

## A LAND OF MILK AND HONEY: DAIRY FARMS, H-2A WORKERS, AND CHANGE ON THE HORIZON

*I've lain awake thinking of you, I'll warrant,  
More than you have yourself, some of these nights.  
The wonder was the tents weren't snatched away  
From over you as you lay in your beds.  
I haven't courage for a risk like that.  
Bless you, of course you're keeping me from work,  
But the thing of it is, I need to be kept.  
There's work enough to do—there's always that;  
But behind's behind. The worst that you can do  
Is set me back a little more behind.  
I shan't catch up in this world, anyway.  
I'd rather you'd not go unless you must.<sup>1</sup>*

### INTRODUCTION

Vermont farms exported more than 40 million dollars in dairy products in 2008.<sup>2</sup> Dairy farms are vital to the Vermont economy, not only in exports, but in creating the bucolic scenery underlying the state's 1.61 billion dollar tourism industry.<sup>3</sup> Traditionally, the Vermont dairy farm is a family-owned and operated business. As milk prices drop, however, the traditional structure has become less economically viable.<sup>4</sup> Whereas Vermont dairy farms numbered over 2,300 in 1992, just over 1,000 dairy farms remain in the state today.<sup>5</sup> As farms increase production—just to keep up—few American workers are willing to do the backbreaking, dawn-to-dusk labor that dairy farming requires.<sup>6</sup>

As farmers face the reality of the decreasing economic viability of small-dairy operations, more and more turn to foreign workers to stay

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1. ROBERT FROST, *A Servant to Servants*, in *THE POETRY OF ROBERT FROST* 67–68 (Edward Connery Latham ed., 1979) (excerpt).

2. U.S. Dep't of Agric. Econ. Research Serv., *Commodity Exports by State Historical (Time-Series) Data for All States and Commodity Groups 1998–2008* (June 2009), available at <http://www.ers.usda.gov/Data/StateExports>.

3. VT. DEP'T OF TOURISM & MKTG., *THE TRAVEL AND TOURISM INDUSTRY IN VERMONT: A BENCHMARK STUDY OF THE ECONOMIC IMPACT OF VISITOR EXPENDITURES ON THE VERMONT ECONOMY* 3 (2007), available at [http://www.vermontpartners.org/pdf/Research\\_Brochure\\_2007.pdf](http://www.vermontpartners.org/pdf/Research_Brochure_2007.pdf).

4. At present, dairy farmers receive approximately 97 cents per gallon of milk, which costs \$1.80 to produce. Press Release, VT Agency of Agric., *Keep Local Farms Program Launched* (Sept. 14, 2009), available at <http://www.vermontagriculture.com/news/2009/KLFLaunch.pdf>.

5. Wilson Ring, *Vermont Dairy Farms Count on Illegal Immigrants*, ASSOCIATED PRESS, May 13, 2009, at 2, available at <http://www.immigrationworksusa.org/uploaded/file/051309Vermontdairyfarmscountonillegalimmigrants.pdf>.

6. *Id.* at 1.

afloat.<sup>7</sup> The present number of foreign workers in Vermont is unknown; however, a recent informal survey estimated that Vermont dairy farms employed at least 2,000 foreign, Hispanic workers.<sup>8</sup> State officials estimate that 1,500 of these workers are undocumented, and therefore in the United States illegally.<sup>9</sup> Given the circumstances that these farms face today, without a supply of foreign labor, dairy farms in Vermont—and nationwide—could simply “dry up.”<sup>10</sup>

U.S. Immigration and Customs Enforcement (ICE)<sup>11</sup> presents a constant fear both for workers (facing deportation and strict limits on any hope to return to the United States), and for the farmers who require a steady supply of reliable labor to keep business running.<sup>12</sup> Though farmers contend that it is often difficult to tell whether immigration documents are legitimate, it is no secret that many farmers rely on illegal labor to maintain the family farm.<sup>13</sup> In November 2009, the threat posed by ICE became a reality when federal agents served subpoenas on dairy farmers in two Vermont counties.<sup>14</sup> This movement by immigration officials brings with it a concern for many farmers that their work force will disappear at a time when dairy farms are already in serious financial trouble.<sup>15</sup>

In spite of problems faced by the farmers and the foreign laborers employed in the dairy industry, dairy farms are largely unable to obtain certified foreign workers in the country under valid visas. Dairy farm workers do not qualify for H-2A agricultural work visas. H-2A visas are nonimmigrant visas designed to bring a foreign labor force for agricultural employers, such as fruit and vegetable growers.<sup>16</sup> Congress expressly

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7. *Id.*

8. *Id.* at 2.

9. *Morning Edition: Vermont Fights for Immigrant Dairy Workers* (NPR radio broadcast Aug. 8, 2009) (transcript on file with National Public Radio), available at <http://www.npr.org/templates/story/story.php?storyID=5626103>.

10. Ring, *supra* note 5, at 1.

11. Immigration and Customs Enforcement is a division of the Department of Homeland Security.

12. Ring, *supra* note 5, at 1–2.

13. *Id.* at 2.

14. Keagan Harsha, *Immigration Agents Raid Vt. Dairy Farms*, WCAX NEWS, Nov. 19, 2009, <http://www.wcax.com/global/story.asp?s=11539962>. Note that the title of this article is somewhat a misnomer: farmers were served with subpoenas to produce valid immigration documents for foreign employees. These subpoenas should be distinguished from a “raid,” which involves a search of the premises by federal agents. See *Leahy to Meet with Homeland Security on Farm Worker Crackdown* (VPR radio broadcast Nov. 20, 2009) (transcript on file with Vermont Public Radio), available at [http://www.vpr.net/news\\_detail/86503](http://www.vpr.net/news_detail/86503).

15. Harsha, *supra* note 14.

16. “Nonimmigrant” visas are visas for workers who do not seek permanent residence in the United States but who are permitted to stay for a short period of time and are expected to leave the country after their visa expires.

identified dairy farms to be within the definition of “agricultural labor,” however, in order to qualify for a visa, the work involved must also be “temporary or seasonal.”<sup>17</sup> Dairy work is year-round in nature and does not meet the temporary or seasonal requirement as presently defined by regulation.<sup>18</sup>

This Note evaluates the present regulatory bar to the employment of H-2A agricultural workers on dairy farms and argues that the current regulations should be reformed immediately to bring dairy farms within the scope of the H-2A program. Part I will discuss the current statutory and regulatory requirements for H-2A visas, as well as the visa certification process, and identify the current provisions that exclude dairy farmers from accessing the foreign labor pool. Part I will also discuss the impact this exclusion has had on dairy farms in Vermont and nationwide. Part II will discuss the Agricultural Jobs Opportunities, Benefits and Securities Act (AgJOBS Act) and the H-2A Improvement Act, which each contain provisions to address the H-2A issue with respect to dairy farms, and explain why such legislation is an insufficient response to the problem. Part III will discuss the possible regulatory changes that could bring a more immediate remedy to the issue, without relying on congressional action, and evaluate the authority under which administrative agencies can effect such change.

## I. THE PROBLEM: IMPLEMENTATION OF THE H-2A PROGRAM

### *A. Background*

The H-2 visa was first established in 1952 with the passage of the Immigration and Nationality Act (INA).<sup>19</sup> The statute was amended in 1986 as part of the Immigration Reform and Control Act (IRCA).<sup>20</sup> The 1986 amendment divided the existing H-2 program into two parts: the newly-created H-2A visa, which applies to agricultural workers, and an H-2B visa, which applies to non-agricultural workers.<sup>21</sup> The purpose of the revised H-

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17. 8 U.S.C. § 1101(a)(15)(H)(ii)(a) (Supp. III 2006).

