



Immigration Rules Update

BY JESSIE OSWALD

The Thoroughbred breeding and racing economy, like many other agricultural industries, runs largely on the labor of international workers. Many farm owners and trainers have been able to build successful, reliable, and legal international workforces by using a federal seasonal work program, known as the H-2B visa.

Changes to H-2B visa may change things for horse industry

Though a costly and bureaucratic process, the H-2B visa program allowed for experienced workers to return to farms and training barns with regularity during peak foaling, breaking/training, or racing seasons. That is until April 23, when changes in the H-2B program suddenly made securing these visas harder.

“They’re (Department of Homeland Security) turning down the visas, they’re turning down the extensions, they’re turning down everything,” said Maryland-based trainer Hamilton Smith.

A temporary restraining order on the new changes secured by a group of landscaping companies has the visa issue at a standstill and allows the system, for the time being, to operate under pre-existing procedures, but many Thoroughbred business owners are concerned the situation may get worse before it gets better.

Tarrant & Combs in Lexington. “I had an employer come to me in trouble because the previous employment agency who had been working with her was raided and she came to me to get it done right.”

Jumping through Legal Hoops

In order to obtain legal work authorization and hire a foreign worker, an employer must file a petition for a non-immigrant worker through the U.S. Citizenship & Immigration Services (CIS). Although several types of work visas are available, the H-2B visa applies to the temporary or seasonal non-agricultural labor a groom, hotwalker, or barn worker might perform. The employer’s need must be temporary in nature—a one-time occurrence, seasonal need, peak-load need, or an intermittent need. Although the horse industry is a year-round business, most employers have a time each year when the work slows down, which makes this type of visa a viable option.

A statutory limit of 66,000 exists on the number of foreign workers who may obtain the H-2B visa each year, with half beginning employment in the first half of the fiscal year (October 1) and the remaining 33,000 in the second half of the fiscal year (April 1). The visa grants work authorization for up to 10 months at which time the worker must return to his or her home country. Although this time frame may be extended twice before the worker must return home, extenuating circumstances surrounding the job and the employer’s temporary need must exist.

The immigration process consists of three steps:

1. The employer applies for and receives a temporary labor certification for H-2B workers from the U.S. Department of Labor (DOL);
2. The employer files a petition for a non-immigrant worker with the CIS, along with the DOL’s approved temporary labor certification; and
3. Upon approval of the petition from the CIS, the prospective foreign worker outside the U.S. applies for a visa at the U.S. embassy or consulate abroad.

The process seems simple enough, but the devil lies in the details; details that require an employer to obtain approvals from two distinct government agencies, each with its own set of rules.

“You have to obtain a prevailing wage (the going wage rate paid for similar positions in the area of employment) from the DOL,” explained Krebs. “You have to advertise the position on a national job bank, rather than a local one. You have to advertise the position in a newspaper

Importance of International Workers

The bulk of the Thoroughbred industry’s labor needs is in racetrack barn areas or on farms, not in front of adoring race fans. It is dirty work with long hours. Absent the people driven by their passion for horses, it’s not the kind of work most people want to do, despite America’s high unemployment.

“We try to hire locals, but they don’t want to work the hours,” said Smith, who often hires Mexicans to help him with his horses on the backside. “Nobody wants to get up at 3:30 in the morning and come to work and be there practically, off-and-on, all day. You can’t get them to do it.”

Smith and other employers in the horse industry are often forced to turn to international workers, most commonly Hispanics, to provide the day-to-day care and maintenance of the barn and the horses.

“They’re industrious and they’re hard-working and they’re not lazy,” Niall Brennan said

about the foreign workers he hires to assist him in his business of training and consigning 2-year-old Thoroughbreds. “I’ve found in general, far in the majority, that they are great workers. They love having the job, and I enjoy having them. We feel like we have a very good team of people.”

Employing these foreign workers, however, requires more time and expense than hiring U.S. workers—incurring the expense of additional advertising costs, immigration filing fees, and often requiring employers to obtain the services of an attorney to prepare the confusing government paperwork.

“It is very complicated,” said Glen Krebs, an immigration attorney at Wyatt,



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for two days—one being a Sunday—and you have to send this information (the recruitment and its results) in with the application to prove that there are no Americans willing or able to work.”

Krebs went on to explain the strict time constraints of when recruitment can begin and when the labor certification application can be filed with the DOL. It's a complicated and costly process, and it's only the first step in obtaining the H-2B visa. Once the labor certification is approved, the petition for a non-immigrant worker is filed with the CIS who will review the petition and determine whether the employer has met the qualifications and whether the visa approval shall be issued. A visa cannot be granted without successful completion of both steps. The process typically takes three to four months and runs an employer about \$1,000 per worker in legal and filing fees.

