

Temporary work visa programs and the need for reform

A briefing on program frameworks, policy issues and fixes, and the impact of COVID-19

Report • By [Daniel Costa](#) • February 3, 2021

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What this report finds: Although the Trump administration slashed humanitarian pathways and actively sought to reduce immigration from family and diversity green card categories, the number of migrant workers employed in the United States through temporary work visa programs increased during the Trump presidency, to over 2 million. This represents an increase of 13% from the last year of the Obama administration and showcases the reliance of U.S. employers on the programs and the political support for them even by politicians who actively seek to restrict other immigration pathways. Many of the temporary migrant workers employed in these visa programs are in jobs deemed essential during the COVID-19 pandemic, but they have not been afforded adequate protections. These migrant workers have limited rights and face challenges including illegal recruitment fees and debt bondage, lower wages, employment that ties them to a single employer, lack of protections in the workplace, family separation, and no path to permanent residence or citizenship. However, their needs and the realities of their situation—as well as how to improve it—are not well understood, even by mainstream immigrants' rights advocates. The COVID-19 pandemic and the Trump administration's failure to take action to protect temporary migrant workers has exacerbated their already vulnerable, precarious position.

Why it matters: Because of the way work visa programs are currently structured, temporary migrant workers—like unauthorized immigrants—continue to suffer and fear retaliation and deportation if they speak up about wage theft, workplace abuses, discrimination, or other substandard working conditions. That in turn degrades labor standards for workers in a wide range of industries. Reforming work visa programs, therefore, would help to improve working conditions and raise wages for all workers. Temporary work visa programs are also important politically. While other aspects of the immigration system garner more headlines, temporary work visa programs play an outsized role in the broader immigration policy debate in the United States, and have been central to past legislative efforts to reform the U.S. immigration system.

What we can do about it: Both the executive branch and Congress can take action on this. The executive branch can promulgate new regulations and update existing ones—most notably to ensure that migrant workers are paid fairly through prevailing wage rules. But the most transformative and lasting solutions will require congressional action: Congress could pass laws to update, simplify, and standardize

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temporary work visa programs—specifically, by reforming the recruitment process to ensure transparency and accountability for migrants who are abroad; requiring that all workers with temporary visas are paid no less than the local average or median wage for their job; uncoupling visas for temporary migrant workers from their employers; providing a path from temporary status to permanent residence that is not controlled by employers; appropriating more funding to labor standards agencies for enforcement and oversight of a reformed system; regulating foreign labor recruiters; and passing the POWER Act to protect workers from the threat of employer retaliation and deportation. Finally, there should be greater transparency throughout a reformed system, which would be designed to be more flexible and data-driven, with annual numerical caps in visa programs that adjust to changing economic conditions. This could be accomplished through the creation of an independent, permanent commission on employment-based migration, an idea with broad support among bipartisan groups and research institutes that have studied the idea.

Introduction

Nearly all immigrants, refugees, and asylum-seekers join the workforce after entering the United States, but a portion of our immigration system is intended to bring people here expressly for work. Within that complex employment-based system, the majority of migrants come through temporary, precarious pathways—known as temporary work visa programs—that provide employers with millions of on-demand workers who have limited rights, and whose needs and realities are not well understood, even by mainstream immigration advocates.

While temporary work visa programs represent a major component of the U.S. immigration system, little is known about them compared with other aspects of the system that garner more public attention. Nonetheless, work visa programs have played an outsized role in political and policy debates about how to reform the immigration system in the past, and likely will again.

Temporary work visa programs are an instrument ultimately used to deliver migrant workers to employers, but without having to afford them equal rights, dignity, or the opportunity to integrate and participate in political life. While such programs may serve as important pathways for migrants to come to the United States, the numerous programmatic flaws that undermine labor standards and leave migrant workers vulnerable to abuses—and even human trafficking—clearly demonstrate a need for dramatic improvements.

This is not news; migrant worker advocates, government auditors, and the media have identified these flaws across U.S. temporary work visa programs for decades. Most of the workers who participate in the programs will never have a chance to become lawful permanent residents or naturalized citizens, despite spending months, and in many cases, years, working in the United States. The COVID-19 pandemic and the national emergency that was declared on March 13, 2020,¹ along with the inadequacy of the federal government's response, have only exacerbated the challenges migrant workers face while employed through temporary work visa programs.

Despite the popular narrative that President Trump’s administration has instituted a so-called immigration crackdown on all pathways into the United States, temporary work visa programs have been a clear exception. Even before the pandemic began, important immigration pathways that can lead to permanent residence and citizenship had been slashed—and humanitarian pathways for asylees and refugees in particular had already been reduced to historic lows. But, at the same time, data show that temporary work visa programs were 13% larger in 2019 than during the last year of the Obama administration. Even the temporary work visa “ban” issued in June 2020 in retrospect looks to be mostly symbolic—a political tactic to blame migrants for high unemployment and the economic collapse that resulted from the COVID-19 pandemic. This is a dangerous trajectory away from welcoming immigrants as persons who have equal rights and who can settle in the United States permanently and toward using the immigration system mostly to appease the desire employers have for more indentured and disposable migrant workers.

Labor migration pathways can and should be reformed to comport with universal human and labor rights standards. While many major improvements to temporary work visa programs can be accomplished by the executive branch through regulations, the reality remains that the most transformative and lasting solutions will require congressional action. An added benefit of these more durable solutions is that they will set a useful baseline of protections for temporary migrant workers, both in normal times and during emergencies like pandemics. The protracted period of high unemployment the United States is likely to be in, in which labor shortages will be rare, offers a moment for policymakers to take stock of the immigration system and implement needed reforms to employment-based pathways. And considering that a record number of temporary migrant workers are employed in the United States—more than 2 million in 2019, with many performing jobs now deemed essential—the need to protect these workers has never been more acute.

This first half of this report provides a brief introduction to the broader political context of temporary work visa programs and their relation to other key immigration reforms; identifies the most common programs along with key elements of each; and explains how these programs operate and identifies some of their most problematic aspects in terms of legal and regulatory frameworks. The latter sections discuss how to reform temporary work visa programs, concluding with a section on some of the specific challenges temporary migrant workers have faced during the COVID-19 pandemic that have exacerbated their already precarious situation.

Time for a new grand bargain: The broader political context of temporary work visa programs and comprehensive immigration reform

While deportations, detentions, worksite raids, and the asylum system garner more

headlines, temporary work visa programs play an outsized role in the broader immigration policy debate in the United States. Temporary work visa programs have long been considered one-third of the “three-legged stool” that some politicians, advocates, and commentators think is required to come to an agreement on so-called comprehensive immigration reform (CIR); the other two “legs” are border and interior enforcement, and legalization and a path to citizenship for the unauthorized immigrant population.²

For the last decade and a half at least, the business community has prioritized temporary work visa programs as a necessary component of CIR; without them, they would likely withhold their support for proposed reform legislation. The business community’s main demands include expanding and deregulating existing temporary work visa programs, as well as creating new programs that include minimal bureaucracy and few worker protections. On the other hand, migrant worker advocacy groups, worker organizations, and labor unions have pointed out how temporary work visa programs keep migrants indentured to employers and can be used to undercut wages and labor standards for migrants and similarly situated workers.³ They have pushed instead for additional rights for temporary migrant workers, including pay that is on par with what U.S. workers earn in similar occupations and regions, the freedom to change employers, family unity, and the ability to quickly adjust to lawful permanent resident status.⁴

Since at least 2006, coming to a political agreement on temporary work visas in the context of CIR negotiations has been almost impossible. Sen. Chuck Schumer (D-N.Y.), who was part of a team of eight senators who drafted CIR legislation in 2013, noted at the time that “this issue has always been the deal breaker on immigration reform”⁵; similar comments have been made by legislators and key staffers on Capitol Hill. What’s clear is that until major stakeholders and lawmakers come to a consensus on temporary work visa programs, legislation that includes other important immigration reforms—such as legalization and a path to citizenship for the unauthorized immigrant population—will continue to face significant hurdles before it can become law.

But there is plenty of evidence that advocates and reformers are ready to move beyond the previous trade-offs in immigration that involve assenting to additional border security and interior enforcement measures in order to achieve key reforms like legalization for the 11 million unauthorized immigrants currently in the United States and a clearing of the backlogs of applications for permanent immigrant visas (commonly referred to as “green cards”). Just as that compromise involving enforcement is being reexamined by progressive activists and the immigrants’ rights movement,⁶ the labor migration aspect of the CIR grand compromise should be reimagined as well. In fact, the Biden administration has already signaled that they support this approach as well, by releasing an immigration reform plan on Inauguration Day that proposes to legalize the unauthorized immigrant population without including new draconian enforcement measures or new and expanded temporary work visa programs as a trade-off.⁷

The business community meanwhile continues to demand large and deregulated flows of new migrant workers with limited rights in exchange for legalization—in other words, a path to citizenship for the workers here, but no path and no rights for the millions of workers who will arrive in the future—but that trade-off is inherently unjust. Immigration

reformers must dare to imagine a new grand bargain, one in which all immigrant communities are respected and protected and all migrant workers have equal rights and a path to becoming permanent residents and citizens. The old ways of thinking and previous grand bargains have clearly failed to translate into victories for immigrants, and actors like the business community have repeatedly proven unwilling or unable to deliver votes in Congress from immigration skeptics when it was time to vote on the previous iterations of CIR legislation that included more immigration enforcement and temporary work visa programs.

The basics: What are temporary work visa programs?

One of the main authorized or “legal” pathways for U.S. employers that wish to hire migrant workers or for migrants who want to work in the United States lawfully is via “nonimmigrant” visas that authorize temporary employment. In the United States, employers almost exclusively control and drive the process, by deciding to recruit and hire employees through temporary work visa programs. Workers who participate in those programs are known as temporary migrant workers, or “guestworkers”—defined as persons employed away from their home countries in temporary labor migration programs. The programs themselves are often referred to as circular or “guest” worker programs, or temporary work visa programs.⁸ Temporary and home can be defined in different ways, with “temporary” ranging from several months to several years, and “home” usually meaning the worker’s country of birth or citizenship.⁹ All temporary work visa programs require migrant workers to return to their home countries when their visa expires; workers can remain legally in the United States only if they obtain another temporary visa or lawful permanent resident status.

