

Far from the Winner's Circle: Recent Developments in the H-2B Visa Program and the Impacts on the Horseracing Industry in the United States

By Kelly Ann Whelan

A statue of the famous American racehorse Secretariat stands at the Kentucky Horse Park in Lexington, one of the world's largest international equestrian competition centers. Led by his longtime groom Eddie Sweat and Canadian jockey Ron Turcotte in the irons, the bronze Secretariat memorializes the historic 1973 Triple Crown win. The sculptor specifically included Sweat due to the groom's vital role in Secretariat's success.

Support roles such as Sweat's in horseracing are crucial to the industry. Over the past 30 years, these roles have been increasingly filled by immigrant labor, generally from Central and South America. Even the jockey of the 2015 Triple Crown winner, American Pharoah, was from Mexico.

Yet, the recent changes to immigrant labor categories, such as the H-2B visa, along with border restrictions have caused a shortage in available labor for support roles in the horseracing industry. Without adequate workers, the number of racing entries has dropped. Such shortages represent significant losses for the U.S. economy. Prior to the changes, the horse industry contributed approximately \$39 billion directly to the U.S. economy annually, with approximately \$26.1 billion generated from the racing segment.¹ In particular, horseracing is vital for local economies in Kentucky, Maryland, New York, Florida, and California.

The topic of immigrant labor in the horseracing industry has come to the surface this Triple Crown season, the first leg of which, the Kentucky Derby, was run on September 5. In this brief, we look at the structure of the H-2B visa, the recent changes, the impacts on the industry, and a solution to allow workers and industry professionals to continue to contribute to the American economy.

H-2B Visa Structure

Every year, the horseracing industry has to fill thousands of support role jobs, such as hot walkers (people who walk horses before and after a workout), grooms, exercise trainers, and other backside jobs. Generally, equine employers find that Americans do not apply for these jobs, so owners and trainers must maintain a majority immigrant workforce under the H-2B visa "temporary non-agricultural workers" category.

The H-2B visa allows people to come to the United States to work in certain non-agricultural industries such as hospitality workers, construction workers, maintenance, janitorial, equine management, and landscaping. The employer seeking to bring workers through the H-2B visa program, must establish that (1) there are not enough workers in the US who are "able, willing, qualified, and available" to do the temporary work, (2) bringing employees from overseas will not adversely affect the wages and working conditions of similarly employed US workers, and (3) the need of the overseas workers is temporary, such as a one-time occurrence, a seasonal need, a peak load need, or an intermittent need.²

In normal times, Congress set the cap of available H-2B visas for all needs at 66,000, split with 33,000 for workers beginning employment in the first half of the fiscal year (October 1 - March 31) and 33,000 for workers beginning employment in the second half of the fiscal year (April 1 - September 30). Any unused numbers from the first half of the fiscal year are available for employers seeking to hire H-2B workers during the second half of the fiscal year. Unused H-2B numbers from one fiscal year do not carry over into the next fiscal year.³

Recent Developments in the H-2B Program

Industry experts have long expressed that the cap for H-2B visas is far too low, with nearly twice the number of applications as available visas.⁴ In 2016, a visa exemption in the H-2B program that allowed recent visa holders to return for seasonal work with racing stables and trainers was not renewed.⁵ The removal of the exemption caused a shortage of those in support roles, in particular exercise riders, hot walkers, and grooms.⁶

In late June 2020, the Administration announced that due to an unemployment rate that was around 13 per cent in May, it was suspending the issuance of any new H-2B visas for seasonal workers, H-1B visas for skilled employees, L visas for managers and specialized workers, and J visas for cultural exchange opportunities.⁷

The COVID-19 related restrictions only further compound the issues plaguing the industry for years. The Kentucky Equine Education Project recently stated that,

During a typical year, the demand for H-2B visas vastly outpaces the supply. To fully suspend the issuance of these visas is a massive blow to [Kentucky's] signature industry. Without a workforce that can meet the demands of the growing industry, it will be difficult for that economic impact to continue at the same level, especially as we are working to recover from the global pandemic.⁸

The only way for industry professionals, such as trainers, to get any relief is the proclamation's exception for those workers whose entry "is in the national interest as determined by the Secretary of State and the Secretary of Homeland Security."⁹ The chances for relief under this route are likely slim.