18. See DHS Special Requirements for Admission, Extension and Maintenance of Status, 8 C.F.R. § 214.2(h)(5)(iv)(A) (2010).

19. Immigration and Nationality Act of 1952, ch. 477, § 1101(a)(15)(H)(ii), 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. § 1101(a)(15)(H)(ii) (Supp. III 2006)). The H-2A visa gets its name from the statutory provision in which it is found—§ 1101(a)(15)(H)(ii)(a) (emphasis added).

20. See § 1101(a)(15)(H)(ii)(a) (Supp. III 2006).

21. Kimi Jackson, *Farmworkers, Nonimmigration Policy, Involuntary Servitude, and a Look at the Shepherding Industry*, 76 CHI.-KENT L. REV. 1271, 1278 (2000).

2A visa was to ensure a sufficient agricultural labor force and, simultaneously, to protect domestic workers from the possible adverse effects of an increased foreign labor force.<sup>22</sup> The general amended provisions of IRCA were also designed to control the employment of undocumented workers by U.S. employers.<sup>23</sup>

Agricultural employers in the United States may request nonimmigrant agricultural workers in order to mitigate a shortage of “able, willing, and qualified” domestic workers available for employment.<sup>24</sup> To hire foreign workers under the H-2A program, an employer must first apply to the Department of Labor (DOL) and certify that the request meets the statutory and regulatory requirements for the visas sought.<sup>25</sup> Once the DOL certifies an employer, the Department of Homeland Security (DHS) (or the agency branch appointed thereby, in this case, the U.S. Customs and Immigration Service (USCIS)) makes a determination whether to approve the employer.<sup>26</sup> Once an employer gains approval, it is then eligible to employ qualified foreign agricultural workers.

To meet the requirements of the labor certification process, an applicant must demonstrate that employment falls within the definition of “agricultural labor,” there are insufficient qualified U.S. workers available for employment, and the employment of nonimmigrant aliens would not adversely impact U.S. workers.<sup>27</sup> The employers must also demonstrate that employment conditions<sup>28</sup> meet the requirements set forth by regulation.<sup>29</sup> In

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22. DHS Temp. Emp’t of Foreign Workers in the U.S., 20 C.F.R. § 655.0 (2010).

23. See Immigration Reform and Control Act of 1986, Pub. L. 99-603, § 101, 100 Stat. 3359 (1986) (codified as amended in scattered sections of 8 U.S.C.).

24. 20 C.F.R. § 655.90(a)(1) (2010).

25. U.S. GEN. ACCOUNTING OFFICE, GAO/PEMD-89-3, THE H-2A PROGRAM: PROTECTIONS FOR U.S. FARMWORKERS 2 (1988), available at <http://archive.gao.gov/t2pbat16/137107.pdf> [hereinafter GAO REPORT 1988].

26. *Id.* Although the GAO Report refers to the authority of the Attorney General, this reference should be understood to refer to the Secretary of Homeland Security. The Homeland Security Act of 2002 abolished the Immigration and Naturalization Service (INS) which held authority delegated by the Department of Justice (under the Attorney General). Since the INS was abolished, “[m]ost references to the AG are automatically understood to refer to the Secretary of Homeland Security where applicable.” Immigration Practice, 2008–2009 Edition § 2-2, (Robert C. Divine & R. Blake Chisam eds., 2008) [hereinafter Immigration Practice]. References to the AG’s authority over the Executive Office of Immigration Review (EOIR) and its subsidiaries should not be understood to reference the Secretary of Homeland Security as the AG retained authority over that office. *Id.*

27. See DHS Special Requirements for Admission, Extension and Maintenance of Status, 8 C.F.R. § 214.2(h)(5)(ii) (2010).

28. *Id.* Here, “employment conditions” refers to requirements for contract, wages, housing, meals, transportation, workers compensation, and other conditions that employers must meet in order to qualify for certification. These requirements are found in scattered sections of 20 C.F.R. (2010).

29. The employment conditions of H-2A workers have been widely criticized in scholarship, and are often described as “modern-day servitude.” Although this is a significant problem in the agricultural

order to fulfill these requirements, the employer must, among other measures, follow recruitment and wage-rate determination procedures established by regulation.<sup>30</sup> The primary purpose of these procedures is to ensure the protection of U.S. workers,<sup>31</sup> which accords with the policy goals behind IRCA.

### *B. Overview of the H-2A Program*

The language of 8 U.S.C. § 1101 identifies a “nonimmigrant” agricultural worker as “an alien . . . having a residence in a foreign country *which he has no intention of abandoning* who is coming temporarily to the United States to perform agricultural labor or services . . . of a *temporary or seasonal* nature.”<sup>32</sup> Section 1101 authorizes the Secretary of Labor to define “agricultural labor or services” by regulation, but requires that any such definition include the definitions of “agricultural labor” and “agriculture” furnished by 26 U.S.C. § 3121(g) and 29 U.S.C. § 203(f), respectively.<sup>33</sup> In other words, any definition created by the DOL must be made *in addition to* the definitions provided in these statutory provisions.

Under 26 U.S.C. § 3121(g), the term “agricultural labor” includes work on farms operated for profit, and the term “farm” includes “stock, *dairy*, poultry, fruit, [and] fur-bearing animal. . . .”<sup>34</sup> Under 29 U.S.C. 203(f), “[a]griculture” includes farming in all its branches and among other things includes . . . dairying.<sup>35</sup> Dairy farms are thus explicitly included within the statutory definitions of agricultural labor and agriculture referred to in § 1101. This section does not, however, furnish a definition of terms for the “temporary or seasonal” requirement within the statute; instead, these terms are among those left for DHS to define by regulation.<sup>36</sup>

DHS defined “temporary or seasonal” by regulation in 8 C.F.R. § 214.2. According to this provision, employment is temporary “where the employer’s need to fill the position with a temporary worker will, except in extraordinary circumstances, last no longer than one year.”<sup>37</sup> Dairy farmers are thus excluded because the regulation defines “temporary” in relation to

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immigration context, this paper does not reach this subject. For a detailed discussion of these problems see Lisa Guerra, *Modern-Day Servitude: A Look at the H-2A Program’s Purposes, Regulations and Realities*, 29 VT. L. REV. 185 (2004).

30. Criteria for Certification, 20 C.F.R. § 655.161 (2010).

31. GAO REPORT 1988, *supra* note 25, at 12.

32. 8 U.S.C. § 1101(a)(15)(H)(ii)(a) (2006) (emphasis added).

33. *Id.*

34. 26 U.S.C. § 3121(g)(5) (2006) (emphasis added).

35. 29 U.S.C. § 203(f) (2006).

36. 8 C.F.R. § 214.2(h)(5)(iv)(A) (2010).

37. *Id.*

the *employer's need*, as opposed to the individual employee's expectation of continued employment. In the case of dairy farms, the employer's need for reliable labor has no end in sight—farmers need workers for as long as the farm is in operation.

