Written Material for EO 12866 Meeting Regarding

RIN-1205-AC05

Adverse Effect Wage Rate Methodology for the Temporary Employment of H2A Nonimmigrants in Non-Range Occupations in the United States

December 14, 2022

The following information supports comments made during an EO 12866 meeting regarding RIN-1205-AC05 with staff from the Office of Information and Regulatory Affairs, Office of Management and Budget and staff from the Department of Labor on December 14, 2022 at 2 p.m. The information shared during the meeting and provided below to support the meeting comments is a collaboration of Michigan's fruit and vegetable industry. Growers participating in the call included Mark Miezio from Cherry Bay Orchards (cherry grower), Katie Vargas from Joe Rasch Orchards (apple grower), Justin Oomen from Crystal Valley Organics (vegetable grower) and Jordon Walsworth from Golden Stock Farms (asparagus grower).

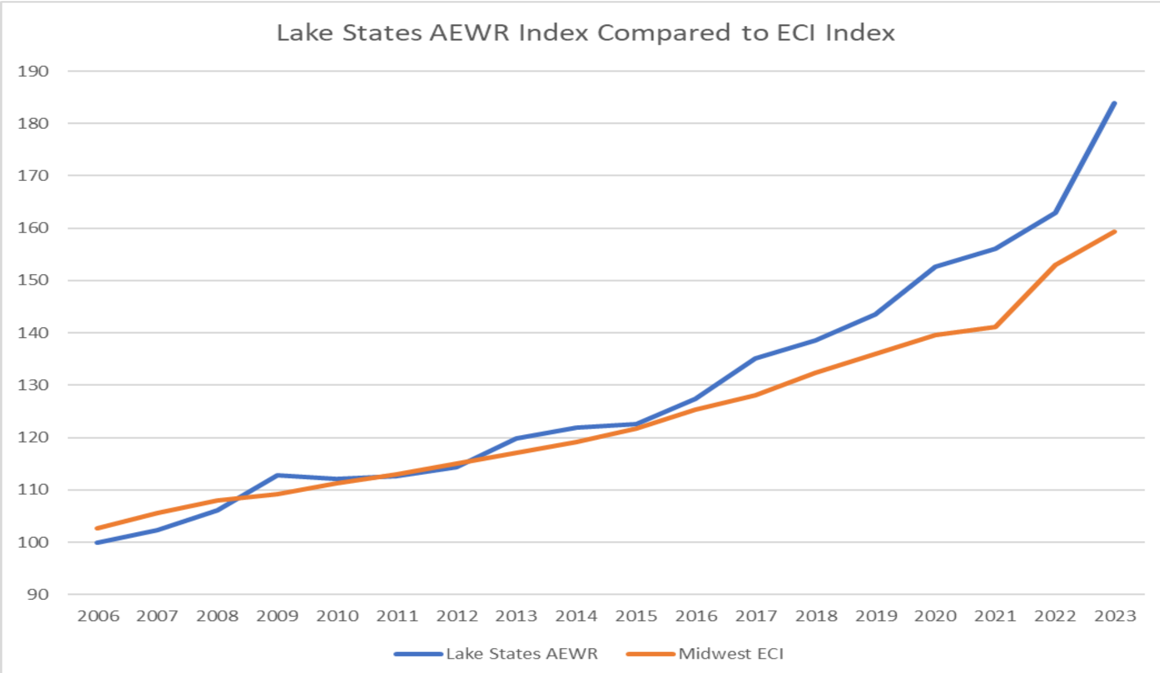
Background

Michigan agriculture is the second most diverse in the United States growing nearly 50 types of fruits and vegetables that go to both the fresh and processed markets. Michigan is home to a multitude of fruit and vegetable packers and processors who rely on domestically grown produce to run their facilities and directly employ thousands of people with annual payrolls of more than $350 million in communities across the state. The total economic impact of fruit and vegetable production in Michigan from the farm to the finished product is nearly $3 billion annually.