The most common argument for using temporary work visa programs to facilitate migration is that they help employers fill vacant jobs, especially when employers assert there is a shortage of U.S. workers, in other words, to fill labor shortages. Other major rationales include (1) to facilitate youth exchange programs and admit foreign students (in both cases, the migrants are usually permitted to work); (2) to allow intracorporate transfers (sometimes called intracompany transfers), meaning that employees of multinational companies move from a branch or office of a company to another branch or office of the same company in a different country; (3) to fulfill trade agreement provisions, such as those included in agreements like the North American Free Trade Agreement; (4) to facilitate foreign investment in countries of destination; (5) to manage migration that would otherwise be inevitable—for example, as the result of geopolitical changes; and (6) to allow for cross-border commuting.¹⁰

According to the Congressional Research Service, “there are 24 major nonimmigrant visa categories, which are commonly referred to by the letter and numeral that denote their subsection in the Immigration and Nationality Act (INA)”¹¹; over the past few years, between 9 million and 11 million total nonimmigrant visas have been issued. While the vast majority of these were visitor visas that do not authorize employment, nevertheless

hundreds of thousands of new nonimmigrant visas in an alphabet soup of temporary work visa programs have been issued to migrant workers or renewed; in addition, the United States has approved work permits to nonimmigrants in visa classifications that do not automatically authorize employment.

Some work visa programs have an annual numerical limitation. For example, the H-2B visa is capped at 66,000 per year; the H-1B visa is capped at 85,000 for the private sector—although it also allows an unlimited number not subject to the annual cap for certain employers.¹² However, most work visa programs do not have an annual numerical limit. Each visa program has a different duration of stay associated with it, as well as individual rules about whether and how it can be renewed. For example, H-2A visas for temporary and seasonal agricultural occupations are valid for up to one year, depending on the duration of the job, but can sometimes be renewed, while H-1B visas for occupations that require a college degree may be valid for up to three years, renewable once for a total of six years, and L-1 visas for intracompany transferees may last up to five years for a position that requires specialized knowledge about the employer, or seven years if the worker is a manager or executive.

The Pew Research Center has estimated that approximately 5% of the total foreign-born population are temporarily residing in the United States with nonimmigrant visas.¹³ Although good data are lacking from the U.S. government on the exact number of nonimmigrant residents who are employed, and in which visa programs, we estimate that more than 2 million temporary migrant workers were employed in 2019, accounting for 1.2% of the U.S. labor force (see discussion in the following section).¹⁴

The most common temporary work visa programs in the United States are listed and described in **Table 1** and **Table 2**. Table 1 lists the most common temporary work visas, along with a general description and examples of typical occupations under each (the list of occupations is not meant to be exhaustive). Table 2 lists the same temporary work visas, but with the corresponding annual numerical limit (where applicable) and the number of new visas issued or new petitions approved or initial employment authorization documents (EADs) that were approved by U.S. Citizenship and Immigration Services (USCIS) in fiscal 2019,¹⁵ as well as the period of stay that each visa authorizes. It is important to note that these represent new temporary migrant workers in 2019, not the total population of workers, which is usually larger due to visa and EAD renewals (the total population is discussed later). For example, Table 2 shows that 139,000 H-1B petitions for initial employment were issued in 2019, but USCIS recently reported that the total population of H-1B workers in the United States in 2019 was 583,000.¹⁶

Table 1

Description and typical occupations of common nonimmigrant visa classifications that authorize employment

Visa classification	Description	Typical occupations and activities
A-3	Attendants, servants, or personal employees of diplomats, embassy workers, and foreign government officials	Domestic workers
B-1	Business visitors (cannot receive remuneration from a U.S. source)	Attending business meetings; maintenance of goods purchased by U.S. company from home country; B-1 in lieu of J-1, or H-1B, or H-3; personal servants of B-1 business visitors
F-1 Optional Practical Training	Foreign university students	Any occupation related to the degree earned; information technology occupations are common
G-5	Attendants, servants, or personal employees of representatives and staffers of international organizations	Domestic workers
E-1	Treaty traders, must be citizens of countries with which the United States maintains treaties of commerce and navigation, and spouses and children of treaty traders	Engaging in substantial trade, including trade in services or technology, in qualifying activities, principally between the United States and the treaty country
E-2	Treaty investors, must be citizens of countries with which the United States maintains treaties of commerce and navigation, and spouses and children of treaty investors	Developing and directing the operations of an enterprise in which the nonimmigrant has invested a substantial amount of capital
E-3	Australian specialty occupation professional	Computer and information technology occupations, accountants, physicians, nurses, teachers
H-1B	Specialty occupations that require a college degree or its equivalent	Computer and information technology occupations, accountants, physicians, nurses, teachers
H-2A	Seasonal and temporary agricultural occupations	Fruit and vegetable crop farming, tobacco farming, sheepherding
H-2B	Seasonal and temporary nonagricultural occupations that do not require a college degree	Landscaping and groundskeeping, forestry, housekeeping, construction, seafood processing, restaurant occupations

Table 1
(cont.)

Visa classification	Description	Typical occupations and activities
H-4	Spouses of principal nonimmigrants with H visas	N/A; H-4 visa holders with employment authorization documents may work for any employer
J-1	Exchange visitors	Various programs—such as Summer Work Travel, Intern/Trainee, Camp Counselors, Alien Physicians, and Teachers—permit a wide range of occupations and varying skill levels, including amusement and recreation park workers, lifeguards, housekeepers, teachers, camp counselors, physicians, and farmworkers
J-2	Spouses of principal nonimmigrants with J visas	N/A; J-2 visa holders with employment authorization documents may work for any employer
L-1	Intracompany transfers, either managers and executives or employees with “specialized knowledge”	Corporate managers and executives, information technology occupations
L-2	Spouses of principal nonimmigrants with L visas	N/A; L-2 visa holders with employment authorization documents may work for any employer
O-1	Persons with extraordinary ability in the sciences, art, education, business, or athletics	Computer and scientific occupations
P-1	Internationally recognized athletes or members of entertainment groups; essential support personnel	Professional athletes, professional and well-known entertainers, circus performers and their staff, other support staff
TN	Canadian and Mexican professionals (visa created by North American Free Trade Agreement)	Accountants, architects, economists, lawyers, pharmacists, teachers

Notes: List of typical occupations is not meant to be exhaustive.

Source: Author’s analysis of [U.S. Citizenship and Immigration Services](#) website, accessed August 2020; [Bureau of Consular Affairs](#) website, U.S. Department of State, accessed August 2020; and Immigration and Nationality Act § 101(a)(15).

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Table 2

Annual numerical limit, number of visas issued, petitions or EADs approved in fiscal 2019, and period of stay for the most common nonimmigrant visa classifications that authorize employment

Visa classification	Annual numerical limit	Visas issued or petitions or EADs approved	Period of stay
A-3	No annual limit	857	Initially valid for up to three years, and may be extended in two-year increments. However, Department of State practice is to issue for a maximum period of 24 months, and the visa is renewable. Overall, length of stay may not exceed that of the employer.
B-1	No annual limit	37,841	Duration of visa approved by State Department; admission normally valid for six months. Only certain subcategories of B-1 may be employed.
F-1 Optional Practical Training (post-completion)	No annual limit	223,308	One year for OPT and 36 months for OPT with qualifying STEM degree.
G-5	No annual limit	404	Initially valid for up to three years, and may be extended in two-year increments. However, Department of State practice is to issue for a maximum period of 24 months, and the visa is renewable. Overall, length of stay may not exceed that of the employer.
E-1	No annual limit	6,668	Renewable indefinitely in two-year increments.
E-2	No annual limit	43,286	Renewable indefinitely in two-year increments.
E-3	10,500	5,807	Renewable indefinitely in two-year increments.
H-1B	65,000 (for-profit employers); 20,000 additionally available for workers possessing master's degree; no annual limit for universities and nonprofit research organizations	138,927	Three years, renewable once for a total of six years; but also renewable indefinitely until a permanent immigrant visa becomes available, if a U.S. employer has petitioned for an immigrant visa or filed for permanent labor certification, or if an immigrant petition has been approved.
H-2A	No annual limit	204,801	Less than one year, but renewable in one-year increments up to three years.

Table 2
(cont.)

Visa classification	Annual numerical limit	Visas issued or petitions or EADs approved	Period of stay
H-2B	66,000	97,623	Up to nine months but renewable in one-year increments up to three years.
H-4	No annual limit	47,821	Same duration of stay as principal spouse's visa.
J-1	No annual limit, except in Summer Work Travel (SWT) program (109,000)	213,509	Duration of program: four months for SWT; 12 months for interns; 18 months for trainees; three years for teachers.
J-2	No annual limit	11,781	Same duration of stay as principal spouse's visa.
L-1	No annual limit	76,988	Seven years for managers and executives (L-1A); five years for employees with "specialized knowledge" (L-1B).
L-2	No annual limit	25,673	Same duration of stay as principal spouse's visa.
O-1	No annual limit	17,751	Up to three years; renewable in one-year increments.
P-1	No annual limit	25,601	10 years for athletes and essential support personnel.
TN	No annual limit	21,193	Up to three years; may petition for extension or depart U.S. and apply for new three-year period.
<i>Total</i>		1,199,839	

Notes: For some work visa programs, counting the number of visas does not provide an accurate count of new workers on a visa in a given year or the number of visa holders who are employed in a visa program (since not all work). Thus, in some cases it is more accurate to count petitions approved or work authorization documents. For more background, see Daniel Costa and Jennifer Rosenbaum, *Temporary Foreign Workers by the Numbers: New Estimates by Visa Classification*, Economic Policy Institute, March 2017.

Source: Author's analysis of U.S. Citizenship and Immigration Services website, accessed August 2020; U.S. Department of State, "Nonimmigrant Visa Statistics"; U.S. Department of State, "J-1 Visa Basics: Facts and Figures"; U.S. Department of State, *Foreign Affairs Manual*; Immigration and Nationality Act.

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The numbers in context: Temporary work visa programs grew under Trump, while permanent pathways shrunk

As noted above, despite the popular narrative that the Trump administration instituted an “immigration crackdown” on all pathways into the United States, temporary work visa programs have been a clear exception. Other, permanent immigration pathways that can lead to citizenship were slashed—even before the pandemic began—including the number of refugees admitted being reduced to a historic low and asylum being severely restricted through new regulations—but this has not been the case with temporary work visa programs. This section provides a brief look at the relevant numbers of permanent immigrant visas and temporary work visas in order to understand them in relation to each other.

The main factor impacting the issuance of both permanent and temporary visas since the COVID-19 pandemic has been the slowdown and shutdown of consular processing for visas around the world, a reality likely to continue to impact most migration pathways for at least a significant part of 2021, if not the entire year. There were also two presidential proclamations issued by Trump in 2020 that would suspend or “ban” the issuance of certain temporary work visas and permanent immigrant visas, and which are set to expire on March 31, 2021. It remains a possibility that the Biden administration will reverse the two presidential proclamations before they expire, but as of the time of publication, both were still in force.

While the ban on permanent immigrant visas (issued in April 2020) will continue to have a significant impact until it expires or is repealed even if consular processing resumes at normal levels—as discussed in this section—it appears that the June 2020 ban on temporary work visas will end up being mostly symbolic and a political tactic. In any case, the shift to more temporary work visas and fewer permanent immigrant visas is a significant and dangerous trajectory away from welcoming immigrants who would be granted equal rights and the ability to settle in the United States permanently; it reflects an immigration system used mainly to appease the business community’s demands for more migrant workers who are indentured to them and disposable.