Employment is seasonal “where it is tied to a certain time of year by an event or pattern.”<sup>38</sup> The rule cites short growing cycles or a specific aspect of a longer cycle as examples of seasonal work. As previously noted, dairy work is a year-round enterprise. Occasionally, dairy farmers have brought in dairy workers as seasonal “livestock” or “grain” workers.<sup>39</sup> Though helpful to some, this is the rare case. The available labor is short-lived and still leaves farmers with a labor shortage at the end of the summer months. In other contexts, advocates have argued that dairy work *is* in fact seasonal because “milk production slacks in summer months,” and temporary because “no guarantees of employment existed.”<sup>40</sup> Based on the limited case law on the subject, these arguments have not been accepted.<sup>41</sup>

The present interpretation of “temporary” found within the text of § 214.2 is not problematic in the aggregate context of non-dairy agricultural workers nationwide. The regulation seems to reflect the purposes behind the creation of the H-2A agricultural work visa and is not manifestly incongruent with the language of the underlying provisions found in § 1101. Despite Congress's explicit inclusion of dairy workers within the definition of “agricultural” and “agricultural work” however, the regulations still problematically exclude dairy employers from qualification.

### C. Impact of Exclusion on the Dairy Industry

The exclusion of dairy workers, viewed in the context of the struggling dairy farms in Vermont and across the nation, fails to carry out the primary goals of the H-2A program with respect to that group. Under the present regulatory interpretation, the administration of the H-2A program does not ensure a sufficient labor force, and by virtue of the lack of willing domestic workers, does nothing to protect U.S. jobs. Ultimately, this regulation

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38. *Id.*

39. Jill Harrison et al., Briefing Paper No. 5, *Legal Issues Facing Immigrant Dairy Workers in Wisconsin 2*, in *Changing Hands: Hired Labor on Wisconsin Dairy Farms*, UNIV. OF WISC. MADISON PROGRAM ON AGRIC. TECH. STUD. (2009).

40. *Alvarado v. Nederend*, 2009 WL 506484, 3–4 (E.D. Cal. 2009) (internal citations omitted).

41. In fact, the court in *Alvarado* required the proponent to restate the claim because the opposing party challenged it on the basis of Federal Rule of Civil Procedure 11. A challenge under Rule 11, of course, suggests that the defendant viewed the plaintiff's characterization of dairy work as “seasonal” and “temporary” to be factually unsupported. *Id.* at 4; FED. R. CIV. P. 11.

contributes to the trend of illegal employment of agricultural workers, which directly conflicts with the purpose of IRCA.

To meet the requirements for certification by the DOL, an employer must demonstrate that there are insufficient qualified U.S. workers and that employment of H-2A workers would not have an adverse impact on domestic wages or conditions.<sup>42</sup> Employers must actively recruit U.S. workers by means of advertisement and outreach to local organizations.<sup>43</sup> Employers are also required to pay agricultural employees the Adverse Effect Wage Rate (AEWR).<sup>44</sup> AEWRs are an amount equal to “the annual weighted average hourly wage for field and livestock workers” or the higher prevailing wage rates in the region.<sup>45</sup> Unless an employer demonstrates that it meets these requirements and is still unable to hire U.S. workers, the DOL will not certify the employer’s application.<sup>46</sup>

Recent trends show that dairy farmers have faced great difficulty trying to hire domestic laborers on their farms. Since 2000, the number of farms employing foreign laborers has dramatically increased.<sup>47</sup> Even in the midst of a recession, while many Americans are struggling to find work, farmers say they are unable to find local workers willing to work on the farms.<sup>48</sup> Many attribute this problem to unwillingness to work the long hours required, often in conditions of extreme heat and cold.<sup>49</sup> Farmers say that when domestic workers do come to farms in search of work, they lose interest upon hearing what the job would entail.<sup>50</sup> Farmers find that foreign laborers *are* willing to do the work required and bring to it an excellent work ethic.<sup>51</sup>

In 2009, 40% of dairy laborers in the United States were immigrant workers, yet one-fifth of farmers still expected a shortage of laborers for the

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42. 8 C.F.R. § 214.2(h)(5)(ii) (2010).

43. 20 C.F.R. § 655.103(b) (2010).

44. *Id.*

45. *Id.*

46. *Id.*

47. THOMAS R. MALONEY & DAVID C. GRUSENMEYER, CORNELL UNIV., DEP’T OF APPLIED ECON. & MGMT., SURVEY OF HISPANIC DAIRY WORKERS IN NEW YORK STATE 1 (2005), available at [http://dyson.cornell.edu/research/researchpdf/rb/2005/Cornell\\_Dyson\\_rb0502.pdf](http://dyson.cornell.edu/research/researchpdf/rb/2005/Cornell_Dyson_rb0502.pdf). This report specifically pertains to dairy farms in New York, however, this trend is visible throughout other U.S. dairy states. See, e.g., Harrison et al., *supra* note 39, at 1; Harsha, *supra* note 14, at 1; Thomas Quaipe, *Without Immigrant Workers, Who Will Milk the Cows?*, DAIRY HERD MGMT., Aug. 1, 2006, <http://www.dairyherd.com/dairy-herd/features/without-immigrant-workers-who-will-milk-the-cows-114045754.html>.

48. Telephone Interview with Thomas Maloney, Senior Extension Associate, Dep’t of Applied Econ. and Mgmt., Cornell Univ. (Nov. 30, 2009).

49. Miriam Jordan, *Got Workers? Dairy Farms Run Low on Labor*, WALL ST. J., Jul. 30, 2009, <http://online.wsj.com/article/SB124890678343891639.html>.

50. *Id.*

51. *Id.*

year.<sup>52</sup> Losing this supply of foreign labor would incapacitate the dairy industry.<sup>53</sup> The recent crackdown by federal agents adds to the growing concern that workers—even those in the country legally—will be in constant fear of farm raids, and will move on to work in other industries.<sup>54</sup> This is the same fear that caused the DOL to add special provisions allowing sheepherders to gain access to H-2A visas in the 1980s, despite the year-round nature of the work.<sup>55</sup>

As illustrated by the current trend in Vermont, such a shortage of workers results in increased employment of undocumented workers, thus defeating a primary purpose of IRCA. Without access to legal sources of foreign labor, increased enforcement measures by federal immigration agents will have a severe impact on the operation of dairy farms. For dairy farms in Vermont—and across the country—continued exclusion from the H-2A program will ultimately contribute to the extinction of the American small dairy operation known today and may also have a significant impact on large dairy operations.

The possible means to address the limitations faced by dairy farm employers seeking to employ H-2A workers are few. The first possibility is for Congress to make an explicit statutory provision allowing dairy farmers to employ H-2A workers. The second option is to amend the regulatory definitions of “temporary or seasonal” to bring dairy work into the scope of those provisions. A third alternative is to create a special exception for dairy workers in a manner similar to the exception currently provided for H-2A employment of sheepherders.<sup>56</sup> Although congressional action by statutory amendment is perhaps the most secure of these options, it may also be the most inefficient and inflexible manner of addressing the issue, particularly in light of the recent increase in federal enforcement, which calls for a more immediate change.

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52. *Id.* It is worth noting that some immigrants working on dairy farms may be in the United States on a valid, non-H-2A visa, and thus not everyone in the foreign labor pool available to dairy farmers is undocumented.

53. Ring, *supra* note 5, at 1; Kristin Carlson, *Foreigners on the Farm: Vt.'s Reliance on Immigrant Workers*, WCAX NEWS, Nov. 19, 2009, at 1, available at <http://www.wcax.com/global/story.asp?s=11540589>.

54. Harsha, *supra* note 14, at 1.

55. U.S. DEP'T. OF LABOR, FIELD MEMORANDUM No. 24-01, SPECIAL PROCEDURES: LABOR CERTIFICATION FOR SHEEPHERDERS AND GOATHERDERS UNDER THE H-2A PROGRAM 1 (2000), available at [http://www.foreignlaborcert.doleta.gov/fm/fm\\_24-01.htm](http://www.foreignlaborcert.doleta.gov/fm/fm_24-01.htm) [hereinafter DOL FIELD MEMO. 2000]. The exception for sheepherders is discussed in greater depth in Part III.