Until very recently, most Michigan fruit and vegetable growers utilized local workers and domestic migrant labor. In fact, Michigan's fruit and vegetable industry has relied on domestic migrant labor since the 1930s. Employment of domestic migrant workers peaked in 1964 when approximately 80,000 domestic migrants came to Michigan.[1] Michigan growers began to experience a noticeable decline in domestic migrant workers in the mid- to late- 2000s which led to the use of H2A labor. In FY 2008, 469 H2A certificates were issued for Michigan work locations with that number increasing to 15,524 H2A certificates in FY 2022.[2]

Fiscal Year	MI Certifications Issued	Percent Change From Previous Period
2008	469	
2015	2,226	374.6%
2020	5,773	159.3%
2021	11,376	97.1%
2022	15,524	36.5%

During this same period – FY 2008 - 2022, the Adverse Effect Wage Rate (AEWR) increased 53.5% and will increase another 12.8% in 2023 if the flawed AEWR methodology is not corrected. The significance of the increase in the AEWR between 2008 and 2022 is best viewed when compared to the Midwest Employment Cost Index (ECI). Wages began to diverge beginning around 2017 about the same time Michigan growers began using significantly more H2A labor because of a lack of local workers and traditional domestic migrant workers.



In the ETA-2021-0006 rulemaking currently under OMB review, the Department of Labor (DOL) is proposing to continue using the 2010 methodology to establish the AEWR for field and livestock worker (combined) wages going forward. This is the same method they've used for 30 years – take the USDA Farm Labor Survey and publish it. DOL continues to cling to the 2010 notion that "the relatively higher willingness to pay signaled by farmers who do import foreign workers temporarily under these circumstances (because domestic labor was not immediately forthcoming) may serve to mobilize domestic farm labor in neighboring counties and states to enter the subject labor market over the longer term and obviate the need to rely on importation of foreign labor on an ongoing basis" (75 FR 6899) even though this theory has not panned out. The significant increase in the AEWR over the past decade has not brought new labor to the farm. It is time for DOL to re-examine their underlying assumptions and reassess the current conditions surrounding food production in the United States.

Department of Labor Should Undertake Rigorous Analysis to Determine AEWR Need

Michigan fruit and vegetable growers believe the current method for establishing an AEWR is no longer a reasonable nor appropriate way to meet the Immigration and Nationality Act (INA) requirement that DOL serve the interests of **both** farmworkers and growers. Much has changed in Michigan's fruit and vegetable industry over the past 30 years. We are not unique. Factors that should be considered by DOL when assessing ways to meet the INA requirements include current farm worker migration patterns, food imports from low-wage countries and the existing bias in the Farm Labor Survey (FLS).

The Department assumes its economic analysis from 2009 continues to be relevant thirteen years later despite significant changes in food production for both workers and employers. DOL continues to hold to the notion from the 2010 rule (75 FR 6883, 6899) that "because of the seasonal nature of agricultural work, much of the labor force continues to follow a migratory pattern of work that often encompasses large regions of the country" they must establish an AEWR rather than utilizing the state prevailing or state minimum wage. Mounting evidence suggests that farm workers no longer migrate in the significant numbers they did in the 20th century.

Data from the National Agricultural Worker Survey (NAWS) reveals that 37% of U.S. agricultural workers in the 1989-91 time period were either follow-the-crop migrants or shuttle migrants while 59% were considered settled. Twenty-five years later, only 12% were follow-the-crop migrants and shuttle migrants while 87% were settled. This data does not support DOL's rationale that regional wage data must be used when setting the AEWR given the number of agricultural workers who have settled and are not following a migratory pattern to find work. The shift to settled migrants is even more stark for the Midwest and the situation faced by Michigan growers – 92% of migrants are classified as settled in the 2017-18 NAWS Midwest. Specific data further supporting our assertion that use of regional data is not necessary to meet the statutory requirement that the employment of H2A workers not adversely affect the wages and working conditions of workers in the U.S. similarly employed.

