra* note 13, at 584–85 (discussing the Bracero Program).

¹⁴⁴ *Id.* at 585.

¹⁴⁵ *Id.* at 577.

tions willing to leave their home and work in uncertain conditions in return for just around minimum wage.¹⁴⁶ Employers are aware that workers are in desperate situations and that unstable immigration status will put noncitizens in precarious and vulnerable situations.¹⁴⁷ Furthermore, employers know that the noncitizen's lack of accessibility to the justice system will inhibit the ability of these workers to protect their rights.¹⁴⁸

C. Membership Theory

Stumpf posits that membership theory has led to this convergence of criminal and immigration law.¹⁴⁹ Both areas of law are rooted in determining the characteristics that make an individual worthy of inclusion in an identified community.¹⁵⁰ Membership theory is based on the idea that society either includes or excludes an individual and that a social contract between an individual and the government will lead to benefits.¹⁵¹ A particular decision-maker chooses which individuals to include based on a certain set of criteria they deem important to make this determination.¹⁵² This decision-maker, often the government, selects who may enter society, and thus reap the benefits and legal protections, and who to exclude, and thus remain a non-member.¹⁵³ The decision-maker's specific criteria for inclusion, and the resulting determination of societal membership or lack thereof, play a significant role in furthering crimmigration.¹⁵⁴ In legal decision-making, for example, membership theory may impact an individual's constitutional rights.¹⁵⁵ This section discusses the H-2A program in the context of membership theory, first providing an overview of the concept of the ladder of accession, and then arguing that the flaws of the program undermine H-2A workers' membership status.

¹⁴⁶ *Id.* at 579–80.

¹⁴⁷ *See id.* at 577.

¹⁴⁸ *See id.*; *Tijerina-Salazar v. Venegas*, No. PE:19-CV-00074-DC, 2022 WL 1927007, at *2 (W.D. Tex. June 3, 2022) (Plaintiff alleges Defendants “shared among themselves proceeds from [the] exploitation of laborers while [they] all knew that H-2A laborers were only available to . . . Defendants due to visa fraud and assignment of unauthorized work.”).

¹⁴⁹ Stumpf, *supra* note 8, at 378.

¹⁵⁰ *Id.* at 397.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *See id.* at 398, 402.

¹⁵⁴ *Id.*; Maartje van der Woude, *Ethnicity Based Immigration Checks: Crimmigration and the How of Immigration and Border Control*, in *CONTROLLING IMMIGRATION THROUGH CRIMINAL LAW: EUROPEAN AND COMPARATIVE PERSPECTIVES ON “CRIMMIGRATION”* 141, 150 (Gian Luigi Gatta et al. eds., 2021).

¹⁵⁵ Stumpf, *supra* note 8, at 398.

1. The "Ladder of Accession"

Stumpf suggests that immigration law views societal membership as a "ladder of accession . . . and a set of criteria to determine whether an individual meets the requirements for these various levels"¹⁵⁶ on the ladder. Membership results from an invitation for a noncitizen to enter by someone legally established in a country, such as a future employer.¹⁵⁷ Violation of these requirements may lead to punishments, such as deportation and the barring of re-entry, which essentially revokes the membership of the noncitizen.¹⁵⁸ Further, while criminal law presumes full membership,¹⁵⁹ immigration law presumes nonmembership.¹⁶⁰ In the crimmigration context, the government, in discovering an individual is a non-member or has broken their membership rules, has the discretion to decide when and how to remove the noncitizen.¹⁶¹ A noncitizen's constitutional rights often depend on their ties to a future country of employment and their level of membership in that country.¹⁶² Undocumented people compose the lowest level of membership; legal citizens compose the highest level of membership.¹⁶³

2. Shaky Membership of the H-2A Worker

An additional way in which problems with the H-2A program lead to crimmigration is the connection to membership theory. First, while H-2A workers are not at the lowest level of membership, as a valid visa provides temporary legality to work in the country, these noncitizens are close to the bottom and are at risk of becoming undocumented once their visa expires. Not only is their work "low-skilled" and their compensation barely minimum wage, but their ability to legally be in the country ends once the employment contract ends, thus terminating their membership. Further, an employer's sweeping control over both the noncitizen's employment and immigration status makes the employer essentially the on-the-ground decision-maker. While the government ultimately determines whether a noncitizen may enter the country and for how long, the employer monitors the noncitizen workers once they arrive and determines whether the employee is properly fulfilling their employment obligations.¹⁶⁴ Employers receive deference to make these determinations, which could have drastic consequences for individual

¹⁵⁶ *Id.*

¹⁵⁷ *See id.*

¹⁵⁸ *Id.* at 398–99.