56. See 20 C.F.R. § 655.102 (2010) (acknowledging special procedures for the handling of applications for variances for sheepherders in the Western States).



## II. A STATUTORY APPROACH: PROPOSED LEGISLATION

*A. The AgJobs Act*

In May 2009, Representative Howard Berman (D-CA) introduced the Agricultural Jobs Opportunities, Benefits and Securities Act (AgJOBS Act) to Congress.<sup>57</sup> Representative Berman, with various co-sponsors, had previously introduced the AgJOBS Act in 2003, 2005, and 2007.<sup>58</sup> Each year, the bill faced opposition from anti-immigration groups as well as from H-2A contractors seeking to avoid any expansion of worker rights created under the bill, and each year Congress has adjourned without passing the Act.<sup>59</sup>

As it was introduced in 2009, the AgJOBS Act included a provision that would ameliorate the problematic exclusion of dairy workers from the H-2A visa program.<sup>60</sup> The proposed statute contains an exception under which dairy workers would be admitted to the United States for an initial period of one year, which may be extended for a period of up to three years.<sup>61</sup> This is the same time period allowed for present agricultural workers under H-2A, but the dairy exception would not be restricted by a requirement that an individual employer's need last no longer than one year.<sup>62</sup> Further, dairy workers would not be subject to limitations requiring a leave of absence from the United States between periods of employment, as required under present regulations.<sup>63</sup>

Prior to congressional adjournment in 2008, United Farm Workers<sup>64</sup> and major agribusiness accepted changes to the legislation following negotiations with the Senate and White House, as well as former Secretary of Homeland Security, Michael Chertoff, and former Secretary of Commerce, Carlos Gutierrez.<sup>65</sup> The bill was not passed in 2008, but

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57. AgJOBS Act of 2009, H.R. 2414, 111th Cong. § 201 (2010).

58. Farmworker Justice, *History of AgJobs*,

<http://www.fwjjustice.org/component/content/article/41agjobs/101-history-of-agjobs> (last visited Jan. 15, 2011).

59. Farmworker Justice, *AgJOBS in the 108th Congress (2003–2004)*, <http://www.fwjjustice.org/108th-congress-2003-2004> (last visited Jan. 14, 2011).

60. AgJOBS Act of 2009, H.R. 2414, 111th Cong., § 218B (2010).

61. *Id.*

62. *Id.*

63. *Id.*

64. United Farm Workers is a farm workers union. See UNITED FARM WORKERS, <http://www.ufw.org/> (last visited Mar. 2, 2011).

65. Farmworker Justice, *AgJOBS in the 110th Congress (2007–2008)*, <http://fwjjustice.org/110th->

proponents viewed successful negotiations as a positive sign. Similarly, the 111th Congress did not pass the bill, and although Representative Berman “remain[s] committed to passing AgJOBS,”<sup>66</sup> the Act has not yet been reintroduced in the 112th Congress. Recent reports indicate that Representative Berman plans to reintroduce the bill, but it is unclear whether and how the bill will differ from the 2009 version.<sup>67</sup> Considering the historic opposition that has defeated the AgJOBS Act in past years, it is not difficult to foresee the outcome in the 112th Congress if the bill is reintroduced, given the presence of continued anti-immigrant hysteria.

### *B. The H-2A Improvement Act*

In response to the slow pace of the passage of the AgJOBS Act, Senator Patrick Leahy (D-VT) introduced the H-2A Improvement Act on September 28, 2010.<sup>68</sup> Senator Leahy made it clear that he “remain[s] in complete support of the more comprehensive AgJOBS legislation,”<sup>69</sup> but introduced the H-2A Improvement Act to address the immediate needs of the Vermont dairy industry. The Act would amend § 1101(a)(15)(H)(ii)(a) by inserting “who is coming temporarily to the United States to perform agricultural labor or services as a dairy worker, shepherd, or goat herder” after the word “abandoning.”<sup>70</sup> Under this Act, an alien coming to the United States as a dairy worker would be admitted for a period of three years which could then be “extended for an additional period of up to 3 years.”<sup>71</sup> The language of the Act would specify that dairy was not subject to the “temporary or seasonal” requirement.

Following the February 11, 2010 rulemaking of the DOL, discussed in more detail below, which formally denied dairy farms a place within the H-2A framework, the Act seems to be the next logical step in the effort to help the dairy industry in a time of immediate need. However, the Act contains some provisions that are sure to cause opposition, and passage of the Act is sure to be labored—assuming that it makes any progress. First, the Act’s

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congress-2007-2008 (last visited Jan. 14, 2011).

66. *Id.*

67. U.S. CONFERENCE OF CATHOLIC BISHOPS GOV’T RELATIONS, WEEKLY UPDATE ON IMMIGRATION AND REFUGEE LEGISLATIVE MATTERS 112<sup>TH</sup> CONGRESS, FIRST SESSION 149 (Feb. 21, 2011) available at [http://www.micevhill.com/attachments/immigration\\_documents/hosted\\_documents/112th\\_congress/weekly\\_legislative\\_updates/WLU022111.pdf](http://www.micevhill.com/attachments/immigration_documents/hosted_documents/112th_congress/weekly_legislative_updates/WLU022111.pdf).

68. S. 3858, 111th Cong. (2010), available at <http://thomas.loc.gov/cgi-bin/query/z?c111:S.3858.IS.>

69. Press Release, Senator Patrick Leahy, Leahy, Gillibrand Offer to Give Dairy Workers Access to Visa Program (Sept. 28, 2010), available at [http://leahy.senate.gov/press/press\\_releases/release/?id=bb742dad-6e0b-4628-b08d-361620ff7571](http://leahy.senate.gov/press/press_releases/release/?id=bb742dad-6e0b-4628-b08d-361620ff7571).

70. S. 3858, 111th Cong. (2010), available at <http://thomas.loc.gov/cgi-bin/query/z?c111:S.3858.IS.>

71. *Id.*

initial three-year time period up to a possible six-year work period will be a point of contention, especially given the fact that this is far more than is granted to current H-2A workers who do meet the “temporary and seasonal” requirement. Additionally, the Act exempts dairy, sheepherders, and goat herders from the labor certification process.<sup>72</sup> This will eliminate the “checks” created by the certification process to ensure that the jobs of U.S. workers will not be negatively affected by farmers’ access to the foreign labor pool.

Comprehensive reform under the AgJOBS Act or the more specific changes under the H-2A Improvement Act could bring consistent legal nonimmigrant foreign labor to dairy farms across the country. Both acts bring dairy workers within the scope of H-2A visas, which could alleviate the current labor shortages faced in Vermont and other dairy states. Achieving change through statutory reform is a cumbersome process, and one that is difficult to predict. As noted by Senator Leahy, legislation on the issue could take a long time.<sup>73</sup> Given the present statutory language including dairy farms, which are then inexplicably excluded under regulatory definitions—it is still more expedient to amend the governing regulatory provisions in order to “take care of the situation today.”<sup>74</sup>

### III. A REGULATORY APPROACH: REDEFINITION OR EXCEPTION

Regulatory amendment is the most efficient means by which to reform the H-2A visa program to include dairy workers. First, the regulatory definition of “temporary” might be changed in such a way that dairy farmers would no longer fall outside the scope of § 1101. Second, given the unusual circumstances of the hard, year-round labor required of dairy workers and the current labor shortage, the DOL could create an explicit exception that would establish a separate certification process for dairy workers akin to that currently provided for sheepherders.<sup>75</sup>

Congress delegated broad authority to issue regulations with respect to immigration and nationality laws, including issuance of visas, to DHS under 6 U.S.C. § 236(b)(1).<sup>76</sup> This grant of authority enables DHS to “fill in the gaps” with respect to H-2A certification through regulation. Therefore,

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72. *Id.*

73. Carlson, *supra* note 53.

74. *Id.* (quoting Senator Leahy). Leahy and the judiciary committee met with the Secretary of Homeland Security in December 2009, “to push for an immediate rule change.” *Id.*

75. See 20 C.F.R. § 655.102 (2010) (stating that the Office of Foreign Labor Certification has authority to establish special procedures for processing certain H-2A applications, including procedures for handling applications of sheepherders).