Analysis by Fan et al. (2015)[3] shows that since the late 1990s, the share of agricultural workers who migrate within the U.S. fell by about 60%. Fan and his coauthors discuss the reasons for this decline that include changes in the demographic makeup of the workforce as well as governmental and economic changes in the U.S. and Mexico. Their analysis shows that from 1989 to 1998 – when the theory underpinning use of an AEWR and not a state prevailing or minimum wages began – roughly half of all seasonal crop farm workers migrated at least 75 miles within the U.S. The share of workers who migrate dropped to 17% in 2012.[4] They found that migration rates fell in all areas of the country for most demographic groups. This tracks with the on-the-ground experiences of Michigan growers who have always faced competition for local workers from year-round manufacturing employment opportunities driven by the State's manufacturing base and who began observing migrant labor supplies diminishing in the mid- to late-2000s. DOL repeatedly refers back to the analysis done in 2010 as though it is sufficient justification for its current proposal; however, in the past 12 years there have been considerable shifts in the farm labor market. Simply reverting to the 2010 analysis fails to consider its own updated NAWS survey information and its own H-2A use statistics that both demonstrate local labor shortages that the migrant workforce is no longer filling.

DOL should also examine the impact of imported fruits and vegetables on the economics of domestic food production. Imports from low-wage countries that also grow labor intensive crops limit the wages Michigan growers can offer and still sustain their farms. Over the past 20 years, imports from Mexico as well as Central and South America have increased nearly 500 percent. Wages in these countries are $10-12 per day while the U.S. government will require Michigan growers to pay $17.34 per hour in 2023 plus housing and transportation. Depending on the crop, labor makes up 30-60 percent of grower costs in Michigan fruit and vegetable production. The cost advantage held by low-wage countries holds down grower returns while the AEWR just continues to increase.

These competitors are taking advantage of this continued government-imposed wage escalation. Late last month, USDA revised their estimates for 2023 fruit and vegetable imports upwards adding $500 million and bring the total to $49.1 billion.[5] USDA reports that the largest component of import growth is horticulture products of which fruits and vegetables increases comprise 60 percent. They also note that these increases are due in part to high U.S. production costs. Finally, according to USDA import volumes have increased 15.5 percent since 2019.

In addition, the exponential increase in H2A worker numbers skews the FLS. As the DOL is aware, H2A worker wages are included in the FLS. Including H2A worker wages that are established based on the government-mandated AEWR as part of the survey to determine subsequent AEWR wages violates the basic principle of independent (predictor) variables – the AEWR is a dependent variable and data directly derived from a dependent variable should not be included with the other independent variables (domestic worker wages) to determine the AEWR. As the number of H2A workers increase, including them in the survey skews the data even more, creating a continual upward wage spiral. This is especially felt in local areas where H-2A program use is more prevalent and there is limited competition that may cause a variance in the labor market.

A review of DOL's H2A certification data and Department of State data on visas issued shows that the number of H2A workers for individual employers – a proxy for farm owners who would report H2A workers on the FLS survey – as a percentage of farm workers enumerated in the FLS has increased from 7.5% in 2010 to around 29% in 2020.

	Visas including border crossings	Visas attributed to farm owners	Annual average hired agricultural workers (FLS)	Farm owner visas as a % of annual average hired agricultural workers
2010	55,921	42,500	565,750	**7.5%**
2020	213,394	162,179	558,250	**29.1%**

The data clearly shows that inclusion of H2A worker data in the FLS is biasing the survey results. This impact should be robustly examined.

