

# Unprotected and Overworked: An Analysis of the Abuses Migrant Horse Workers Face under the H-2B Program

*Jocelyn Lucero\**

## INTRODUCTION

Shortchanged wages, non-potable water, stables for homes: these are a few of the stark realities migrant horse workers face shortly after they begin their journey to procure the long-awaited American dream. Recently, an investigation by the Department of Labor (“DOL”) found that the owner of a well-known horse training facility violated regulations imposed by the H-2B visa program, the Migrant and Seasonal Agricultural Worker Protection Act (“MSPA”), and the Fair Labor Standards Act (“FLSA”).<sup>1</sup> In *Acosta v. EWC & Associates, Inc.*, EWC & Associates Inc. was ordered to pay \$1.2 million in back wages and damages to its employees, in addition to civil penalties amounting to \$100 thousand.<sup>2</sup> The DOL’s investigation found that EWC had paid its employees straight time for overtime hours; collected kickbacks from the workers’ H-2B visa fees; unlawfully deducted transportation costs from workers’ pay; provided unsafe and unhealthy housing conditions—including converted stables with no running potable water; and failed to keep records of overtime worked and deductions made from workers’ pay.<sup>3</sup> Unfortunately, these employer abuses are an all-too-common occurrence in the H-2B visa program and require immediate attention for reform.<sup>4</sup> In

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\* Editor-in-Chief, Vol. 14 of the KY. J. EQUINE, AGRIC. & NAT. RES. L.; B.A. International Affairs & Spanish, 2019, Transylvania University; J.D. May 2022, University of Kentucky J. David Rosenberg College of Law.

<sup>1</sup> U.S. Department of Labor Investigation Results in California Horse Training Facilities Paying \$1,270,683 In Back Wages and Damages to 30 Employees, U.S. DEP’T OF LABOR (Feb. 15, 2019), <https://www.dol.gov/newsroom/releases/whd/whd20190215-2> [https://perma.cc/92U7-9GUY].

<sup>2</sup> Suzanne Monyak, *Horse Training Co. To Pay \$1.3M For Shorting Workers*, LAW 360 (Feb. 20, 2019) <https://www-law360-com.ezproxy.law.uky.edu/articles/1130974/horse-training-co-to-pay-1-3m-for-shorting-workers> [https://perma.cc/5DS7-MFYQ].

<sup>3</sup> U.S. DEP’T OF LABOR, *supra* note 1.

<sup>4</sup> Daniel Costa, *Employers increase their profits and put downward pressure on wages and labor standards by exploiting migrant workers*, ECONOMIC POL’Y INST. 1, 3 (Aug. 27, 2019) <https://files.epi.org/pdf/174093.pdf> [https://perma.cc/JAU7-9FDZ].

*Acosta*, justice was served, but the reality is most employer abuses go unchecked, leaving migrant horse workers exploited with little to no remedies.<sup>5</sup>

#### *A. The Equine Industry's and Kentucky's Reliance on Migrant Workers*

The equine industry is highly reliant on migrant workers, and the H-2B visa program fills hundreds of jobs that keep the industry running.<sup>6</sup> The backsides of race tracks, training stables, and horse farms are occupied by migrant workers fulfilling jobs as hot walkers, groomers, exercise riders, and equine managers.<sup>7</sup> This reliance on migrant workers created a panic among advocates of the equine industry when former President Donald Trump took executive action to suspend certain types of work visas.<sup>8</sup> In response to the ongoing COVID-19 pandemic, former President Trump issued an executive order which halted the flow of migrant workers under the H-2B visa program until the end of 2020.<sup>9</sup> The order was the administration's response to a growing unemployment rate.<sup>10</sup> A senior administration official stated that the former President's action "would free up 525,000 jobs for Americans."<sup>11</sup> However, the equine industry was skeptical.<sup>12</sup>

Equine industry advocates explained that a higher unemployment rate does not necessarily mean there are American workers waiting to fill the jobs of migrant workers.<sup>13</sup> Maggie Sweet, the Chief Operating Officer of a well-known training stable, commented on the issue, stating, "[w]e're totally stretched. The