The number of temporary migrant workers increased during the Trump administration

Table 3 shows new estimates of the number of temporary migrant workers employed in 2016 and in 2019, based on an updated version of the methodology devised by Costa and Rosenbaum.¹⁷ It reveals that the number of temporary migrant workers employed during

2019 was nearly 2.1 million—over 237,000 more than during the last year of the Obama administration, or a 13% increase. In total these workers represented 1.2% of the U.S. labor market in 2019. Much of the increase was driven by growth in the visa programs for low-wage jobs—H-2A, H-2B, and J-1—but also by growth in a number of the visa programs for migrant workers who normally possess at least a college degree (or are required to), including H-1B visas (for information technology jobs), the Optional Practical Training program for foreign graduates with F-1 visas, L-1 visas for intracompany transferees, and O-1 and O-2 visas for persons with extraordinary abilities.

Growth in temporary work visa programs is part of a long-term trend

While temporary work visa programs expanded during the Trump administration, the growth of the programs represented a continuing long-term trend dating back more than 30 years. **Figure A** shows the number of new visas issued in 36 nonimmigrant visa classifications that represent U.S. temporary work visa programs, or programs that allow spouses and children to accompany the principal temporary migrant worker, between 1987 and 2019.¹⁸ For comparison, the figure also shows the number of permanent immigrant visas issued in the employment-based (EB) green card preferences—i.e., green cards issued for the purpose of work, which allow migrants to adjust to become lawful permanent residents—over the same period. The dotted line in Figure A shows the point at which the last major immigration reform was passed in the United States, in November 1990, when the Immigration Act of 1990 (commonly referred to as IMMACT90) was enacted.

The major trends that have occurred since IMMACT90's enactment were that issuances of EB green cards increased slowly until stabilizing around the new annual cap for EB green cards of 140,000 (created by IMMACT90), while the number of temporary work visas issued increased exponentially during the same period. In 2019, the number of EB green cards issued represented only 8.6% of all new work visas issued to migrant workers and their families (temporary plus EB green cards). These data show that the labor migration pathways available to migrant workers and their families in the U.S. immigration system are almost exclusively temporary.¹⁹

The difference under Trump was that the steady growth in temporary work visa programs occurred while the Trump administration simultaneously, and successfully, made unprecedented moves to slash virtually every permanent immigrant pathway available in the U.S. system.

The refugee and asylum pathways were diminished under Trump

While temporary work visa programs grew during the Trump administration, the number of refugees admitted dwindled to its lowest total ever—in fact, the lowest since the passage

Table 3

Temporary work visa programs grew 13% under Trump

Estimated number of temporary migrant workers employed in the United States, 2016 and 2019

Nonimmigrant visa classification	Number of workers employed	
	2016	2019
<i>A-3 visa for attendants, servants, or personal employees of A-1 and A-2 visa holders</i>	2,162	1,687
<i>B-1 visa for temporary visitors for business</i>	3,000	3,000
<i>CW-1 visa for transitional workers on the Commonwealth of Northern Mariana Islands</i>	8,093	3,263
<i>F-1 visa for foreign students, Optional Practical Training program (OPT) and STEM OPT extensions</i>	199,031	223,308
<i>G-5 visa for attendants, servants, or personal employees of G-1 through G-4 visa holder</i>	1,309	945
<i>E-1 visa for treaty traders and their spouses and children</i>	8,085	6,668
<i>E-2 visa for treaty investors and their spouses and children</i>	66,738	66,738
<i>E-3 visa for Australian specialty occupation professionals</i>	15,628	16,858
<i>H-1B visa for specialty occupations</i>	528,993	583,420
<i>H-2A visa for seasonal agricultural occupations</i>	134,368	204,801
<i>H-2B visa for seasonal nonagricultural occupations</i>	149,491	160,410
<i>H-4 visa for spouses of certain H-1B workers</i>	54,936	74,749
<i>J-1 visa for Exchange Visitor Program participants/workers</i>	193,520	222,597
<i>J-2 visa for spouses of J-1 exchange visitors</i>	10,147	11,781
<i>L-1 visa for intracompany transferees</i>	316,224	337,164
<i>L-2 visa for spouses of intracompany transferees</i>	25,670	25,673
<i>O-1/O-2 visa for persons with extraordinary ability and their assistants</i>	38,706	47,725
<i>P-1 visa for internationally recognized athletes and members of entertainment groups</i>	24,262	25,601
<i>P-2 visa for artists or entertainers in a reciprocal exchange program</i>	97	107
<i>P-3 visa for artists or entertainers in a reciprocal exchange program</i>	8,426	9,848
<i>TN visa or status for Canadian and Mexican nationals in certain professional occupations under NAFTA</i>	50,000	50,000
<i>Total</i>	<i>1,838,886</i>	<i>2,076,343</i>

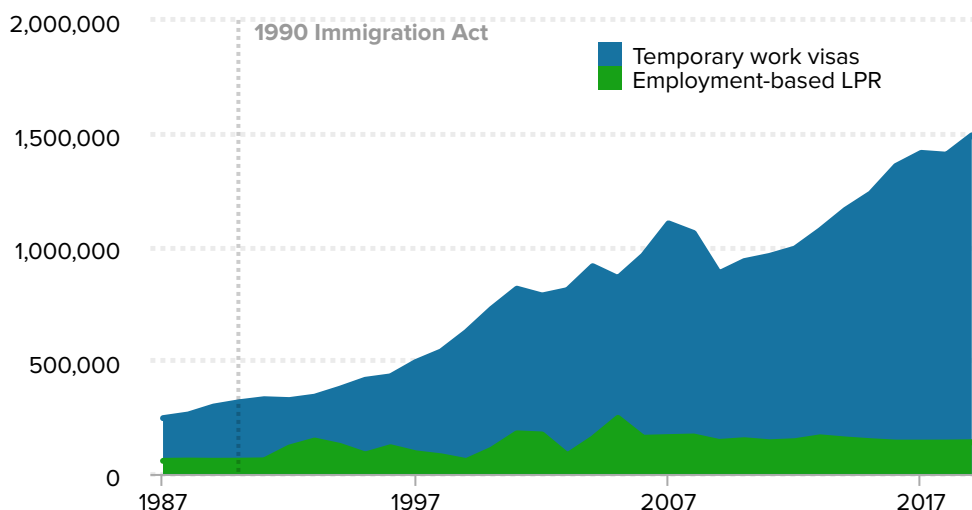
Notes: Methodology for calculating the number of workers derived from Daniel Costa and Jennifer Rosenbaum, *Temporary Foreign Workers by the Numbers: New Estimates by Visa Classification*, Economic Policy Institute, March 2017. All references to a particular year should be understood to mean the U.S. government's fiscal year (Oct. 1–Sept. 30).

Sources: See extended sources in the [online version](#) of this report.

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Figure A

Employment-based permanent immigrant visas and temporary nonimmigrant work visas issued, including principal and derivative beneficiaries, 1987–2019



Notes: The Immigration Act of 1990 was enacted on November 29, 1990. LPR stands for lawful permanent resident. Employment-based LPR refers to permanent immigrant visas in the employment-based preference categories, which confer permanent residence on the migrant beneficiary. For more background on employment-based permanent immigrant visas, see USCIS, “[Permanent Workers](#),” *Working in the United States*, last reviewed/updated Jan. 9, 2020.

Source: See extended sources in the [online version](#) of this report.

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of the Refugee Act of 1980, the law that created the United States’ modern-day regime for refugee resettlement. **Figure B** shows that in 2016, the last year of the Obama administration, nearly 85,000 refugees were admitted, but in 2020—when international aid agencies were warning that the need for refugee resettlement is greater than ever²⁰—just under 12,000 were admitted by the Trump administration, a reduction of 86%.

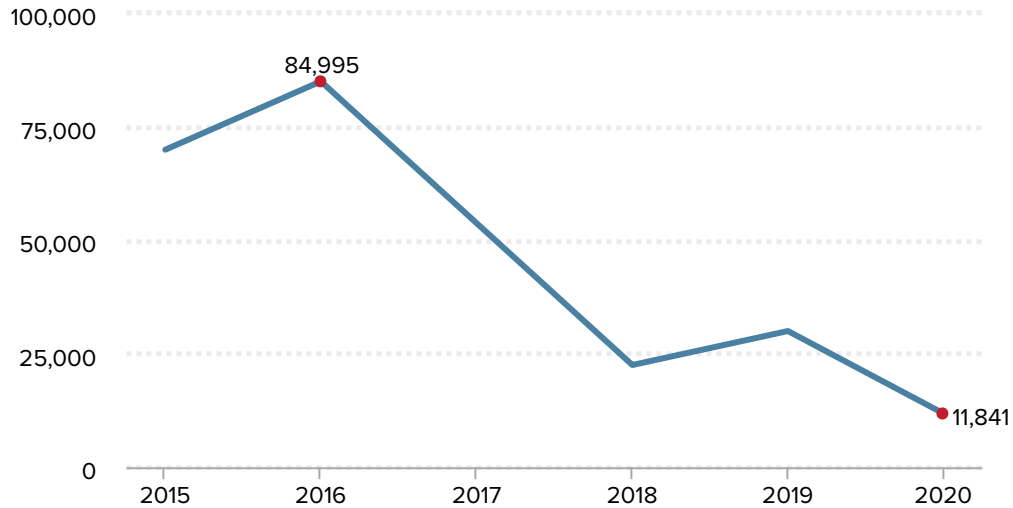
When it comes to the U.S. asylum system, the number of approved asylum claims in 2019 reached the highest level since 1990, at 46,508.²¹ However, this number is misleading because first, it was due in part to the record number of new claims in recent years combined with a backlog of claims initiated during the Obama administration. And second, while the number of claims approved has increased, the denial rate for asylum claims has risen sharply. Finally, most experts agree that the policies enacted by the Trump administration on asylum, along with the Board of Immigration Appeals decisions made by Trump’s Department of Justice that relate to asylum and are precedent-setting, served to greatly restrict access to the asylum process for persons hoping to become new applicants for asylum at the U.S. border or for those applying for asylum from within the United States—and will ultimately lead to many fewer new asylum claims and claims that are ultimately approved.²²

For example, one of those policies, the Migrant Protection Protocols (MPP), better known as the “Remain in Mexico” policy, led to nearly 68,000 Mexican migrants being sent back

Figure B

Refugee admissions declined by 86% under Trump compared with the last year of the Obama administration

Annual number of refugees admitted into the United States, fiscal years 2015–2020



Notes: Data reflect refugee resettlement numbers in the fiscal years shown but do not show the annual refugee ceilings set by the executive branch.