Finally, DOL's idea that the equilibrium wage can go up and up without consequences is a fallacy. Their narrow and outdated theoretical economic analysis assumes that with the labor shortages in production agriculture, growers can simply increase wages to the equilibrium level to attract U.S. workers. However, as the USDA Economic Research Service pointed out in the 2018 Farm Labor Markets[6] report:

- The farm labor supply in the U.S. is not very responsive to wage changes.
- In the long run, higher wages should induce more people to work in agriculture, but this supply response may be limited if agricultural jobs are perceived as less desirable.
- On the demand side, competition from low-wage countries (imports) that also grow labor-intensive crops limits the wages U.S. growers can offer and still make a profit.

- **When the response of the labor supply is muted and when foreign competition limits the options of growers, growers will observe that raising wages do not draw many more applicants to their farms and fewer growers will be able to remain competitive at even modestly higher wages** (emphasis added).

The DOL's position that simply assumes: (1) H2A workers will always have an adverse effect on U.S. worker wages because of a large influx of labor into a local market and (2) simply establishing a regional AEWR that continually increases is what is needed to meet the requirements of the statute, does not recognize the changing dynamics on-the-ground as the ERS report points out.

Further, DOL's position does not consider that substantial increases in labor costs provide incentives for growers to search for ways to mechanize harvest and eventually switch to less labor-intensive crops driving more of the production of fruit and vegetables to low-wage regions such as Mexico and South America.[7] Such shifts have consequential effects on the ability of growers to produce the current portfolio of fruits and vegetables for U.S. consumers. In fact, DOL's proposal to simply continue with a theoretical wage equilibrium analysis and provide no analysis of an actual adverse effect as they have done since 1987 hurts the very people they purport to protect, ignores its dual mission of ensuring the program also works for U.S. agriculture, and negatively impacts America's food security by increasing the volume of imported fruits and vegetables.

Mark Miezio, President, Cherry Bay Orchards

Cherry Bay Orchards is headquartered in Northwest Michigan. They manage over 5,000 acres of farms along the western edge of the Michigan Fruit Belt from the Michigan-Indiana border and about two hours south of the Mackinaw Bridge. Cherry Bay Orchards is also co-owners in a tart cherry cooperative and have domestic processing facilities throughout the Fruit Belt region.

Most of Cherry Bay's orchards are in rural Leelanau County, where the average home price in November, 2022 was over $750,000. This puts significant pressure on orchards to source a workforce given the lack of affordable housing. Cherry Bay has been involved in the H2A Program since 2013 to help it source the labor it needs petitioning for over 460 workers. Even with the significant increases in the AEWR, during apple harvest, Cherry Bay has had a total of two domestic workers apply and qualify to work on the farm. Of those two, one worked for one day before quitting. The second lasted a week before quitting. Without the H2A program, Cherry Bay would not be able to source the seasonal domestic labor needed to keep the farm operating.

Most of the fruit Cherry Bay grows and processes is further processed into retail products of dried Montmorency cherries, Montmorency concentrate and Montmorency cherry juice. In addition, Cherry Bay has worked to create some nutraceutical powders from tart cherries. That work is produced and sold by Shoreline Fruit, LLC that employs over 110 full time, year-round domestic workers at their U.S. based production facility in Traverse City, Michigan. Without the ability to grow and harvest cherries at the farm level, Cherry Bay would not be able to support the value-added activities at their domestic production facility.

Over Cherry Bay's 10 years utilizing the H2A program, they have seen the AEWR increase from $11.30 to $15.37, a 36% wage increase that doesn't include housing and transportation costs. The proposed increase for 2023 of just under $2 will cause significant financial harm to all their businesses. If the proposed increase moves forward, Cherry Bay would expect to lose an additional $125,000 which is not sustainable. The farms that supply Shoreline must be financially healthy for Shoreline to stay in business. The proposed increase in AEWR for 2023 puts the financial health of both the farms and the domestic production facility at risk.