76. 6 U.S.C. § 236(b)(1) (2006).

it is within the authority of DHS to define “temporary or seasonal” with respect to H-2A visas. DHS has, in turn, delegated the authority over H-2A visa certification to USCIS.<sup>77</sup>

If the problem faced by dairy farms is to be addressed by amending the regulations, these changes must be consistent with the authority granted to DHS and DOL by statute. In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,<sup>78</sup> the Supreme Court provided a two-prong inquiry to test the validity of an agency regulation promulgated under congressionally delegated administrative authority.<sup>79</sup> The first prong is to determine “whether Congress has directly spoken to the precise question at issue.”<sup>80</sup> If congressional intent is clear, the inquiry need go no further. If the statute is ambiguous, the second inquiry under *Chevron* “is whether the agency’s answer is based on a permissible construction of the statute.”<sup>81</sup> The *Chevron* test thus provides a guideline to evaluate the validity of an amendment proposed to address the H-2A “temporary” pitfall.

#### *A. Changing the Definition of “Temporary or Seasonal” to Include Dairy Workers*

As discussed above, Congress requires that H-2A agricultural employment be of a “temporary or seasonal” nature.<sup>82</sup> Congress provided no definition for “temporary or seasonal,” and thus left agencies to define these terms by regulation. Dairy work is a year-round enterprise, and it is unlikely that it could be defined as employment that is “seasonal in nature.” The more likely approach is to modify the definition of “temporary” to encompass dairy farm employment.

A regulatory interpretation that would change the current meaning of temporary work to include dairy farm workers is consistent with congressional intent under a *Chevron* analysis. If challenged—for example, by a domestic worker who was denied labor at a dairy farm which hired foreign workers<sup>83</sup>—a reviewing court would likely find the regulatory change

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77. See 8 U.S.C. § 1202(c), (d) (2006) (outlining the general admission procedures for nonimmigrants); DHS Introduction, 8 C.F.R. § 100.1 (2009) (delegating authority from DHS to USCIS); 8 C.F.R. § 214.2(h)(5) (2010) (describing USCIS H-2A visa petition procedures); DHS Special Requirements of Admission, Extension, and Maintenance of Status, 8 C.F.R. § 214.2(h)(5)(ii) (2010) (describing the effect of the labor certification process).

78. *Chevron U.S.A. Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837 (1984).

79. See *id.* See also *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988); *N.L.R.B. v. Food & Commercial Workers*, 484 U.S. 112, 123 (1987) (employing the two-pronged inquiry).

80. *Chevron*, 467 U.S. at 842.

81. *Id.* at 843.

82. 8 U.S.C. § 1101(a)(15)(H)(ii)(a) (Supp. III 2006).

83. Of course, such a challenge would depend upon whether such a worker has standing to

valid. As discussed above, *Chevron* provides the analytical framework for determining the validity of regulations promulgated under § 1101. This regulation does not implicate the first-prong of *Chevron* because Congress did not provide a definition for “temporary” work, and thus has not addressed the precise question at issue.<sup>84</sup> Instead, Congress endowed DHS with the authority to define the term. Thus, the second prong of the *Chevron* inquiry is triggered.

The *Chevron* Court stated that an agency interpretation should be given deference unless the interpretation is contrary to congressional intent.<sup>85</sup> In other words, courts “should not disturb [the interpretation] unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.”<sup>86</sup> In this case, the proposed regulation directly corresponds with congressional intent as expressed within the statute and with the purposes illustrated by its legislative history.

Instead of the current definition, which sets a firm one-year limit to the employer’s need for foreign labor, the term should be defined more flexibly. An amended regulation might define agricultural work to be of a temporary nature where the nonimmigrant employee provides agricultural labor or services for a period not to extend beyond a certain amount of time, perhaps years, at the end of which the alien would leave the United States, presumably to return to the country of residence. Alternatively, rather than changing the language altogether, DHS could simply employ similar language as a secondary definition where a focus on the employer’s need falls short in supplying a sufficient labor force.

The language of § 1101 provides striking evidence that Congress would sanction a regulation defining temporary in the manner suggested above. First, § 1101 refers to multiple categories of nonimmigrant aliens to exclude those categories from the definition of “immigrant” aliens. Section 1101(a)(15) provides, in pertinent part, that “the term ‘immigrant’ means every alien except an alien who is within one of the following classes of nonimmigrant aliens . . . [including under subsection] (H) an alien . . . (ii)(a) having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform agricultural labor or services.”<sup>87</sup>

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bring suit. Standing is possible if a domestic worker became available and sought employment within the first half of the foreign worker’s labor contract under the “fifty percent rule,” discussed below.

84. § 1101(a)(15)(H)(ii)(a); *Chevron*, 467 U.S. at 842.

85. *Chevron*, 467 U.S. at 843.

86. *Id.* at 845 (quoting *United States v. Shimer*, 367 U.S. 374, 382–83 (1961)).

87. § 1101(a)(15)(H)(ii)(a).

That Congress requires the alien to have no intention to abandon his or her country of residence in order to qualify for an H-2A visa suggests that DHS could provide for a broader definition of “temporary,” as long as the worker ultimately returns to the home country. Furthermore, § 1101 requires that a nonimmigrant H-2A worker must be an alien coming to the United States temporarily to perform agricultural labor.<sup>88</sup> Taken together, this language implies that the relevant measure of “temporary” should be the *alien’s* expected duration of employment in the United States, as opposed to the employer’s need for labor. DHS could thus redefine “temporary” in a manner that shifts the focus of the temporal requirement from the employer’s need to fill the position, to instead look to the individual employee’s expectation of continued employment on the farm, and in the United States.

Second, Congress conveyed authority to the DOL to define “agriculture” and “agricultural labor,” and explicitly required that the definitions of those terms contained in existing statutes be included within the DOL definitions.<sup>89</sup> In both instances, the provisions referred to expressly include “dairy” and “dairying” within the scope of “agricultural labor” and “agriculture.”<sup>90</sup> This language reflects Congress’s intent that dairy farms were to be included in the scope of any regulation promulgated under § 1101. Thus, amending the regulations to bring dairy farmers within the scope of the rules is in fact *more* aligned with congressional intent as expressed in § 1101.

The purpose of the H-2A program and IRCA, as evidenced by the legislative history, is “to assure agricultural employers an adequate labor force while at the same time protecting the jobs of U.S. workers.”<sup>91</sup> The statutory provisions addressing the H-2A program were amended by IRCA to allow responsible agencies the ability to better assert control over the employment of undocumented workers.<sup>92</sup> The proposed regulatory change is in line with the purposes as expressed by the language of the statute and illustrated in the recent legislative history of § 1101.