Source: Migration Policy Institute [analysis of WRAPS data](#) from the Department of State's Bureau of Population, Refugees, and Migration.

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to Mexico to await their asylum hearings as of September 2020.²³ (The Biden administration ordered on January 20, 2021, that no new migrants be enrolled in the MPP program, while directing current enrollees to “remain where they are.”²⁴) In March 2020, the Centers for Disease Control and Prevention implemented an emergency policy under Title 42 of the Public Health Service Act to seal the U.S. border, ostensibly justified by the COVID-19 pandemic, which led to 150,000 migrants—many of them asylum-seekers—being rejected or expelled from the United States without the usual due process the law would have provided for them.²⁵ (As of the time of publication, the Biden administration had not rescinded the policy.) And for the asylum applicants already in the United States having their claims adjudicated, the Trump administration promulgated two regulations, one that doubled the wait time required before applicants can obtain employment authorization documents permitting them to work lawfully, and another that removed the requirement that USCIS process their work permit applications within 30 days, further increasing wait times and risking the possibility that the government will not issue them a work permit at all. Numerous other policies detrimental to asylum access have been identified by advocates and researchers.²⁶

The number of green cards was on the decline under Trump before the pandemic and was impacted further by the slowdown in consular processing and the immigrant visa ban

By the end of fiscal year 2019, the number of permanent immigrant visas that lead to lawful permanent residence (i.e., green cards) had been on a steady decline since President Trump took office. **Figure C** shows that in the last year of the Obama administration (fiscal 2016), the total number of green cards issued at U.S. embassies and consulates abroad was nearly 618,000; in 2019, the number had dropped to 462,500, a decline of 25% compared with the last year of the Obama administration.²⁷ After the start of the COVID-19 pandemic, most U.S. consulates abroad that issued both nonimmigrant visas and green cards were closed or operating at a limited capacity, resulting in very few visas of any type being issued, especially between April and August 2020, leading to a further decline of the annual total. In fiscal 2020, which ended on Sept. 30, 2020, a total of only 250,500 green cards were issued abroad.²⁸

Approximately one month after the pandemic was underway, President Trump declared a national emergency and tweeted that he would sign an executive order “to temporarily suspend immigration into the United States.”²⁹ Two days later, the White House issued a presidential proclamation titled “Suspension of Entry of Immigrants Who Present a Risk to the United States Labor Market During the Economic Recovery Following the 2019 Novel Coronavirus Outbreak.”³⁰ This proclamation directs the government to refrain from issuing immigrant visas abroad in the family-based, employment-based, and Diversity Visa³¹ green card preference categories. The proclamation is for all intents and purposes an immigrant visa ban, with the potential to reduce by hundreds of thousands the number of migrants who can become lawful permanent residents (LPRs) by obtaining green cards if it were to remain in place for a substantial period of time after normal consular processing resumes.

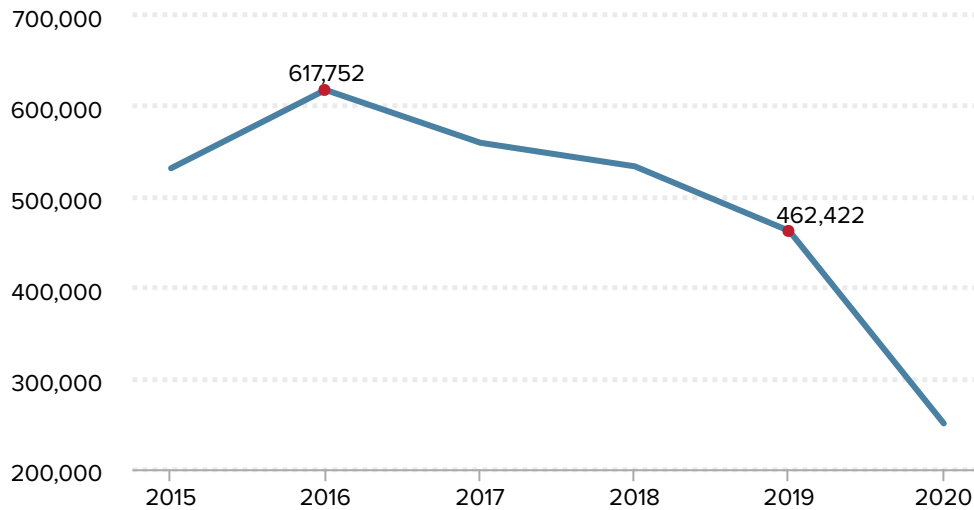
The proclamation establishing the immigrant visa ban was initially valid for 60 days, but was extended until the end of 2020, and was then extended again on Dec. 31, 2020, for an additional three months, meaning it will expire on March 31, 2021.³² Unless the Biden administration repeals the proclamation, it will have been in place for a total of 11 months when it expires at the end of March. As of the time of publication, the Biden administration had not reversed the immigrant visa ban, but it was reported on January 28 that the administration does plan to repeal it.³³

Table 4 shows what the long-term impact of the immigrant visa ban could have been if it had remained in place for an entire year during a period when consular processing is at normal levels. Of the 1 million total green cards issued during all of 2019, there were 316,000 green cards issued under the categories suspended by Trump’s proclamation, meaning that if the presidential proclamation remained in force for one full year at normal immigration levels, it would result in a reduction of 316,000 green cards, or 31%, nearly one-third, of the 1 million green cards issued in 2019.³⁴

Figure C

Even before the pandemic, green cards issued abroad had declined 25% under Trump compared with the final year of the Obama administration

Annual number of immigrant visas issued at foreign service posts, fiscal years 2015–2020



Notes: All references to a particular year should be understood to mean the U.S. government's fiscal year (October 1–September 30). Fiscal year 2020 includes visa issuance reduction caused by the closure and slowdown of U.S. consulates abroad and the June 2020 presidential proclamation suspending the issuance of certain immigrant visa preference categories.

Source: Author's analysis of U.S. Department of State, "Immigrant and Nonimmigrant Visas Issued at Foreign Service Posts: Fiscal Years 2015–2019," in *Report of the Visa Office 2019*, Fiscal Year 2019; and "Monthly Immigrant Visa Issuance Statistics," Fiscal Year 2020, Bureau of Consular Affairs.

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As noted, Trump's green card suspension came at a time when nearly all forms of temporary and permanent immigration to the United States had already been stopped or suspended because of COVID-19-related border closures and travel restrictions, as well as closures of U.S. consulates around the world that resulted in limited availability of visa-processing services. As a result and considering the Biden administration's intent to repeal it or allow it to expire on March 31, 2020, the immigrant visa ban's impact will be minimized in the short term. But as consulates abroad begin to reopen, the impact has already been felt by aspiring immigrants and their family members. (One exception is that Diversity Visas have resumed being processed after an injunction was issued by a federal court.³⁵)

Table 4

Trump’s presidential proclamation aimed to cut green cards by 31%

Number of people applying from abroad who became U.S. lawful permanent residents in 2019 in the categories suspended by Trump’s April 2020 presidential proclamation

Immigrant class of admission, new arrivals only	Number in 2019
Immediate relatives of U.S. citizens	
Parents	66,782
Family-sponsored preferences	
First: Unmarried sons/daughters of U.S. citizens and their children	20,866
Second: Spouses, children, and unmarried sons/daughters of alien residents; children of spouses of alien residents	85,089
Third: Married sons/daughters of U.S. citizens and their spouses and children	22,874
Fourth: Brothers/sisters of U.S. citizens (at least 21 years of age) and their spouses and children	56,083
Employment-based preferences	
First: Priority workers, and their spouses and children	2,238
Second: Professionals with advanced degrees or aliens of exceptional ability, and their spouses and children	3,432
Third: Skilled workers, professionals, and unskilled workers, and their spouses and children	13,522
Fourth: Certain special immigrants, and their spouses and children	2,080
Diversity Immigrant Visa program	42,437
Children born abroad to alien residents	59
Other	356
Total in suspended categories	315,818
Total green cards issued, all categories	1,030,990
Suspended categories as a percentage of total green cards	31%

Notes: New arrivals represents applicants for lawful permanent resident status who are residing outside of the United States, usually in the country of origin. “Other” category primarily consists of those admitted under special legislation.

Source: Author’s analysis of U.S. Department of Homeland Security, [Legal Immigration and Adjustment of Status Report Fiscal Year 2019, Quarter 4](#), Table 1B.

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Trump’s temporary work visa ban may have reduced the number of new temporary migrant workers, but waivers, exemptions, and litigation have mitigated the impact

On June 22, 2020, President Trump issued another presidential proclamation titled “Suspension of Entry of Immigrants and Nonimmigrants Who Present a Risk to the United States Labor Market During the Economic Recovery Following the 2019 Novel Coronavirus Outbreak,”³⁶ halting the issuance of certain major categories of nonimmigrant, temporary work visas until the end of 2020—in other words, a ban on temporary work visas. This proclamation originally suspended the issuance of new temporary work visas to migrants and their family members, if they were applying from abroad, until Dec. 31, 2020, but (along with the immigrant visa ban) the work visa suspension was extended until March 31,

2021,³⁷ by the Trump administration just before President Biden was inaugurated. As of the time of publication, the Biden administration had not yet reversed the temporary work visa ban, but it was reported on January 28 that the administration does have plans to repeal it along with the immigrant visa ban.³⁸

The proclamation establishing the temporary work visa ban does not suspend the issuance of visa statuses for those applying from within the United States, only those located abroad. The impacted visa classifications are the H-1B for occupations requiring a college degree, H-2B for low-wage jobs outside of agriculture, L-1 for intracompany transferees, and some of the major programs that authorize employment in the J-1 Exchange Visitor Program, specifically the J-1 Intern, Trainee, Teacher, Camp Counselor, Au Pair, and Summer Work Travel programs.³⁹ The proclamation did not restrict the issuance of H-2A visas for migrants working in temporary and seasonal agricultural occupations (i.e., farmworkers).

It was perhaps surprising that the temporary work visa ban was issued at all, given the pushback from the business community, but it appeared the Trump administration was being responsive to pressure from anti-immigrant groups, one of its other major constituencies. Media reports at the time of the green card ban noted that the Trump administration had also considered suspending temporary work visas, but that Trump ultimately declined to do so because of “intense pressure from business groups,”⁴⁰ including technology and agribusiness firms, who reportedly “exploded in anger”⁴¹ at the notion that their access to temporary work visas might be suspended or restricted. Nevertheless, when the temporary work visa ban was ultimately issued, the slowdown and shutdown of consular processing for visas around the world meant that there was already a sharp slowdown in the issuance of nonimmigrant visas, and therefore the ban’s impact on the number of visas was going to be negligible, at least at first.