Brennan, an Irish immigrant residing in Ocala, Fla., relies on a foreign workforce, especially during the busy sales season. During his peak season Brennan's business consists of about 60 full-time employees, 20 of them working pursuant to the H-2B visa. Brennan's foreign workers typically obtain their visas and start work in October, returning home in June to take odd jobs paying less than most people would pay for their daily cappuccino. During the next four months, while Brennan's foreign workers try to support their families in their homeland, Brennan begins the H-2B process all over again, completing it in time for his workers to return to his stable in October.

“In many areas of America where there is unemployment, the unemployed don't want to work or don't want to work in certain jobs,” said Brennan. “That's the reality and the truth, and America needs to wake up and smell the coffee. The reality is, without these visas, without the international workers in the horse industry, we don't have a business.”

The visa program allows employers to get the affordable help they need while giving those that want the work an opportunity at the American dream.

“In Mexico you can hardly get a job over there anymore because of the violence,” said Tony Romo, a Mexican national working as a groom in Brennan's stable, pursuant to an H-2B visa. “Now that I'm married and I have a little kid, I have to come here to make it.”

Troubling Changes

Recent changes by the DOL have made it more difficult for employers to obtain the temporary labor certification, which they need first before they can file a peti-



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GLEN KREBS

tion with the CIS for an H-2B visa. Without the certification, farm owners and trainers cannot legally bring their international employees back into the country. The DOL has also given employers more responsibilities that carry additional costs.

“It's a much more difficult administrative procedure and, timing-wise, it's much more difficult,” Krebs said of the changes enacted by the DOL April 23. “The main thing that all of the employers are complaining about is that they have to pay the aliens like H-2A (a visa pertaining to temporary agricultural workers) employers do. They have to pay for their transportation here, pay for their transportation back to Mexico, and they have to pay for all the legal fees, a per diem or transportation to the worksite... it has become much more costly and more burdensome administratively, but the Department of Labor says they're doing it to protect American workers.”

The premise for the new rules is to ensure that no American worker is adversely affected by the employment of the foreign worker. Employers found in violation of their contractual wage obligation to employees or found to have violated the H-2B program requirements may suffer penalties, fines, or even debarment from the program. While there may be concerns about protecting American workers, agricultural employers need options.

“They're trying to kill the visa by creating rules and requirements that stifle it,” said Brennan. “If you have to pay all these fees, by the time I can hire these guys, I couldn't afford to do it. They're going to force them to go out of business and shut down small business owners, or they're going to force them to go underground and do it illegally. The irony of it is that all these people want to do is be legal.”

“I'm having a lot of problems getting my boys back from Mexico with the visas,” said Smith. “It's getting so tough now that the guys that try to do it the right way are getting abused.”

Brennan and Smith are not the only employers upset with the new changes. Just days after the changes were to go into effect, a group of landscape companies that participate in the H-2B program filed a lawsuit in the U.S. District Court for the Northern District of Florida. The plaintiffs filed the motion for a temporary restraining order and preliminary injunction to prevent the DOL from enforcing the new

changes to the H-2B labor certification (*Bayou Lawn & Landscape Services, et al., vs. Hilda Solis, et al.*). Based on the plaintiffs' complaints and supporting documentation, Judge M. Casey Rodgers issued the preliminary injunction on April 26 and gave the parties 60 days to submit their motions for summary judgment and an additional 14 days to respond to the opposing party's motion.

“My reading of the judge's decision was that he probably is going to permanently bar this,” said Krebs. “It appeared that the judge did not think that the Department of Labor had congressional authority to legislate, and he felt that what they were doing was legislating, not just clarifying.”

Although the issue is currently at a standstill with the program operating under the pre-existing procedures, things may just be heating up. One might think that if the new changes are permanently barred that the H-2B program will continue as it has been the last few years, but Krebs has his doubts.

In addition to describing the preliminary injunction and instructing applicants to continue to file labor certifications under the old system, a statement released by the DOL on its website states, “However, please be aware that this preliminary injunction necessarily calls into doubt the underlying authority of the Department of Labor to fulfill its responsibilities under the Immigration and Nationality Act and Department of Homeland Security regulations to issue the labor certifications that are a necessary predicate for the admission of H-2B workers.” It is this sentence that has piqued Krebs' interest.

“It sounds to me like what they're saying is, ‘look, if you stop us from doing this, we're not even going to give you the 9142 (the labor certification application), and if you don't have the 9142, you can't file the I-129 (CIS visa petition),’” said Krebs. “It sounded to me like a veiled threat. If the Department of Labor refuses to issue the 9142 and there are no H-2Bs available, then we would see an increase in illegal immigration.”

For now, employers such as Brennan and Smith, who are desperate for reliable workers, will continue to fill their barns with the foreign workers, who are just as desperate to have the work.

“It means everything because where we live in Mexico, without this job...this is my first year coming with the visa, where we're able to do a little more and save a little money,” said Romo. “If I can get the visa back again, that would really help us do it all over again for next year.”

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