We appreciate the intention of the H2A program, and the desire by DOL to protect our domestic labor force. However, DOL is putting undo stress on a small specialty crop product that is being inundated with import pressure particularly from Turkey which has significantly depressed prices and the ability of growers to continue to pay the wages the government sets.

<u>Justin Oomen, Owner, Crystal Valley Organics</u>

Justin Oomen spoke on behalf of Crystal Valley Organics and Oomen Farms as well as providing a perspective from his ownership interest in a frozen vegetable processing facility. He is part of the third generation on their family business where he farms with his dad, brother and three cousins. He shared that his children have a passion for the farm and he expects them to continue the family farm business.

His farms grow a variety of vegetables many which are very labor intensive. These include asparagus, asparagus crowns, zucchini, carrots, winter squash, parsnips, and green beans. His operation also grows wheat and corn as rotational crops. His farms supply both organic and conventional vegetables to three fresh pack sheds and six processors.

Because of these labor intensive crops, they utilize more than 100 H2A workers each year to ensure crops are harvested and they are able to stay in business. They have used H2A labor for six years because the harvest window for hand harvested crops is narrow and domestic labor was not consistently available.

In 2017, when his operations started using H2A labor their wage floor was $12.75 per hour plus housing and transportation. If the DOL does not correct the flaws with the current AEWR, his operations will be paying $17.34 per hour plus housing and transportation – a 36% increase in just six years. **Because of foreign competition from low-wage countries, they can't raise their prices and still compete in the marketplace. They simply cannot justify the large increases needed to cover these added labor costs with buyers or with consumers.**

With the 12.8% increase in labor this coming season, his farm will need to make decisions on which hand harvest crops to no longer grow because they aren't profitable with the large wage increase. They will need to switch to row crops which don't include hand labor. These decisions will also have huge ramifications on local processor and suppliers. If his operations don't continue growing these vegetables, the processors and fresh packing sheds they normally supply will face layoffs and shutdowns.

For example, the local, frozen processing facility they supply employs approximately 200 domestic workers and receives product from fifty different local growers. The infrastructure and investment in these plants have been specifically designed for processing fruits and vegetables. If these facilities had to significantly reduce their output or shut their doors, it would have a huge impact on not only the local growers but also the economic well-being of the whole community.

Decisions made on this rule will play a significant role in helping to keep the American food supply domestic and affect West Michigan farmers and the livelihood of farm families, workers at the fresh pack sheds and processing facilities, our communities and future generations.

<u>Katie Vargas, Joe Rasch Orchards (apple grower)</u>

Katie is a sixth-generation apple grower and packer, working alongside her husband and parents. During their peak season, they directly employ approximately 120 people and have utilized the H-2A program for nine seasons. Their farm, and others that she has worked with, went into the H-2A program as the only alternative to closing their farms due to a lack of available labor. She expressed concern that this same program that was the answer to labor availability many years ago will now run their farm into the ground.

With a 12.8% increase in the AEWR for 2023, Joe Rasch Orchards must budget an additional $120,000 to our farm laborer payroll. From 2018 to 2022, the increase was 18%, which means in a matter of five years we are trying to pull an additional $300,000 into our budget that is simply not coming in as prices have not increased for our commodities and in some cases, have dropped. Industry standards for fruit appearance have increased as well, resulting in a greater amount of fruit that is not acceptable for fresh sales and instead sold at low processing/juice prices, or in worst case scenarios, dumped as their farm did as of this writing.

Beyond this, the AEWR has had a demonstrated history of compounding itself and growers can only anticipate that it will continue to rise at same or similar rates. From the years 2009-2013, it increased 6.3%, from 2014-2018, 13.66% and from 2019-2023, 28.06%. This is simply not sustainable and makes growing a perennial, hand-harvest crop like apples unwise for a young couple like Katie and her husband to take in supporting their families and livelihood.

What this means for Katie, is that at best, that they hold off on hiring for additional manager positions and will not have the funds to invest in products to help guarantee their apples meet the fresh standards which would mean more revenue for their operation.