Most of the nonimmigrant visa classifications targeted are primarily issued to applicants at consulates abroad and were therefore suspended by the proclamation; but the H-1B visa is an exception to the rule. In 2019, 60% of new H-1Bs were issued to migrants who were already present in the United States, often on a student visa.⁴² Therefore, it is reasonable to expect that the H-1B program will be less impacted by the proclamation in terms of a reduction in visas. The language in the proclamation also contains national interest waivers and exceptions for temporary migrant workers whose work will support the food supply chain or serve the national interest by being either critical to defense, law enforcement, diplomacy, or national security; if temporary migrant workers are involved with the provision of COVID-19 medical care or research; or if their work is otherwise necessary to facilitate the economic recovery of the United States. However, those listed exemptions were somewhat broad and ill-defined at the time the proclamation was issued.

Multiple lawsuits were filed soon after the proclamation was issued, seeking to enjoin the implementation of the work visa provisions, as well as challenging the green card suspension.⁴³ As litigation was proceeding, the U.S. State Department issued guidance on Aug. 12, 2020, for consular officers that offered new details and specifications about the jobs and industries covered by the proclamation’s national interest waivers and exemptions and that generally diminished the restrictiveness of the original

proclamation.⁴⁴ One prominent immigration attorney told *Bloomberg Law* that he thought that the State Department’s Aug. 12 guidance was in direct response to the litigation,⁴⁵ calling the guidance “a complete walkback” of the proclamation “because [the government’s lawyers] know they’re going to lose the litigation,” further noting that just about every industry would be covered by the new exemptions, and predicting that ultimately “many visa hopefuls stuck outside the U.S. will likely be able to prove they qualify for a national interest waiver to the ban.”⁴⁶ Two months later, in early October, with respect to litigation brought against the work visa ban by the National Association of Manufacturers, the U.S. Chamber of Commerce, the National Retail Federation, TechNet, and Intrax, a federal court in San Francisco ruled that the ban would not apply to these plaintiffs or employers that are members of these employer associations (including one cultural exchange visa sponsor). As a result, those associations and their member employers can recruit and hire migrants in any of the suspended visa programs.

The practical impact of Trump’s June 22 proclamation establishing a work visa suspension will ultimately be minimal as a result of the broad waivers and exemptions—thus, in retrospect, the June 22 proclamation looks to be mostly symbolic and a political tactic to blame migrants for high unemployment and the economic collapse that resulted from the COVID-19 pandemic. By far the biggest factor contributing to fewer temporary work visas being issued in 2020 and early 2021 remains the closure of U.S. consulates around the world and the limited availability of visa processing services at consulates.

Temporary migrant workers face unique challenges due to program frameworks

Although they are legally authorized to work, temporary migrant workers are among the most exploited laborers in the U.S. workforce because employer control of their visa status leaves many powerless to defend and uphold their rights. The list below summarizes some of the most problematic aspects of temporary work visa programs.

Illegal recruitment fees and debt bondage are common

Temporary migrant workers can face abuse even before arriving in the United States: Many are required to pay exorbitant fees to labor recruiters to secure U.S. employment opportunities, even though such fees are usually illegal.⁴⁷ Those fees leave them indebted to recruiters or third-party lenders, which can result in a form of debt bondage.⁴⁸ (Even migrants recruited to work with employment-based green cards have ended up paying exorbitant fees, as seen in one case reported in *ProPublica*, in which a Korean worker paid \$26,000 to a recruitment agency to work in a poultry processing plant.⁴⁹) After arriving in the United States, temporary migrant workers may find out the jobs they were promised don’t exist.⁵⁰ And in a number of cases, temporary migrant workers have become victims

of human trafficking—with some being forced to work in the sex industry.⁵¹

Contrary to popular belief, it's not just farmworkers and other temporary migrant workers in low-wage jobs suffering from the abuses that pervade temporary work visa programs: College-educated workers in computer occupations, as well as teachers and nurses, have been victimized and put in “financial bondage” by shady recruiters and staffing firms that steal wages, forbid workers from switching jobs or taking jobs the recruiters don't financially benefit from, and file lawsuits against workers if they try to change jobs or quit.⁵²

Temporary work visa programs permit employers to circumvent U.S. anti-discrimination laws and segregate the workforce

While U.S. anti-discrimination laws are intended to make workplaces fairer and more equal by prohibiting discrimination in hiring and employment on the basis of factors like race, color, sex, religion, and national origin at the point of hire—in practice they don't apply to temporary migrant workers who are recruited abroad. Because workers are being selected by recruiters in countries of origin, outside of U.S. jurisdiction, employers have the ability to reclassify entire sectors of the U.S. workforce by race, gender, national origin, and age through temporary work visa programs.⁵³

This occurs through recruiters and employers limiting access to jobs made available to workers based on employer preferences for national origin, gender, and age, allowing them to sort workers into occupations and visa programs based on racialized and gendered notions of work. Thanks to temporary work visa programs, an employer may select an entire workforce composed of a single nationality, gender, or age group—for example, selecting only young Mexican men for farm jobs with H-2A visas, or young Indian men to work as computer programmers with H-1B visas, or young women from Eastern Europe for work in restaurants and amusement parks with J-1 visas. The large shares of visas issued to specific countries of origin, and the limited demographic data available, provide evidence that this is occurring,⁵⁴ and websites exist that allow employers to browse the profiles of workers on employment agency websites that advertise workers like commodities.⁵⁵

Employers and recruiters can also weed out workers who might dare to speak out against unlawful employment practices, assert their legal rights, or organize for better working conditions by joining or forming a union. They can do this by refusing to hire workers whom they think will be likely to complain, and retaliating against workers who do speak up or complain—for instance, by firing them and effectively forcing them to leave the country, or by threatening to blacklist them from being hired for future job opportunities.

The visa status of temporary migrant workers is usually tied to their employer, thus chilling labor rights, preventing mobility, and enabling employer lawbreaking

The many temporary migrant workers who are in debt after paying recruitment fees are anxious to earn enough to pay back what they owe and hopefully make a profit, and are thus unlikely to speak up at work when things go wrong on the job. But even those who aren't caught in the debt trap are often subject to exploitation once they are working in the United States. Like unauthorized immigrants, temporary migrant workers have good reason to fear retaliation and deportation if they speak up about wage theft, workplace abuses, or other working conditions like substandard health and safety procedures on the job—not because they don't have a valid immigration status, but because their visas are almost always tied to one employer that owns and controls their visa status. That visa status is what determines the worker's right to remain in the country; if they lose their job, they lose their visa and become deportable. This arrangement results in a form of indentured servitude.⁵⁶ Further, as noted in the previous section, employers can punish temporary migrant workers for speaking out by not rehiring them the following year or by telling recruiters in countries of origin that they shouldn't be hired for other job opportunities in the United States (effectively blacklisting them).⁵⁷

The specter of retaliation makes it understandably difficult for temporary migrant workers to complain to their employers and to government agencies about unpaid wages and substandard working conditions. Private lawsuits against employers who break the law are also an unrealistic avenue for enforcing rights, for two reasons: First, most temporary migrant workers are not eligible for federally funded legal services under U.S. law, and second, those who have been fired are unlikely to have a valid immigration status permitting them to stay in the United States long enough to pursue their claims in court. Because of the conditions created by tying workers to a single employer through their visa status, temporary work visa programs have been dubbed by some as “close to slavery” or “the new American slavery,” and government auditors have noted that increased protections are needed for temporary migrant workers.⁵⁸

While temporary migrant workers generally cannot easily change jobs or employers, the terms and conditions of some nonimmigrant visas for college-educated workers actually do permit them to change employers—in particular the J-1, F-1 Optional Practical Training (OPT) program, H-1B, and TN visas allow workers to change employers—although the rules vary even among these visas. In the J-1 visa, which is managed by the State Department, there are sponsor organizations that partner with the State Department to manage oversight and compliance. Those private organizations act as middlemen between the J-1 workers and U.S. employers, and ultimately must sign off on a job change for a J-1 worker, rendering it difficult in practice. In the F-1/OPT context, universities play a key role and ultimately approve employment for OPT workers but exercise little oversight, sometimes

resulting in abuses.⁵⁹

It is important to stress that temporary migrant workers in these four visa programs that allow for some portability have nevertheless been subjected to substandard workplace conditions, and been the victims of fraud and even trafficking, which suggests that the ability to change employers, on its own, is not a panacea for protecting temporary migrant workers. Allowing temporary migrant workers to change employers is something that some proponents of expanded temporary work visa programs—like researchers from the Center for Global Development and the Cato Institute⁶⁰—have proposed in lieu of additional labor standards enforcement. But the legal ability to change jobs does not alone provide protection from exploitation; while this is a pervasive assumption in basic economics, it is a generally incorrect assumption that is finally being called into question.⁶¹ The ability to change employers should be a basic fundamental freedom for workers, not an excuse to abandon labor standards enforcement.

Temporary migrant workers are often legally underpaid

There is abundant evidence that the laws and regulations governing major temporary work visa programs—such as H-2B and H-1B—permit employers to pay their temporary migrant workers much less than the local average wage for the jobs they fill.⁶² For example, in the H-1B program—which has a prevailing wage rule that is intended to protect local wage standards—60% of all H-1B jobs certified by the U.S. Department of Labor (DOL) in 2019 were certified at a wage that was below the local average wage for the specific occupation.⁶³ However, most work visa programs have no minimum or prevailing wage rules at all—perhaps that’s why some employers have believed they could get away with vastly underpaying their temporary migrant workers, as one Silicon Valley technology company in Fremont, California, did by paying less than \$2 an hour to skilled migrant workers from India on L-1 visas who were working up to 122 hours per week installing computers.⁶⁴

While employers are still required by law to pay temporary migrant workers at least the state or federal minimum wage, that’s often far less than the true market rate, or the local average wage, for the occupation in which they are employed. The company employing the L-1 workers in Fremont who were paid less than \$2 an hour was cited for violations by DOL because California law required that they be paid no less than \$8 an hour (the state minimum wage at the time), plus time-and-a-half for overtime. But the average wage in Fremont for the job they were doing—installing computers—was \$20 per hour at the time according to DOL data, and if they were also configuring the computers for the company’s network, they deserved to be paid \$44 per hour.⁶⁵ In the end, the company was required to pay back wages of \$40,000 plus a fine of \$3,500 “because of the willful nature of the violations”—a slap on the wrist considering the egregiousness of the wage theft, and hardly a disincentive against future violations.⁶⁶

Considering how the wage rules or lack thereof in these programs operate, and the situation workers are left in, perhaps it is no surprise there is evidence that temporary

migrant workers in low-wage jobs earn approximately the same wages, on average, that unauthorized immigrant workers do for similar jobs, despite the fact that unauthorized workers have virtually no rights in practice.⁶⁷ In other words, these temporary migrant workers do not have any financial incentive to work legally through visa programs since there is no wage premium to be gained for it—and, in fact, authorized temporary migrant workers can end up worse off economically than unauthorized workers because of the debts they incur through fees paid to recruiters, and considering the fact that they may have no family or social networks to rely on. This could ultimately result in incentivizing workers to migrate without authorization, rather than using available legal channels.