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<sup>5</sup> *Id.*

<sup>6</sup> See Eric Mitchell, *H-2B Visa Suspension Hampering Racing's Recovery*, BLOOD HORSE (June 25, 2020) <https://www.bloodhorse.com/horse-racing/articles/241979/h-2b-visa-suspension-hampering-racings-recovery> [https://perma.cc/Z6TS-QCC5]; Piper H. Blackburn, *Ahead of Kentucky Derby, shortage of migrant workers looms for trainers*, BORDER REP. (Aug. 30, 2020) <https://www.borderreport.com/hot-topics/immigration/ahead-of-kentucky-derby-shortage-of-migrant-workers-looms-for-trainers/> [https://perma.cc/V7XV-9DQQ].

<sup>7</sup> Blackburn, *supra* note 6; Mitchell, *supra* note 6.

<sup>8</sup> See Blackburn, *supra* note 6.

<sup>9</sup> See Mitchell, *supra* note 6.

<sup>10</sup> See *id.*

<sup>11</sup> Brett Samuels, *Trump Signs Executive Order Suspending Certain Visas Through 2020*, THE HILL (July 22, 2020), <https://thehill.com/homenews/administration/503914-trump-signs-executive-order-suspending-certain-work-visas-through?rl=> [https://perma.cc/Z38L-LBX4].

<sup>12</sup> *Id.*

<sup>13</sup> Mitchell, *supra* note 6.

government assumes with this high unemployment rate that people are going to want to work for you, but they don't. Our foremen are grooming horses, and our workers are grooming more horses than they probably should.”<sup>14</sup> In Kentucky, the new restrictions were felt significantly ahead of the horse racing season.<sup>15</sup> Kentucky trainer, Dale Romans, commented, “[t]here’s nobody out there to do the work.”<sup>16</sup> Unemployed Americans are not stepping forward to fill crucial jobs that migrant workers have occupied for so long.<sup>17</sup> Laurie Mays, a project manager at the Kentucky Chamber of Commerce, has been tasked with bringing more American workers into the equine industry, but she confessed that there will always be a need for migrant workers.<sup>18</sup> “There’s still not enough people, even if you get all of the local talent to be engaged in the industry, our industry is very labor-intensive, and it takes a lot of manpower to happen. . . [t]he horses don’t take holidays; they don’t care what the weather is outside.”<sup>19</sup>

A shortage of migrant workers would produce a disastrous result for the equine industry due to a ripple effect.<sup>20</sup> Horse trainers would be forced to take on a lower number of horses to train; consequently sales and breeding revenues of the equine industry would plummet, and eventually less horses would run the tracks of Kentucky.<sup>21</sup> In Kentucky alone, the equine industry accounts for more than 60 thousand jobs and generates \$6.5 billion in annual cumulative direct, indirect, and induced economic activity.<sup>22</sup> Additionally, the equine industry generates \$115 million annually in tax revenue for Kentucky.<sup>23</sup> An industry that is so lucrative should be inclined to help the workers that make it possible. Migrant workers have become the backbone of the equine industry and it is time they start being treated as such. The abuse and exploitation migrant workers face is no way to reward them for their critical role in the industry. To address the root causes of

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<sup>14</sup> *See id.*

<sup>15</sup> Blackburn, *supra* note 6.

<sup>16</sup> *Id.*

<sup>17</sup> Mitchell, *supra* note 6.

<sup>18</sup> Blackburn, *supra* note 6.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Economic Impact of the Equine Industry in Kentucky*, KY. BRED <https://www.kentuckybred.org/kentucky-equine-industry-impact/> (last viewed Oct. 15, 2020) [<https://perma.cc/G5QV-JWT6>].

<sup>23</sup> *Id.*

abuse, comprehensive reform of the H-2B program and its regulations are imperative.

This Note analyzes the equine industry's relationship with migrant workers admitted under the H-2B program. Specifically, this Note argues that the H-2B program must undergo reform to protect migrant horse workers that the equine industry and Kentucky rely on. Part I of this Note argues that the inefficiencies and abuses most common under the H-2B program are exacerbated by inconsistencies with international human and labor standards and current ineffective remedies migrant workers are provided with. Part II of this Note discusses recommendations for change within the H-2B program. These recommendations for change include implementing resources for migrant workers, greater policing of employer violations, and policy changes that include the delinking of status from employers and a pathway for migrant workers to remain in the United States permanently.