Shifting the focus of the “temporary” requirement to the foreign employee’s expectation of continued employment would be consistent with the purpose behind both the H-2A program and IRCA. Under the existing regulations, the DOL can grant a nonimmigrant alien working under an H-2A visa an extension of stay of up to three years as long as each employer is first certified to hire H-2A workers, which, as explained above, excludes dairy

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88. *Id.*

89. *Id.*

90. See 26 U.S.C. § 3121(g)(5) (2006); 20 U.S.C. § 203(f) (2006).

91. GAO REPORT 1988, *supra* note 25, at 12.

92. See Immigration Reform and Control Act of 1986, Pub. L. 99-603, § 101, 100 Stat. 3359 (1986) (codified as amended in scattered sections of 8 U.S.C.); GAO REPORT 1988, *supra* note 25, at 2.

workers.<sup>93</sup> As the regulation stands, a nonimmigrant agricultural worker might work for several employers—ostensibly within the same vicinity—for a period of up to three years as a seasonal or temporary worker.

If the “temporary” requirement is aimed to reduce the risk that nonimmigrant aliens would become settled if permitted to remain in the United States, and eventually overstay their visa, the extension to stay provision in the same regulation already seems to defeat this purpose. As long as the individual worker has residence in a country that he has no intention of abandoning and leaves the United States within the time allotted by regulation, the “temporary” requirement would still fall within the statutory guidelines provided by Congress. Given the existing three-year cap on a nonimmigrant agricultural worker’s stay in the United States, a valid regulation might define work of a “temporary nature” instead by a limited expectation of continued employment. A nonimmigrant alien might be issued a one-year visa permitting them to remain at a place of employment for up to three years if an extension is requested and granted.

The extension described above is already a possibility for employees working on farms that meet the current “seasonal or temporary” requirement. Further, if such employment could continue on the premises of a single employer, such a provision might benefit the immigration system by making it easier to track nonimmigrant aliens who arrive on a temporary basis. A change in regulatory language would bring dairy farms into the scope of the rule without undermining the purpose of the rule or the underlying statute.

Under the present regulations, employers are required to implement a “fifty percent rule,” whereby an employer must provide employment for a qualified U.S. worker, if one becomes available, up until 50% of the nonimmigrant’s work contract has elapsed.<sup>94</sup> The purpose of this requirement is to protect U.S. workers from adverse impacts caused by an increase in foreign labor. If the term “temporary” was amended to allow for an initial period of employment with a three-year extension maximum, the fifty percent rule would still operate for up to six months of the initial employment contract. This change would serve the statutory purpose of protecting U.S. workers from adverse effects caused by the employment of H-2A workers.<sup>95</sup> The fifty percent rule is an accepted method of providing assurances against

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93. DHS Special Requirements for Admission, Extension, and Maintenance of Status, 8 C.F.R. § 214.2(h)(15)(ii)(C) (2009).

94. Assurances and Obligations of H-2A Employers, 20 C.F.R. § 655.135 (d) (2010).

95. The fifty percent rule is not the only means to provide assurances that U.S. jobs would be protected. Other assurances outlined by regulation could remain intact under the amended regulation. These assurances are discussed below in more detail, in relation to creating a special exception for dairy farmers.

adverse effects, and the rule would serve the same purpose under amended regulations.

Although a shift of focus on the definition of “temporary” from the employer’s need to a foreign worker’s expectation of continued employment would be permissible under *Chevron* and serve the purposes of the H-2A program, DHS issued a Memorandum Opinion reaffirming the present definition of “temporary” in the context of H-2B nonagricultural visa certification as recently as December 2008.<sup>96</sup> The memorandum asserts that work of a “temporary nature” must be restricted to a limited period of time, focusing on the employer’s need.<sup>97</sup> The memorandum cited *Motor Vehicle Manufacturers Association v. State Farm Mutual Auto Insurance Co.* for the proposition that “regulatory agencies do not establish rules of conduct to last forever . . . and . . . must be given ample latitude to adapt their rules and policies to the demands of changing circumstances.”<sup>98</sup> Though this memorandum was issued under the previous administration, the interpretation holds true until the agency issues a contrary opinion.

On February 11, 2010, DOL issued its final rules regarding the treatment of dairy under the “temporary or seasonal” requirement. In refusing to include dairy within the H-2A program, the Department concluded that it “has no legal authority, nor . . . legislative precedent, that would allow for the inclusion of the . . . dairy industry in the H-2A program.”<sup>99</sup> This language highlights the Department’s willingness to overlook the express language of § 1101, where Congress purposefully included dairy.

Given DHS’s present stance on the “temporary” requirements and DOL’s unwillingness to certify temporary or seasonal workers for the dairy industry, the most feasible approach to alleviating the shortage of dairy workers via issuance of H-2A visas is to create an exception under the authority of the DOL. The present regulatory scheme presents an apt model for such an exception, which was created for the benefit of the shepherding industry.<sup>100</sup> Although the February 11, 2010 rulemaking addresses such an exception, stating that Congress has not provided similar “legislative

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96. DEP’T OF HOMELAND SEC., MEMORANDUM OPINION FOR THE ACTING GENERAL COUNSEL DEP’T OF HOMELAND SECURITY, MEANING OF “TEMPORARY” WORK UNDER 8 U.S.C. § 1101(A)(15)(H)(II)(B) (Dec. 18, 2008), available at <http://www.justice.gov/olc/2008/dhs-temp-worker.pdf>.

97. *Id.* at 2–3.

98. *Id.* at 4 (quoting *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) (citations omitted)).

99. Temporary Agricultural Employment of H-2A Aliens in the United States, Discussion of Comments Received for 20 C.F.R. § 655 Final Rule, 75 Fed. Reg. 6884, 6891 (Feb. 12, 2010), [hereinafter Discussion of Comments for 20 C.F.R. § 655] available at <http://edocket.access.gpo.gov/2010/pdf/2010-2731.pdf>.

100. Special Procedures, 20 C.F.R. § 655.102 (2010).



inclusion of the dairy industry,”<sup>101</sup> the language of § 1101 shows otherwise, and the DOL must carry out Congress’s intent in fulfilling its regulatory function. Based on the plain language of § 1101, the DOL must reexamine the application of the H-2A program to the dairy industry, and *is* endowed with the authority to create an exception for dairy workers similar to that for shepherders.

### *B. Extending the Shepherd Exception to Dairy Farms*

Federal regulations governing the employment of agricultural workers cannot address every situation for which issuing H-2A visas would be a valid exercise of regulatory authority pursuant to § 1101, nor could they provide for every agricultural industry with a legitimate shortage of willing U.S. laborers. The present regulations allow for special certification procedures to be implemented where unusual circumstances so require.<sup>102</sup> The regulations provide for special procedures with respect to the employment of foreign workers as shepherders.<sup>103</sup> Shepherding and dairy farms carry substantial similarities with respect to their labor requirements, which will be discussed in more detail below. Consequently, the exception for shepherders is particularly instructive in evaluating the feasibility of a similar special procedure for the employment of foreign laborers on dairy farms.

The shortage of labor in both the shepherding and dairy industries can be primarily attributed to the difficulties of the respective jobs. Farm work is dangerous and “physically demanding, requiring repetitive tasks while stooping, bending over and crawling.”<sup>104</sup> Furthermore, the wage paid to farm workers is consistently low, making the work even more unattractive to U.S. workers.<sup>105</sup> As noted above, the unavailability of domestic workers is the primary reason that farm employers turn to a foreign workforce, including undocumented workers. The special certification procedures for shepherders were created in order to maintain a legal workforce for the shepherding

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101. Discussion of Comments for 20 C.F.R. § 655, *supra* note 99 at 6891.