At worst, her succession discussions will become exit strategy discussions in the near future. While growers with annual crops such as vegetables have the option of changing their business to a less labor-intensive alternative such as grain or corn, this likely will not even be an option for apple growers. After planting, apple growers care for the trees for five years before they are in full production, so there is substantial investment in the cost of the trees, planting and caring for them, in addition to the cost that they would incur to actually tear them out of the ground.

To be clear and realistic, if they are forced to take the path of no longer growing apples, the land would likely go to development. As a state, as a country, we would never be able to put this land back into farming – you don't just tear down houses and rip up foundations and, beyond that, expect the land to be as fertile as it once was. We will lose some of our most precious resources – land to be able to cultivate our food, and the generations of knowledge that have been passed down for centuries.

Jordon Walsworth, Golden Stock Farms (asparagus grower)

Jordon is the farm manager for Golden Stock Farms which was started in 1932 in Mears, Michigan by Jordon's great grandfather and is now owned by his mother making her the third generation to farm the area and him the fourth generation. Jordon's grandfather started growing asparagus in 1968 and this coming year will be their 55th growing season. Golden Stock Farms currently has 320 acres of asparagus which will generate approximately 1.5 million pounds of produce sold to both the fresh market and to frozen or canned processing channels.

Golden Stock started utilizing the H2A program in 2018. They only turned to the program as the families that had worked with the farm for many years were reaching an age where they had to retire from field work, most of whom no longer migrate from Texas or Florida. Most of the next generation of these workers have no interest in field work and have chosen a different path through secondary education or other trades. Simply said, Golden Stock moved to the H2A program out of necessity since the traditional migrant workforce is vanishing. The farm started with 15 H2A workers out of 50 total workers in 2018. In 2023, they will have 50 H2A workers out of 55 total workers. This is solely due to the lack of domestic labor.

Fifty-seven percent of harvest costs on his farm come from H2A labor. In addition, H2A labor is also used to get the product packed and ready for the fresh market. The H2A labor portion for the packaging operation run 43-49% of the cost. So, on average the H2A labor portion of the total cost per pound of asparagus to reach the grocery story is roughly 50%. This cost cannot be passed to the consumer as U.S. growers face heavy import pressure from other countries with much lower labor costs, to a point where they cannot compete with pricing. For example at points during the Michigan 7-8 week growing season, Peruvian asparagus is sold to retailers for $1 per pound and in some cases less. With the cost of H-2A labor alone, Michigan growers cannot compete with this price. Grocery retailers end up choosing the margin protection of the imported goods.

This continued increase in the AWER rate will result in farms being lost and acreage being pulled from production. The Mears area relies on agricultural production and asparagus is the first produce to start the processing plants locally in May. The area is fortunate to have four fresh packing operations, two freezer processors and one canning processor local. With the inflated cost of raw asparagus in comparison to market conditions, local jobs at these facilities are threatened. Without product or without product priced at reasonable market values, these facilities will begin to scale back operations resulting in a domino effect for our area. The increased AWER will actually result in domestic jobs being lost at the processing level.

Golden stock is doing everything they can on farm to streamline the rest of the growing process and become as efficient as possible with what inputs they can control. Plainly the proposed AWER will result in a $45,000-$50,000 dollar hit to the bottom line of the operation. This reduces the amount of reinvestment in the farm reducing the number of acres they are able to replant and manage.

It should also be noted that in addition to the AWER rate, growers are responsible for housing, transportation, and utilities for H2A workers. Golden Stock's goal is not to find the cheapest labor or take advantage of the hardworking individuals that help them bring in their asparagus crop. They are looking for ways to keep locally grown asparagus competitive in the marketplace and keep their farm around for as long as the next generations want to continue.

Conclusion

As each of the growers highlighted above clearly pointed out maintaining the AEWR and setting it in the same way DOL has for more than 30 years will negatively impact their operations and others across Michigan. It will also negatively impact packers & processors, their workers and communities across Michigan.