In essence, these visa programs operate in practice to create a labor market monopsony for employers—awarding employers greater leverage over their workers⁶⁸—and growing research has shown that even modest amounts of employer monopsony power are utterly corrosive to workers’ ability to bargain for better wages.⁶⁹

Oversight is lacking, leaving temporary migrant workers unprotected

There is very little oversight of temporary work visa programs by DOL. In fact, most of the programs have no rules in place at all to protect temporary migrant workers after they arrive in the United States. Where such rules *are* in place—namely in the H-1B, H-2A, and H-2B programs—enforcement is inadequate to protect workers, and companies that are frequent and extreme violators of the rules are often allowed to continue hiring through visa programs with impunity.⁷⁰ Part of the problem lies with DOL’s weak legal mandate, but is also due to the reality of DOL being woefully underfunded and understaffed. To put that into context, consider that in 2018, the budget for labor standards enforcement across all federal U.S. agencies was only \$2 billion, while spending on immigration enforcement in 2018 was \$24 billion, an astonishing *11 times greater* than spending to enforce labor standards—despite the mandate labor agencies have to protect 146 million workers employed at 10 million workplaces.⁷¹ Consider as well that the Wage and Hour Division—the division at DOL in charge of enforcement in the H visa programs—had fewer investigators on staff in 2019 than it did almost five decades earlier, which explains the agency’s limited capacity to conduct investigations.⁷²

Most temporary migrant workers cannot transition to a permanent immigrant status; in the few programs that offer a pathway, it is controlled by employers

None of the U.S. temporary work visa programs provide for an automatic path to lawful permanent residence—i.e., obtaining a “green card”—which would also allow them to eventually qualify for naturalization (citizenship) after a few years, nor do they allow for a quick and direct path for temporary migrant workers to apply for green cards themselves.

As a result, many temporary migrant workers return to the United States every year for decades in a nonimmigrant status, often for six to nearly 12 months at a time—rendering them permanently temporary in many respects—which also impacts their ability to integrate into the United States and prevents them from earning the higher wages associated with permanent residence and citizenship.⁷³

Only two temporary work visa programs allow for a relatively straightforward application process for green cards, the H-1B and L-1 visas. But in those programs, it is the employer who decides whether the worker should get a green card; the employer also controls the green card application and process. This creates an imbalance of power between temporary migrant workers and their employers that allows employers to exert undue influence over the lives of their workers with visas, and disincentivizes workers from speaking up about workplace abuses, as speaking up could jeopardize their ability to remain in the United States.

Even when employers decide to apply for green cards for the temporary migrant workers who are eligible, workers can end up in what's known as the green card “backlog,” waiting years and even decades for a green card to become available to them. The Congressional Research Service has estimated that approximately 1 million temporary migrant workers are in the green card backlog.⁷⁴ During their time in the backlog, workers can experience an employment relationship that is ripe for exploitation, because workers are unable to switch easily between jobs or employers by virtue of their prolonged temporary status.

Many temporary migrant workers are separated from their families while employed in the United States

While many temporary work visa programs technically allow migrant workers to bring their spouses and children, in most cases U.S. visa rules do not authorize spouses to work—making it difficult, if not impossible, for spouses and children to accompany workers because of the high cost of living and low pay in work visa programs. Taking into consideration that so many temporary migrant workers return every year for decades, workers and their family members can end up facing prolonged separation and trauma—children may grow up hardly knowing, or ever seeing, one or both of their parents.

Recommendations for reforming temporary work visa programs

The bargaining power of workers is undercut when more than 2 million temporary migrant workers—1.2% of the U.S. labor force—are underpaid by employers and cannot safely complain to DOL or sue employers that exploit them because their visa status is owned and controlled by their employer. To remedy this, a number of key reforms have been

proposed and should be considered, both to protect workers and also to modernize the U.S. system for labor migration. These reforms would help develop a strong evidence base for migration policymaking that is nimble enough to respond to the demands of a modern economy with needs that are constantly changing.

The protracted period of high unemployment the United States appears to be in, in which labor shortages will be rare, offers a moment for policymakers to take stock of the immigration system and implement needed reforms without the usual employer pressure to increase numbers and water down protections that occurs during periods of low unemployment. Given that a record number of temporary migrant workers are now employed in the United States at a time of greatly elevated health and safety risks, the need to protect these workers has never been more acute.

The White House can enact limited reforms through the regulatory process, but Congress needs to pass legislation for transformative and lasting reforms

While some improvements to temporary work visa programs can be accomplished by the executive branch through regulations—most notably by ensuring that migrant workers are paid fairly by improving prevailing wage rules in some visa programs and creating new wage rules in the programs that lack them—the reality remains that the most transformative and lasting solutions will require congressional action. An added benefit of these more durable solutions is that they will set a useful baseline of protections for temporary migrant workers, both in normal times and during emergencies like pandemics. In addition, improving labor standards for temporary migrant workers will lift the floor for all workers, which will increase bargaining power and raise wages.

Congress should reform temporary work visa programs by passing laws to update, simplify, and standardize the rules for all of them, in ways that make them consistent with basic human and labor rights. The following sections briefly discuss the key reforms that are necessary.

Congress should regulate foreign labor recruiters to protect migrant workers

Congress could begin its reforms by requiring employers to recruit and offer jobs to qualified U.S. workers before being allowed to recruit workers abroad, ensuring transparency in the recruitment process abroad for potential migrant workers who may participate in visa programs, and requiring that employers be held accountable for the actions of labor recruiters abroad.

There is at least one example of legislation that could serve as a starting point for achieving the reforms necessary to ensure transparency and accountability in recruitment

for migrants who are abroad, although it would need to be improved upon. The comprehensive immigration reform legislation that passed the Senate in 2013 contained a section on foreign labor recruitment, which, if it had become law, would have created a new program requiring foreign labor contractors who recruit migrant workers to register with DOL and to disclose certain information about recruited workers, employers, subcontractors, and job terms, and to post a bond.⁷⁵ The provisions would have also prohibited discriminating or retaliating against workers, banned the charging of recruitment fees to workers, and implemented a new complaint and investigation process along with administrative fines and a private right of action, allowing either the government or an aggrieved person to bring a civil action to enforce the rights of migrant workers.

Congress should require that all temporary migrant workers are paid fairly according to U.S. wage standards

And next, in cases where employers hire migrant workers after proving they were unable to recruit U.S. workers at prevailing wages—in order to preserve U.S. wage standards and ensure that temporary migrant workers are paid a fair wage that is commensurate with the value of their labor—the law should require that all workers with temporary visas are paid no less than the local average or median wage for their job.

There are some key legislative proposals that would achieve this for particular visa programs. In terms of jobs that require at least a college degree, the H-1B and L-1 Visa Reform Act, a bipartisan proposal originally introduced by Sens. Richard Durbin (D-Ill.) and Chuck Grassley (R-Iowa), would reform the H-1B program by requiring employers to first recruit U.S. workers for open positions, and then require employers to pay H-1B workers at least the local median wage, and would provide DOL with additional authority to ensure compliance with the program.⁷⁶ Employers would also be required to pay temporary migrant workers with L-1 visas the local median wage (the L-1 visa program currently has no wage rule). The bill is co-sponsored by Democratic Sens. Richard Blumenthal of Connecticut, Sherrod Brown of Ohio, and Bernie Sanders of Vermont, and a bipartisan version has been introduced in the House of Representatives, co-sponsored by Democratic Reps. Bill Pascrell of New Jersey and Ro Khanna of California.⁷⁷

Another piece of legislation, proposed by Sens. Durbin, Blumenthal, and Amy Klobuchar (D-Minn.) and former Senator (now Vice President) Kamala Harris, would facilitate the fair recruitment of recent foreign graduates of U.S. universities with degrees in the science, technology, engineering, and math (STEM) fields. The Keep STEM Talent Act would allow STEM graduates to obtain green cards—and bypass years of being indentured on temporary visas—if employers simply go through the DOL labor certification process and offer to pay the fair market wage.⁷⁸

In terms of temporary work visas for lower-wage jobs, Rep. Joaquin Castro (D-Texas) recently introduced legislation to reform and improve the H-2B visa—the main program used to recruit workers into lower-wage jobs outside of agriculture (for example in

construction, landscaping, restaurants, seafood processing, and hospitality). Rep. Castro's Seasonal Worker Solidarity Act would, among other things, require that employers pay H-2B workers no less than the local average wage for the occupation, as well as eliminate loopholes that employers use to circumvent paying fair wages in the current H-2B program.⁷⁹

Congress should prohibit temporary migrant workers from being indentured to their employers through their visa status and allow workers to self-petition for permanent residence

Another priority for Congress would be to pass a law firmly establishing that temporary migrant workers will no longer be tied and indentured to their employers through their visa status. Congress should also limit the time that temporary migrant workers are in a temporary/nonimmigrant status by allowing them to self-petition for permanent residence after a short provisional period,⁸⁰ but preferably no longer than 18 months. The aforementioned Seasonal Worker Solidarity Act, for example, would allow H-2B workers to change employers and to self-petition for permanent residence after accruing 18 months of work in H-2B status.

Congress should appropriate more funding to enforce labor standards and bar employers from hiring through visa programs if they violate labor and employment laws

Because of how perpetually underfunded it has been, Congress should appropriate much more funding to DOL to enforce this updated work visa system⁸¹ and strengthen the department's mandates to conduct adequate oversight, including random audits of employers, and pass laws permanently banning any employer from hiring through temporary work visa programs if that employer has violated labor and employment laws. Investigative news reports have revealed that even when DOL sanctions an employer for labor violations committed against temporary migrant workers, the employers are often required to pay only nominal fines and are allowed to continue hiring new workers through visa programs.⁸²

Congress should pass the POWER Act to protect workers of all immigration statuses from the threat of employer retaliation and deportation

Congress should also prioritize reintroduction and passage of the Protect Our Workers from Exploitation and Retaliation (POWER) Act, perhaps the single most important piece of

legislation aimed at protecting workers of all immigration statuses from the threat of employer retaliation and deportation. The POWER Act was last introduced in 2018 by Rep. Judy Chu (D-Calif.) and Sen. Robert Menendez (D-N.J.) and is supported by various unions and migrant worker advocacy organizations. The POWER Act would expand access to humanitarian “U” visas for migrant workers who report workplace violations (U visas are currently available to victims of certain qualifying crimes who are cooperating in a related investigation or prosecution),⁸³ increase the number of U visas available, and extend eligibility to more labor-related crimes.