¹⁵⁹ *Id.* at 399–400.

¹⁶⁰ *Id.* at 400.

¹⁶¹ *Id.* at 402.

¹⁶² *Id.* at 400–02.

¹⁶³ *Id.*

¹⁶⁴ *See supra* Part II.A.

workers; if an employer decides a worker is no longer fit for the position, the noncitizen instantly becomes a nonmember and risks deportation.¹⁶⁵

Further, the lack of constitutional protections a H-2A noncitizen worker receives gives employers a green light to retaliate against those employees who attempt to assert their rights under the H-2A program. The vulnerabilities of H-2A workers, both in their lack of ties to the country and in their exclusion from prominent employment protection statutes, severely threaten their societal membership. Employers can fire an employee at will or blacklist that individual, creating obstacles for these workers to obtain future employment. The employer knows the noncitizen worker will have a difficult time asserting their rights in the legal system, if they even try. This knowledge allows employers to send a message to other employees who speak out to assert their rights and creates a culture of fear among noncitizen workers.

Finally, the temporary nature of the H-2A visa exacerbates the precarious nature of a noncitizen employee's presence in the United States. An H-2A worker's temporary membership blurs the line between exclusion and inclusion, based simply on when their visa is valid and when their visa is not. The H-2A program provides only limited membership for the noncitizen guest worker, and the worker faces a very difficult ascent if they wish to climb the membership ladder.¹⁶⁶ Even when an H-2A noncitizen maintains a valid visa, allowing them to be in the country, their membership is shaky at best. Membership theory emphasizes that inclusion in a society brings the benefits of legal protection.¹⁶⁷ But many H-2A workers are unable to fully receive and fully advocate for their rights.¹⁶⁸ Thus, while having an H-2A visa places a noncitizen on the ladder of membership, in reality, they are beginning their ascent while barely holding on with one hand.

IV. CONCLUSION

One could view the H-2A program as a small, decriminalized space. Determining how to get out of the crimmigration paradigm involves creating some kind of lawful status for these workers, a status workers can gain through the H-2A visa. The status of an H-2A noncitizen worker fluctuates in and out of the criminal context: having a visa allows one to enter lawfully, but one remains subject to the threat of deportation as a

¹⁶⁵ See Gabriella Johnston, *Failing Farmworkers: An Administrative Process Critique of the H-2A Temporary Agricultural Visa*, 24 N.Y.U. J. LEGIS. & PUB. POL'Y 759, 794 (2022).

¹⁶⁶ Farm Workforce Modernization Act of 2021, H.R. 1603, §§ 104–11, 117th Cong. (2021) (outlining the lengthy process of obtaining certified agricultural worker (CAW) status and noting CAW workers and their dependents can then apply for lawful permanent resident status after fulfilling several requirements, including performing a certain amount of agricultural work for a certain period of time).

¹⁶⁷ Stumpf, *supra* note 8, at 397.

¹⁶⁸ See *supra* text accompanying notes 56–69 for a discussion of how an employee's primary enforcement role in ensuring their employment protections puts H-2A workers in an especially vulnerable situation.

result of crime or loss of legal status once their H-2A visa expires. However, although the H-2A visa provides noncitizen workers with some protections, in practice enforcement of these protections is rare and the structure of the program does not provide for a secure membership status.

On the spectrum of membership, with the lowest level being undocumented and the highest level being a legal citizen, the H-2A program places workers on a very low level, close to undocumented status. The temporary legal status H-2A noncitizen workers obtain through their visa keeps them in a near constant state of precarity, susceptible to falling into criminalized spaces once their visa expires. Additionally, the program falls short of providing workers tangible ways to assert their contractual rights during their period of employment. The H-2A worker is at the mercy of their employer, who can not only fire them but also simultaneously take away whatever membership status their employment afforded them.

Flaws in the Bracero Program ultimately led to flaws in the H-2A program. While the DOL's Final Rule and the House Bill 1603 attempt to remedy the H-2A's procedural flaws (as the H-2A program tried to do with the Bracero Program), the fundamental problem is the temporary guest worker regime as a whole, not the specific procedural issues in various programs. Attempts to better these programs are ongoing, but the temporary worker program is doomed to fail beyond its procedural and substantive flaws. While resolving the unbalanced dynamic of employee and employer in a vacuum may be possible, crimmigration, as applied to immigration and membership theory, demonstrates that the underlying problems of temporary guest worker programs, particularly the H-2A program, are unsolvable. Ultimately, the H-2A program and crimmigration are two irreconcilable systems, and the temporary guest worker program as a concept is fundamentally flawed.