There are two significant issues at stake with this rulemaking. One is mechanical and the other is a policy choice.

DOL's proposal to continue to establish the AEWR for farm and field workers like they have for more than 30 years is not appropriate or reasonable. If they haven't already, they should conduct a robust analysis of their underlying assumptions about the current state of farm labor mobility. DOLs own data shows that while the current methodology may have been appropriate and reasonable 1987, the underlying assumptions are no longer relevant.

Then depending upon the outcome of that analysis, they should adjust the FLS data they receive from USDA to remove the bias from the inclusion of H2A workers in the survey data, examine the impact that state laws requiring overtime pay in some parts of a region have on the data and use available data across the federal government regarding import impacts to establish a wage that reflects the current state of food production in the U.S. and that meets the INA requirement that DOL serve the interests of **both** farmworkers and growers.

The policy choice underlying this rule is straightforward. Will the Biden Administration accelerate the off-shoring of U.S. fruit and vegetable production to low-wage countries? We recommend they do not. The growers highlighted above are like hundreds of growers across Michigan who will be forced to move to crops that require less labor, take some fruit trees out of production or stop growing fruit all together should the Administration opt to stick with the status quo. That choice would significantly change the complexion of food production across Michigan. Many processing and packing facility employees who rely on these jobs live in communities where there are not many other employment options. And American consumers deserve a choice – whether to purchase American grown produce or purchase foreign grown produce.

The impacts of maintaining the status quo will not be an immediate catastrophe but instead will play out over several years. But kicking the can down the road is not an option. The 2023 AEWR will add $28-34 million to grower payrolls across Michigan at a time when food inflation is pushing retail grocery buyers to maintain or lower what they are willing to pay for Michigan produce. Once growers shift their acres to other crops or stop farming, the processors and packers and their workers will be gone and will not come back should policy makers decide in the future they need U.S. grown fruits and vegetables.

Submitted on behalf of Michigan's fruit and vegetable industry by Jamie Clover Adams, Executive Director of the Michigan Asparagus Advisory Board

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[1] Refugio I. Rochin, Anne M. Santiago, and Karla S. Dickey, "Migrant and Seasonal Workers in Michigan's Agriculture: A Study of their Contributions, Characteristics, Needs, and Services," Julian Samora Research Institute at Michigan State University, November 1989.

[2] Calculated from: United States Department of Labor, Employment and Training Administration, Foreign Labor Certification Performance Data. Last Retrieved from DOL website on December 10, 2022 from: https://www.dol.gov/agencies/eta/foreign-labor/performance

[3] Maoyong Fan, et al., "Why Do Fewer Agricultural Workers Migrate Now?", American Journal of Agricultural Economics, 97(3): 665-679, January 2015.

[4] Maoyong Fan and Jeffrey M. Perloff, "Where Did All the Migrant Farm Workers Go?", Institute for Research on Labor and Employment Policy Brief, University of California Berkely, July 2016.

[5] Outlook for U.S. Agricultural Trade: November 2022, AES-122, November 29, 2022, USDA, Economic Research Service and USDA, Foreign Agricultural Service.

[6] Steven Zahniser, et al., "Farm Labor Markets in the United States and Mexico Pose Challenges for U.S. Agriculture," United States Department of Agriculture (USDA), Economic Research Service (ERS), Economic Information Bulletin 201, November 2018.

[7] Timothy J. Richards, "Immigration Reform and Farm Labor Markets," Selected Paper prepared for presentation at the 2018 Agricultural and Applied Economics Association Annual Meeting, May 2018.

Michael P. Brady, et al., "Regional Equilibrium Wage Rate for Hired Farm Workers in the Tree Fruit Industry," Western Economics Forum, Western Agricultural Economics Association, 2016, vol. 15(1), pages 1-12.