The POWER Act would also strengthen the investigative powers of labor standards enforcement agencies. And it would permit postponing the deportation of migrant workers who file a bona fide workplace claim or are a material witness to one, so they can remain in the country to pursue the claim; they would also be eligible for employment authorization so they can work during that time.⁸⁴

Congress should improve transparency in temporary work visa programs to protect workers and aid anti-trafficking efforts

While the reforms discussed in the preceding sections would go a long way toward protecting temporary migrant workers, other systemic reforms are also urgently needed to more broadly protect labor standards and modernize the immigration system.

For example, there should be much more transparency in the system. Too little is known about how temporary work visa programs are being used, in part because data on visas are collected on paper forms and applications rather than electronically,⁸⁵ and even most of the digitized information collected is not made public or requires lengthy and costly Freedom of Information Act requests to obtain. Migrant worker advocates have pressed for years for more and better government data and transparency in work visa programs to ensure that migrants are being paid fairly, and that the immigration system is not being co-opted in ways that allow employers to discriminate and segregate the workforce. More data would also serve as a tool that could aid the organizations and advocates who are fighting human trafficking.⁸⁶ Bipartisan legislation has been introduced to achieve this, most recently the Visa Transparency Anti-Trafficking Act,⁸⁷ but opposition by employers has caused it to stall.

Congress should create an independent commission on employment-based migration to make the system more flexible and data-driven and depoliticize the adjustment of numerical limits

Last but not least, temporary work visa programs and the U.S. labor migration system writ

large must be reformed to be more flexible and data-driven. For example, most numerical limits (i.e., quotas or caps) for permanent and temporary work visas were set by law in 1990 and have not been changed since, despite vast fluctuations in economic conditions. A more rational system would have annual caps that adjust to changing conditions—increasing when necessary to alleviate proven labor shortages and decreasing during economic slowdowns and recessions.

The best proposal to do this is through the creation of an independent, permanent commission on employment-based migration, which would be a high-level body staffed by expert researchers with integrity and technical competence, and who are tasked with studying immigration and the labor market and providing timely and reliable data and analysis to policymakers and the public. The commission could work to develop much better measures of labor market shortages, assessment methodologies, and processes to efficiently adjust migrant worker flows to match employers' needs while protecting U.S. labor standards.⁸⁸

Adjusting annual visa caps requires congressional action, which can be contentious, influenced by lobbying and opaque political considerations rather than facts, and too slow to keep up with changing economic conditions. A commission would report regularly to Congress and the president, proposing new quotas on an annual or semi-annual basis, and issue public reports citing the evidence for its recommendations, which would be based on methodologies that are credible and transparent. The commission would consider the many trade-offs inherent in immigration policymaking in its recommendations, and Congress would ultimately decide which policies to adopt or reject. But basing quotas on evidence and data would have the effect of depoliticizing the process of setting numbers and provide an evidence base for decisions that can be inspected by all.

Models for such a commission already exist, both in the United States and abroad. In the United States, for example, it would be difficult to imagine Congress making decisions about trade policy without the advice of the International Trade Commission. Both immigration and trade are vital to the U.S. economy, but Congress cannot be expected to have the relevant expertise to make fully informed decisions about either. In the United Kingdom, the Migration Advisory Committee (MAC) is an independent governmental body that studies labor shortages and makes recommendations to Parliament about when to facilitate more migration and for which occupations. The MAC is staffed with notable economists and labor market experts who study what they call “top-down” labor market indicators, such as growth in wages, employment, and unemployment, and job vacancy data, but MAC staff also interview both employers and unions to get a sense of what’s happening on the ground—what the MAC calls “bottom-up” indicators—which serve to better inform the MAC when crafting its recommendations.⁸⁹

A number of bipartisan groups and research institutes have called for an independent commission on employment-based migration or some version of it, including The Independent Task Force on Immigration and America’s Future (co-chaired by Lee Hamilton and Spencer Abraham), the Council on Foreign Relations’ Independent Task Force on U.S. Immigration Policy (co-chaired by Jeb Bush and Thomas McLarty III), the Brookings-Duke Immigration Policy Roundtable, the Brookings Institution, the Economic Policy Institute, and

the Migration Policy Institute. Versions of a commission have been introduced multiple times in proposed legislation⁹⁰ and should be considered again, either as a standalone proposal or as an integral component of a comprehensive immigration reform package.

The COVID-19 pandemic has exacerbated the vulnerability of temporary migrant workers and the Trump administration failed to take action to protect them

While the structural issues discussed above are ever-present, the human stakes are higher during the COVID-19 pandemic, and new challenges have arisen or been exacerbated by the nature of the pandemic and the solutions required to slow the spread of the virus. The reality for many temporary migrant workers has become more precarious in light of massive job losses and the shutting down of the U.S. immigration system, along with new visa and travel restrictions. Some new challenges are specific to individual visa programs, because of different rules, procedures, and occupations. The Trump administration, during its managing of the pandemic, also implemented changes to rules and policies—with the clear intention of helping employers—but with little to no regard for the well-being of temporary migrant workers, a fact made evident by the failure of the Trump administration to take any action to protect them. This section discusses a few of the key policy issues and vulnerabilities of temporary migrant workers that have come to light and even worsened during the COVID-19 pandemic.

Emergency measures were taken to secure a steady supply of H-2A farmworkers and to cut their pay, but not to protect them from COVID-19

Since the start of the pandemic, a number of policy changes were made at the federal agency level by the Trump administration to ensure that migrant farmworkers who come to the United States to fill temporary and seasonal jobs on farms through the H-2A visa program could continue to arrive and work to bolster the food supply chain.

One of the key moves was the State Department's announcement with respect to issuing H-2A visas—on March 17, 2020, the State Department announced it was stopping mandatory in-person interviews for migrants who were applying for H-2A visas for the first time in Mexico as a result of the pandemic.⁹¹ Since the in-person interview is a necessary step before H-2A workers can enter and work in the United States, and more than 90% of H-2A workers come from Mexico, this meant that in effect no new H-2A workers would be able to obtain visas and travel to worksites in the United States. The State Department later changed course due to pressure from agribusiness, saying it would process H-2A

visas in Mexico and waive the in-person interviews, but only for Mexican applicants who are “returning workers,” meaning they had previously worked in the United States with H-2A visas.⁹² But a few days later, the State Department updated its policy again, announcing it would waive interviews and process visas for both new H-2A and H-2B workers and returning workers who had been employed in the United States in H-2A status during the previous four years—in part because “the H-2 program is essential to the economy and food security of the United States and is a national security priority.”⁹³

About a month later, a temporary final rule was published by another agency, U.S. Citizenship and Immigration Services (USCIS) in the U.S. Department of Homeland Security, titled Temporary Changes to Requirements Affecting H-2A Nonimmigrants Due to the COVID–19 National Emergency,⁹⁴ which permitted farm employers to hire an H-2A worker after the worker completed their current job, whether it was on the same farm or a different one, and that allowed H-2A workers to remain in the United States beyond the usual three-year total maximum allowable period of stay. This new emergency regulation was, as the U.S. Department of Agriculture (USDA) put it, an attempt to protect farmers and ensure the continued flow of America’s food supply.⁹⁵

Virtually at the same time that multiple federal agencies were touting the importance of temporary migrant farmworkers with H-2A visas to the security of the United States, and changing rules to allow them to continue being recruited and to remain in the United States to work for additional employers, the Trump White House and USDA were devising a plot to reduce the required wage rates paid to H-2A workers, known as the Adverse Effect Wage Rate (AEWR)⁹⁶—which represents the regional average wage of farmworkers and is intended to protect U.S. wage standards for all farmworkers. This despite the fact that farmworkers and H-2A workers are already paid some of the lowest wage rates in the U.S. labor market.⁹⁷ National Public Radio (NPR)⁹⁸ and *The Wall Street Journal* reported on this scheme, with the *Journal* noting that the proposal would likely amount to a wage “cut of around \$2 to \$5 per hour” in some states.⁹⁹

The Trump administration ultimately decided in early October to lower the AEWR for H-2A workers by ending the USDA’s Agricultural Labor Survey, which is the best source of information on what farmworkers earn, and which DOL uses to set the AEWR.¹⁰⁰ The United Farm Workers (UFW) union, the UFW Foundation, and Farmworker Justice, an advocacy group, filed suit in federal court to enjoin USDA from ending the survey, and the court issued a temporary restraining order and preliminary injunction in late October 2020.¹⁰¹ In early November, the Trump DOL then issued a final rule detailing the new AEWR methodology, which would in fact lower wages for most H-2A farmworkers, and by the DOL’s own admission, transfer at least \$1.68 billion in wages from farmworkers to employers.¹⁰² The United Farm Workers Foundation and Farmworker Justice sued once again to enjoin the new AEWR, and were successful; on Dec. 24, a federal court in California enjoined the DOL’s new AEWR, and the court ordered DOL to calculate the 2021 AEWR under the previous AEWR methodology.¹⁰³

In low-wage jobs and some high-wage jobs, temporary migrant workers are especially vulnerable to infection due to the nature of their occupations and visa program rules

Across the United States, workers employed in the harvesting, production, and processing of food have been especially impacted by the COVID-19 pandemic, with high infection rates, multiple large outbreaks, and numerous deaths.¹⁰⁴ This is of special concern with respect to temporary migrant workers, because hundreds of thousands of them work in lower-wage occupations that have seen major outbreaks, especially through the H-2A and H-2B visa programs. All 200,000 H-2A workers are employed in agriculture—mostly as crop farmworkers—and account for roughly 10% of the entire workforce that is harvesting crops.¹⁰⁵

In the case of the H-2B program, a new temporary regulation similar to the one issued for H-2A was promulgated, which allows employers to extend current H-2B workers or hire new H-2B workers who are already present in the United States if they will perform work essential to the U.S. food supply chain, and permits H-2B workers to remain in the United States beyond the three-year total maximum allowable period of stay.¹⁰⁶ This was at least a tacit acknowledgement that H-2B workers were in so-called essential occupations and doing vastly important work. (A report in *Roll Call* described the temporary rule as intended “to help beleaguered meatpacking plants keep those foreign employees in the United States as the companies deal with absenteeism and workers quarantined because of COVID-19 exposure.”)¹⁰⁷ One of the top H-2B occupations in 2019 was Meat, Poultry, and Fish Cutters and Trimmers; DOL certified nearly 8,500 jobs in that occupation.¹⁰⁸ The vast majority of those jobs are certified for work at seafood-processing plants, including processing crab, shrimp, crawfish, and other shellfish.