102. § 655.102 (2010).

103. *Id.*

104. Patrick C. McManaman, *From Bracero to H-2A San Joaquin Valley Shepherders: Lessons Learned from the Failure of our Nation’s Guest Worker Programs*, 16 SAN JOAQUIN AGRIC. L. REV. 127, 127 (2007).

105. *Id.* Though critics often suggest increasing wages to make the job more attractive, Phil Martin, an agricultural economist at the University of California at Davis, points out that a higher wage does not necessarily correlate to an increase in willing domestic workers, stating that he would “suspect [that] a whole lot of 18-year-olds prefer to work at McDonald’s for minimum wage than milk cows.” Further, Martin points out that more expensive labor could result in increased investment in technology, which might even hurt the U.S. citizens who do work on the farms. Jordan, *supra* note 49.

industry, and to prevent foreign workers already in the sheepherding industry from seeking employment in other industries.<sup>106</sup>

The provision that established special procedures for sheepherders (which was in effect until March 14, 2010) stated that the regulation was “designed to provide a systematic process for handling applications from . . . employers who have historically utilized nonimmigrant alien workers in agriculture.”<sup>107</sup> The same regulation stated that the types of employment covered by special procedure generally have the same characteristics:

- (1) A fixed-site farm, ranch, or similar establishment;
- (2) A need for workers to come to their establishment from other areas to perform services or labor in and around their establishment;
- (3) Labor needs which will normally be controlled by environmental conditions, particularly weather and sunshine;
- (4) A reasonably regular workday or work-week.<sup>108</sup>

Subsection (b) of the rule noted that the procedures set forth in the subpart were established to provide for some flexibility in agency responsibilities without deviating from the purposes of § 1101—specifically the requirements that there be insufficient willing and qualified domestic workers available and that employment of foreign laborers will not adversely impact U.S. workers.<sup>109</sup>

Following the February 11, 2010 rulemaking, the language of the regulations changed. The present regulations no longer refer to the characteristics listed above, but grant authority to the Office of Foreign Labor Certification Administrator to “establish, continue, revise, or revoke special procedures for processing certain H-2A applications. . . . These include special procedures currently in effect for the handling of applications for sheepherders in the Western States (and adaptation of such procedures to occupations in the range production of other livestock). . . .”<sup>110</sup> It is clear from the language of § 655.102 that DOL intended to retain an avenue for special procedures in certification in certain circumstances. Although this change in the regulations evinces DOL’s desire to avoid broad application of the sheepherder exception to other industries, the language as it now appears in §

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106. Jackson, *supra* note 21, at 1298.

107. 20 C.F.R. § 655.93 (repealed 2010).

108. *Id.*

109. *Id.*

110. 20 C.F.R. § 655.102 (2010).

655.102 nonetheless allows the Administrator to “establish . . . special procedures for processing [dairy] H-2A applications.”<sup>111</sup>

Though § 655.93 is no longer good law, the characteristics listed above is still instructive in the dairy context because the list was informed by the original impetus behind the creation of the shepherd exception—a shortage of willing labor. The labor performed by dairy industry workers parallels the type of difficult labor required of shepherders and the type of labor described in § 655.93. The work can include “60-hour weeks in weather so hot that flies swarm or so cold that exposed skin will freeze.”<sup>112</sup> Dairy farms are invariably “fixed-site” establishments that require laborers to come to the establishment to perform their duties. The labor needs are decidedly controlled by environmental conditions, such as weather, and generally operate on a regular workday schedule, albeit an unusually lengthy one. The original regulation seemingly describes dairy farm labor, yet did not apply to provide a foreign labor force for dairy employers.

Evidently, foreign work in the shepherding industry need not meet the requirements in § 214.2(h)(5)(iv) defining work of a “temporary or seasonal nature.” The DOL<sup>113</sup> conceded that “shepherding jobs are neither temporary nor seasonal.”<sup>114</sup> This is the roadblock encountered with normal application of H-2A visa requirements for dairy workers; the requirement is eliminated with respect to shepherders by virtue of a regulated exception based on the unique characteristics of shepherding labor. The similarities between shepherding and dairy farm labor supports the assertion that a similar special procedure for dairy labor would be a permissible method of bringing dairy within the scope of § 1101 while avoiding the regulatory interpretation of “temporary” that currently bars the employment of H-2A workers on dairy farms.

It is of no consequence that the shepherd program was established by a statutory provision in the 1950s and that Congress, through IRCA, has since “implicitly ratified” the exception.<sup>115</sup> Congress, through § 1101, granted the Secretary of Labor the authority to issue and administer regulations to define

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111. *Id.*

112. Ring, *supra* note 5, at 2.

113. The DOL is the agency responsible for the shepherding exception because it concerns the certification process rather than the immigration regulations, which are the responsibility of DHS. Congress mandates that DHS “consult” with DOL with respect to adjudication of labor certifications in the text of 8 U.S.C. § 1184(c)(1) (2006). Temporary Employment of H-2A Aliens in the United States, 74 Fed. Reg. 25972-01 (May 29, 2009) (to be codified at 20 C.F.R. pt. 655 and 29 C.F.R. pt. 501, 780, 788). Once again, this statute refers to the Attorney General, but is now understood to refer to the Secretary of Homeland Security. *See* Immigration Practice, *supra* note 26, § 2-2.

114. DOL FIELD MEMO. 2000, *supra* note 55, at Background.

115. Discussion of Comments for 20 C.F.R. § 655, *supra* note 99 at 6891.

the type of labor included within H-2A visa certification.<sup>116</sup> Similarly, DOL is required to provide definitions of “agriculture” and “agricultural labor.”<sup>117</sup> This is the grant of authority under which DOL created the exception for the sheepherding industry and the applicable requirements found within the present regulations.<sup>118</sup> It is under this same grant of authority that DOL could create a new exception or extend the present exception to include the dairy industry within the H-2A program.

Though the broad authority of DHS to regulate visas and immigration granted by Congress in 6 U.S.C. § 236 might appear to overcome any DOL regulation that conflicts with a DHS regulation, the question whether dairy farms are to be included within the H-2A program is expressly answered by Congress and falls directly within the realm of DOL authority under § 1101. Furthermore, Congress mandated that DHS consult with DOL with respect to the adjudication of visa applications.<sup>119</sup> Therefore, even though the inclusion of both sheepherding and dairy farms within the H-2A program seems to conflict with the “temporary” requirement as defined by DHS, it is within DOL authority to create such a regulation, and it is similarly outside the scope of DHS authority to issue a regulation which conflicts with Congress’s clearly expressed intent.

As discussed above, *Chevron* provides guidelines to evaluate the validity of a special regulatory provision bringing dairy workers within the scope of § 1101. First and foremost, the existence of a special regulatory provision for sheepherders, which has not, at present, been eliminated by Congress or the judiciary, implies the validity of a regulation created under substantially similar circumstances. Beyond this inference of validity, a *Chevron* analysis of such a regulation demonstrates that it would likely be validated by a reviewing court as it is consistent with congressional intent.

Congress directly addressed the “precise question” of whether dairy work was to be included within the H-2A visa program in § 1101.<sup>120</sup> Congress required the DOL to define the terms “agricultural labor” and “agriculture,” yet at the same time directed the DOL to retain *two* existing statutory definitions that specifically include dairy and dairying.<sup>121</sup> Where, as here, congressional intent is clear, it is the end of the inquiry, and reaching the next “step” of *Chevron* is unnecessary.<sup>122</sup> The DOL, and in the event of a

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116. 8 U.S.C. § 1101(a)(15)(H)(ii)(a) (Supp. III 2006).