An Effective Solution

The stated purpose of the proclamation was to give Americans who lost their jobs due to the pandemic job opportunities. Yet, industry professionals have indicated that Americans are not seeking the jobs

formerly held by immigrant laborers. The National Thoroughbred Racing Association noted that,

Employers are already required by law to prove that they have attempted in good faith to consistently advertise the job and that no one who meets the qualifications has applied for the job. Only then can you apply for the H-2B program. Making these jobs first available to U.S. citizens is baked into the system. It is a rigorous process. Trainers will tell you people don't apply; they don't want those jobs.¹⁰

The second significant issue with the H-2B visa program suspension is that, even if an industry professional could find an American to fill the position, experience and skill remains a problem. Here lies the difference between equine support workers and other visas H-2B visas. Further impacting the suspension is that skilled equine support workers who have worked 15-20 years at the same facility are treated as new employees under the 2016 suspension of the exemption previously stated. Thus, even if a facility could find an American citizen to fill the position, it is unlikely they will be as skilled as the immigrant worker who had worked there for decades.

The third issue is that while some industries, such as construction, can delay projects, horses' needs cannot be delayed. Horses need to be fed, their stalls mucked, and their needs looked after.

Thus, due to the nature of horses as live animals and the industry's requirement for skilled labor, an effective solution is to reclassify the immigrant laborers under the H-2A agricultural worker category. In contrast, the H-2A visa program has no cap. In addition to the economic benefits for the industry, reclassifying equine support workers under the H-2A visa program would also allow other industries, such as seasonal recreation, to expand, thus benefitting other parts of the economy.

Both the prior and new restrictions have significant impacts on migrant workers, industry professionals, and the local, state, and national economies. The

economic fallout from horseracing not having enough support workers is a slippery slope. For example, if there are enough grooms, there will be less horses entered in races. The less horses entered, the less feed ordered, the less veterinarians required, the less farrier visits needed, etc. The number of workers often determines the number of horses a trainer can take on. To accommodate the number of horses with a limited supply of workers, trainers have to work with fewer horses. The sale and breeding of horses is affected, as well as the number of horses that end up on the racetrack.

Like a thoroughbred winning a race, the United States will have to overhaul the immigrant labor system to get into the winner's circle and reap the benefits that the H-2A and H-2B programs could potentially provide.

¹ American Horse Council Foundation, *Executive Summary*, BLOOD HORSE (2005),

www.bloodhorse.com/pdf/nationalsummary_v8.pdf.

² U.S. Citizenship and Immigration Services (USCIS), *H-2B Temporary Non-Agricultural Workers*, DEPARTMENT OF HOMELAND SECURITY (DHS) (2020),

www.uscis.gov/working-in-the-united-states/temporary-workers/h-2b-temporary-non-agricultural-workers.

³ USCIS, *Cap Count for H-2B Nonimmigrants*, DHS (2020), www.uscis.gov/working-in-the-united-states/temporary-workers/h-2b-non-agricultural-workers/cap-count-for-h-2b-nonimmigrants.

⁴ Eric Mitchell, *H-2B Visa Suspension Hampering Racing's Recovery*, BLOOD HORSE (25 June 2020), www.bloodhorse.com/horse-racing/articles/241979/h-2b-visa-suspension-hampering-racings-recovery.

⁵ USCIS, *H-2B Returning Worker Program Expired: Employers Should Stop Identifying "Returning Workers" in*

Petitions for FY 2017, DHS (2016), www.uscis.gov/archive/h-2b-returning-worker-program-expired-employers-should-stop-identifying-returning-workers-in.

⁶ Tom Eblen, *Will Trump's immigration policies cause labor shortage in Kentucky's horse racing industry?*, Lexington Herald Leader (10 December 2016), www.kentucky.com/news/local/news-columns-blogs/tom-eblen/article120179178.html.

⁷ The White House, *Proclamation Suspending Entry of Aliens Who Present a Risk to the U.S. Labor Market Following the Coronavirus Outbreak*, THE WHITE HOUSE PROCLAMATIONS (22 June 2020), www.whitehouse.gov/presidential-actions/proclamation-suspending-entry-aliens-present-risk-u-s-labor-market-following-coronavirus-outbreak/.

⁸ Mitchell, *supra* note 4.

⁹ The White House, *supra* note 7.

¹⁰ Mitchell, *supra* note 4.