There have been numerous reports published in the media and from industry analysts finding that COVID-19 outbreaks are widespread on both farms and in seafood-processing plants.¹⁰⁹ One of those reports, from *CalMatters*, noted that:

Farmworkers were three times as likely to catch COVID-19 as workers in any other industry, according to a California Institute of Rural Studies (CIRS) report based on Monterey County data from late June. Author and CIRS co-founder Don Villarejo estimated that ratio was likely true statewide, an assertion Monterey County Farm Bureau Executive Director Norm Groot supported.¹¹⁰

In addition, a report published in September in *Politico* showed that counties across the country with the highest per capita rates of COVID-19 infections are also some of the top agricultural-producing counties. And while *Politico* also noted that “the vast majority of states, county and local health departments are not collecting data on how many individual farmworkers have tested positive for coronavirus, nor how many have been hospitalized or died from the virus,”¹¹¹ one media outlet has compiled some key numbers.

The Food & Environment Reporting Network’s interactive map on COVID-19 outbreaks in the food system showed that as of Jan. 5, 2021, 52,175 meatpacking workers, 14,852 food processing workers, and 12,558 farmworkers have tested positive for COVID-19, and at least 352 workers have died, including 40 farmworkers.¹¹²

Temporary migrant workers in these food chain occupations have little recourse if their employers act negligently or recklessly when it comes to protecting them, as evidenced by the recent experience of two H-2B workers: *Reuters* and other outlets reported on two Mexican women working with H-2B visas for a seafood-processing plant in Louisiana, where the workers alleged they were forced to live in employer-provided housing while they were ill, and fired in retaliation for going to the hospital for a COVID-19 test and to seek medical care—both tested positive at the hospital.¹¹³ Along with being fired, the employer allegedly threatened to report the workers to immigration authorities. In response and with the help of Centro de los Derechos del Migrante, an advocacy group, the workers filed charges with the National Labor Relations Board and the Occupational Safety and Health Administration (OSHA) at DOL. The treatment of these workers by their employers shows the difficulties faced by workers who rely on their employers for their immigration status; they had numerous incentives to follow orders, stay quiet, and not seek testing and treatment—since doing so likely meant losing their jobs and becoming deportable.

Adequate housing that allows for physical distancing is also an area of concern. The H-2A program is the only work visa program that requires employers to provide housing at no cost to the workers. There are federal regulations and sometimes local laws that govern the quality of the H-2A housing and even how many square feet per worker are required, and OSHA issued additional guidance during the pandemic for workers living in communal settings.¹¹⁴ Nevertheless, it is a well-known fact that many H-2A workers reside in substandard and often cramped conditions that do not meet the required standards but go undetected by state and federal authorities.¹¹⁵

Many H-2A workers share bedrooms, raising the question of whether employers should arrange additional housing—which raises costs, sometimes significantly in expensive areas, such as in certain regions of California—as well as alternative housing for workers who get sick or are exposed to the virus and need to be quarantined. There is recent evidence that many employers have not done enough to ensure housing for H-2A workers is adequate to prevent the spread of COVID-19. A recent investigative report in *CalMatters*, titled “COVID rips through motel rooms of guest workers who pick nation’s produce,” reviewed federal records and found that H-2A workers in California “sleep on average five to a room.” The report cited Monterey County Health Officer Dr. Ed Moreno, who told reporters that “farmworkers face the greatest infection risk not at work, but at home,” further noting that “one [H-2A] resident constitutes an outbreak because of the possibility of it spreading like what we’re seeing.”¹¹⁶

Housing also matters after workers get infected; have employers been allowing infected workers to recover in employer-provided housing or have they fired them, causing them to lose their immigration status and become deportable? Like other farmworkers, many if not most H-2A workers lack health care coverage; have employers been assisting them in

finding a doctor and helping pay their medical bills?

While H-2A is the only visa program that requires employers to provide housing at no cost to the workers, shared housing is also a concern in other visa programs. For example, in the H-2B and J-1 visa programs, employers and program sponsors often provide housing but charge fees to their workers. While that arrangement can raise ethical concerns on its own, it is also the case that there are even fewer laws or regulations that govern the adequacy or health and safety standards for H-2B and J-1 housing. Migrant worker advocates know from speaking with workers that often H-2B and J-1 workers in employer-provided housing live in substandard and cramped conditions, a fact that legal complaints and news reports have confirmed.¹¹⁷ An H-2B worker involved in the aforementioned complaint brought by Centro de los Derechos del Migrante alleged that in her employer-provided housing, she “shared a bathroom and kitchen with nearly fifty other women [and] slept in a bedroom that housed eight workers and was only equipped with bunk beds.”¹¹⁸

Transportation raises additional health and safety issues during the pandemic in terms of physical distancing. H-2A is the only work visa program that requires employers to provide daily transportation between the worksite and living quarters, at no cost to the workers. While other visa programs don’t require that transportation be provided at no cost to workers, employer-provided transportation is also common in the H-2B and J-1 visa programs. In order to keep workers safe, employers need to adequately clean transport vehicles and implement physical distancing measures during transport, which in most cases will require additional vehicles or an increased number of trips with fewer workers in each vehicle. This can raise costs and slow down productivity, which is why governments, workers, and advocates should be concerned about whether employers are actually implementing such measures.

College-educated temporary migrant workers in front-line occupations are also at risk—tens of thousands of them are employed as doctors and in other health care occupations essential to combating COVID-19 and treating those who have become infected with the virus. The dangers of working in the health care sector during the COVID-19 pandemic are all too obvious. While reliable estimates are difficult to come by for health care workers who have been infected and died from COVID-19,¹¹⁹ an analysis published by Amnesty International on Sept. 3, 2020, estimated the number of health care worker deaths in the United States to be 1,077,¹²⁰ and a more recent report from *Kaiser Health News* and *The Guardian* suggests the number could be higher by the thousands.¹²¹

Temporary migrant workers in health care positions are usually employed through either the J-1 Exchange Visitor Program or the H-1B visa program. The number of H-1B visas approved for health care occupations between 2017 and 2019 was just over 43,000, and the number of J-1 doctors in 2019 (in the J-1 program for “Alien Physicians”) was 12,000—meaning the number of temporary migrant workers employed in health care is roughly 55,000 at least.¹²² However, there are likely thousands more employed with visas approved before 2017 and in other visa programs,¹²³ but a reliable estimate is impossible to calculate due to the lack of data by occupation in other temporary work visa programs.

The COVID-19 pandemic left temporary migrant workers stranded and without access to the social safety net

Job losses in the U.S. economy quickly numbered in the tens of millions after the start of the pandemic and the national emergency that was declared by the Trump administration in March 2020, and many temporary migrant workers were employed in industries that faced mass layoffs, like restaurants, hotels, and other jobs in the hospitality industry. Those who were laid off faced numerous dilemmas. For example, in a number of temporary work visa programs, when a worker is laid off, they are required to depart the United States within a few days. But getting home was virtually impossible for many laid-off workers, due to new travel restrictions around the world and few commercial flights being available, as well as the loss of income. Both news outlets and advocates reported stories of stranded workers.¹²⁴ Second, many visas do not allow the worker to find a new employer and begin working at a new job, leaving them unable to afford to pay for basic necessities while stranded in the United States. And third, most temporary migrant workers are not eligible for the unemployment insurance (UI) benefits that have helped financially support tens of millions of U.S. workers during this pandemic.

In terms of UI, temporary migrant workers are usually not able to collect, because if their visa does not permit them to find a new employer and begin new employment, then under UI laws they are not considered “able to work” and “available for work,” which is part of the requirement that they be seeking employment while collecting UI benefits.¹²⁵ The multiple COVID-19 relief packages passed into law did not include UI benefits for temporary migrant workers or undocumented workers.

The Trump administration failed to take any new measures to protect temporary migrant workers during the pandemic

While hundreds of thousands of temporary migrant workers are employed in occupations deemed essential that put them at high risk of infection with COVID-19, the federal government during the Trump administration did not implement any new mandatory and enforceable health and safety standards to protect workers on the job and compel employers to take additional safety measures and precautions at the workplace. There were numerous calls from worker advocates for the Trump administration to publish new enforceable standards for all workers that are specific to COVID-19, especially in the most impacted industries like meat and poultry processing and agriculture, but they went unheeded.¹²⁶ There’s no doubt that new rules taking into account the needs and vulnerabilities of temporary migrant workers would have made a difference. In a sharp contrast with the Trump administration, on Jan. 21, 2021, President Biden issued an executive order directing the Occupational Safety and Health Administration at DOL to release new guidance to employers on protecting workers from COVID-19 within two

weeks and to consider whether any emergency temporary standards on COVID-19 were necessary.¹²⁷

In terms of occupational health and safety, what the Trump administration did issue was nonmandatory *guidance*, including joint interim guidance from DOL's OSHA and the Centers for Disease Control (CDC) for businesses and employers responding to COVID-19,¹²⁸ as well as for employers and workers in multiple industries where temporary migrant workers are employed, including meat and poultry processing, seafood processing, agriculture, and manufacturing.¹²⁹ OSHA also issued interim guidance for construction work and health care workers and employers,¹³⁰ and the CDC issued interim guidance for health care workers¹³¹ and an information page for construction workers.¹³² In most cases, the OSHA or joint OSHA/CDC interim guidance usually provides a clear disclaimer that it “is not a standard or regulation, and it creates no new legal obligations,” often pointing to the Occupational Safety and Health Act’s requirement that employers must already “comply with safety and health standards and regulations promulgated by OSHA or by a state with an OSHA-approved state plan,” and that “the Act’s General Duty Clause, Section 5(a)(1), requires employers to provide their employees with a workplace free from recognized hazards likely to cause death or serious physical harm.”¹³³

The lack of enforceable new OSHA standards was roundly criticized by workers’ advocates, and in March 2020 the AFL-CIO—the largest trade union federation in the United States, along with a number of individual unions—petitioned OSHA to implement an emergency temporary standard, arguing that it was necessary “to protect working people from occupational exposure to infectious diseases, including COVID-19,” and that “voluntary guidance to the employer community was no substitute for the immediate imposition of mandatory, legally-enforceable, COVID-19-specific duties on employers to protect workers.”¹³⁴ The unions later sued in federal court, seeking to compel OSHA to issue an emergency temporary standard, but the case was dismissed in June 2020.¹³⁵

That lack of action at the federal level to protect workers during the Trump administration stands in stark contrast to the numerous federal actions the administration took—via multiple agencies like DOL, DHS, USDA, and the State Department—to help ensure that temporary migrant workers could continue their employment in the United States, without having to depart, and that new workers could arrive. In other words, the Trump administration facilitated and even expedited the process for hiring temporary migrant workers so they could continue picking crops and producing food and various goods and services that benefit the American public, but refused to order those same agencies to implement measures to keep them safe and healthy. On the first full day that President Biden was in office, his administration took more actions to protect workers from COVID-19 than the Trump administration took or implemented in nearly a year while it was overseeing the response to the pandemic. The Biden administration now has an opportunity to follow through on those initial steps to ensure that the federal government uses every tool at its disposal to keep workers—including temporary migrant workers—safe and healthy in their workplaces.

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