117. *Id.*

118. 20 C.F.R. § 655.102 (2010).

119. 8 U.S.C. § 1184 (c)(1) (2006).

120. *Chevron U.S.A. Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 842 (1984).

121. *See* § 1101 (a)(15)(H)(ii)(a) (setting forth requirements to obtain H-2A visa); 26 U.S.C. § 3121(g) (2006) (defining “agricultural labor”); 29 U.S.C. § 203(f) (2006) (defining “agriculture”).

122. *Chevron*, 467 U.S. at 842–43.

challenge, the courts, “must give effect to the unambiguously expressed intent of Congress.”<sup>123</sup>

Implementing special procedures for dairy farms is consistent with the purposes of the H-2A program and with the goals of IRCA. The labor certification process would still require the same determination that there exists a shortage of available U.S. workers and that the wages paid to foreign laborers would not have an adverse effect on the jobs of domestic workers. Employers would also still be required to ensure that labor conditions satisfied applicable regulatory provisions. Furthermore, enabling dairy farmers to hire H-2A nonimmigrant aliens would ultimately reduce the necessity of farmers to hire undocumented workers to perform the labor.

The creation of special procedures need not change the requirement that employers fulfill the procedural requirements for labor recruitment.<sup>124</sup> To satisfy the requirements, employers must post advertisements and otherwise actively recruit U.S. workers before the arrival of any foreign H-2A workers.<sup>125</sup> Furthermore, the fifty percent rule could remain in force, requiring employers to offer employment to any U.S. workers who become available within the first half of the H-2A labor contract.<sup>126</sup> These procedures provide assurances that H-2A employers conduct legitimate efforts to hire domestic workers and demonstrate that there is an insufficient labor supply.

Similarly, special procedures for dairy farms need not eliminate the requirement that employers offer either the annual weighted average hourly wage rate or the higher prevailing wage rates in the region, as currently required for H-2A certification.<sup>127</sup> In the case of shepherders, this requirement remains intact; however, wage rates are determined with respect to the shepherding occupation alone within a particular state,<sup>128</sup> and as a result, the wages are likely lower than for other agricultural occupations. To avoid a depression of wages within the dairy industry, employers might still be expected to offer the AEW for all field and livestock workers. Special procedures for dairy farms would thus align with the present regulatory requirements designed to prevent an adverse effect on U.S. workers’ jobs and wages.<sup>129</sup>

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123. *Id.* at 843.

124. Shepherder employers are exempt from the “positive recruitment” requirement under 20 C.F.R. § 655.103. DOL FIELD MEMO. 2000, *supra* note 55, at 1.

125. 20 C.F.R. § 655.135 (a)–(c) (2010).

126. § 655.135(d).

127. *See* Offered Wage Rate, 20 C.F.R. § 655.120 (2010) (describing the wage requirements for agricultural employers).

128. DOL FIELD MEMO. 2000, *supra* note 55, at 3.

129. Some scholarship on the subject of H-2A visas asserts that present wage rate requirements do not prevent adverse impact on U.S. workers because the presence of agricultural workers results in

Creating special procedures for dairy farms would facilitate a reduction in the number of undocumented laborers in the dairy industry by providing a legal route to satisfy the shortage of labor. Dairy employers hire undocumented workers out of necessity. Domestic workers are either unavailable or unwilling to accept dairy employment, but bringing dairy labor within the scope of H-2A would mitigate the devastating impact of an agricultural labor shortage and consequently the demand for undocumented laborers.<sup>130</sup> Establishing a legal source of foreign labor would thus be consistent with the goals of IRCA.

Creating an exception and special certification procedures for dairy farms is a valid exercise of DOL authority, and gives effect to congressional intent as expressed in § 1101. As discussed above, providing special procedures serves “to assure agricultural employers an adequate labor force while at the same time protecting the jobs of U.S. workers”—the purpose behind the H-2A program.<sup>131</sup> Without the range of regulatory exemptions afforded the sheepherding industry, an exception for dairy farms would follow congressional intent as expressed in IRCA to an even greater degree, while protecting domestic workers and a vital industry.

#### CONCLUSION

Congress included dairy farms among the employers who should have access to the H-2A labor pool. The exclusion of dairy farms is the result of regulatory interpretation by an administrative agency. The regulation at issue can be changed and adapted to address the problematic exclusion of dairy farm workers, as long as such changes are not contrary to congressional intent expressed in the underlying statute. Changing the definition of “temporary” or creating an exception for dairy workers would be a permissible regulatory change, and would fully align with Congress’s intent.

The dairy industry is in a fragile state, particularly with respect to small dairy operations. Failure to mitigate the labor shortage, coupled with the

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artificially low wage rates. Jackson, *supra* note 21, at 1295. This paper does not address the shortfalls of the existing wage-rate regulation. For purposes of this discussion, present wage regulation is presumed to be the accepted and effective method of carrying out the purposes of § 1101.

130. Scholars caution that even with revised regulations to allow dairy employers to draw from the H-2A labor pool, farmers may initially be put off by the paperwork and expense required to hire workers through the program. Though this may be, bringing dairy under H-2A would give farmers the opportunity to supplement labor needs, and place them in a better position when the visa certification process is streamlined by comprehensive immigration reform. Telephone Interview with Thomas Maloney, Senior Extension Associate, Dep’t of Applied Econ. and Mgmt., Cornell Univ. (Nov. 30, 2009).

131. GAO REPORT 1988, *supra* note 25, at 12.

increased pursuit of undocumented workers will have a devastating impact on the industry, and by extension, the other industries it supports. For example, the continued decline of the dairy industry in Vermont could ultimately deal a heavy blow to the multi-billion dollar tourism industry as the face of the state changes.

Although this issue is of special significance in Vermont, given the relative importance of dairy in such a small state, this issue affects the nation. Immigrant labor furnishes approximately two-thirds of milk production in the United States.<sup>132</sup> In Wisconsin and New York, large farms draw an estimated 80% of their workforce from immigrant labor, and this practice is becoming more prevalent on smaller dairy farms as well.<sup>133</sup> Other dairy states have also seen increased pressure from federal immigration agents with respect to worker documentation.<sup>134</sup> Those who do not yet feel the screws tightening upon our nation's dairy producers will surely be unable to avoid the impact once its ripple effect reaches other aspects of our economy, and in particular when it strikes at the shelves of the local grocery store.

An important principle of administrative law, as stated by the Supreme Court, and the same principle noted in the DHS memorandum affirming the current interpretation of "temporary" labor, is that "[r]egulatory agencies do not establish rules of conduct to last forever; they are supposed . . . to adapt their rules and practices to the Nation's needs in a volatile, changing economy."<sup>135</sup> This statement rings true today as farmers struggle to make ends meet, and more are forced to abandon or sell a long-standing family tradition that has existed for generations. The opportunity to make a change for the better is diminishing. Most small dairy operations are already at a breaking point. For change to be effective, particularly in a small dairy state like Vermont, the change must be made now, before dairy farmers truly cannot catch up.

-Merrill Bent\*†

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132. Jordan, *supra* note 49.

133. Quaipe, *supra* note 47.

134. ICE raids have taken place on dairy farms in New York and South Dakota. Harrison et al., *supra* note 39, at 3.

135. Am. Trucking Ass'ns v. Atchinson T. & S. F. Ry. Co., 387 U.S. 397, 416 (1967).

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