## I. THE INEFFICIENCIES OF THE H-2B PROGRAM

### A. Overview of H-2B Visa Program

The current H-2B visa program exacerbates employer abuses and exploitations of migrant workers. The United States has relied on migrant workers to fulfill labor needs for centuries.<sup>24</sup> Initially, it was slaves from Africa, then Chinese workers, and later braceros—Mexican contract laborers.<sup>25</sup> The history of migrant workers is long and—in light of considering the nation's continued use of migrant labor—more history is yet to be made.

The Immigration and Nationality Act (“INA”) lists different visa categories of non-immigrants, who are admitted to the United States for a temporary period of time.<sup>26</sup> These visa categories are identified by letters and numbers, based on the sections of the INA that authorize them.<sup>27</sup> The “H” category is specific for temporary

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<sup>24</sup> *The American Dream Up for Sale: A Blueprint for Ending International Labor Recruitment Abuse*, INT'L LAB. RECRUITMENT WORKING GRP. 1, 8 (Feb. 2013) [https://www.aft.org/sites/default/files/wysiwyg/international\\_labor\\_recruitment\\_abuse.pdf](https://www.aft.org/sites/default/files/wysiwyg/international_labor_recruitment_abuse.pdf) [<https://perma.cc/6JTF-U7HY>].

<sup>25</sup> *Id.*

<sup>26</sup> *H-2A and H-2B Temporary Worker Visas: Policy and Related Issues*, CONG. RSCH. SERV. 1,2 (June 09, 2020) <https://sgp.fas.org/crs/homesecc/R44849.pdf> [<https://perma.cc/EX6L-GAJU>].

<sup>27</sup> *Id.*

workers.<sup>28</sup> H-2A visas for agricultural workers and H-2B visas for nonagricultural workers are included under this category.<sup>29</sup> The administration of the visa program is a joint effort by the Department of Homeland Security (“DHS”) and the Department of Labor (“DOL”).<sup>30</sup> The process begins when an employer is met with a labor shortage that cannot be fulfilled by American workers.<sup>31</sup> First, the employer must apply for labor certification from DOL.<sup>32</sup> After obtaining certification from DOL, the employer must submit an application to DHS.<sup>33</sup> If the employer’s application is approved, foreign workers abroad must travel to a U.S. embassy or consulate to apply for a non-immigrant visa where they are interviewed.<sup>34</sup> Once approved, the foreign worker is issued an H-2B visa and may begin employment on the start date outlined in the employer’s application.<sup>35</sup> This, of course, is an overview of the H-2B process; in reality, it is much more complex and complicated. While DHS and DOL regulate the administration of the H-2B program, the Wage and Hour Division (“WHD”) regulates the enforcement of the program’s regulations and rules.

Title 29 § 503.16 of the Code of Federal Regulations enumerates an employer’s obligations under the H-2B program.<sup>36</sup> Among the most abused rules, 29 CFR § 503.16 requires employers to offer wages equal to, or exceeding, the prevailing—or federal—minimum wage, offer a full-time position, guarantee to offer workers employment for a total number of work hours equal to at least three-fourths of the workdays in a twelve-week period (three-fourths guarantee), and post notice of workers’ rights.<sup>37</sup> Additionally, employers are explicitly prohibited from receiving “kickbacks” or bribes from recruiters; they must not deduct visa fees or transportation fees from workers’ pay; and they must not intimidate, threaten, restrain, blacklist, or discriminate against any person who has filed a complaint under 8 U.S.C. § 1184(c), §

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<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 2–3.

<sup>30</sup> *Id.* at 3.

<sup>31</sup> *Id.*

<sup>32</sup> *H-2A and H-2B Temporary Worker Visas: Policy and Related Issues*, CONG. RSCH. SERV. 1,3 (June 09, 2020) <https://sgp.fas.org/crs/homsec/R44849.pdf> [<https://perma.cc/EX6L-GAJU>].

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 3–4.

<sup>36</sup> 29 C.F.R. § 503.16 (2015).

<sup>37</sup> *Id.*

214(c) of the INA, or 20 CFR part 655, subpart A.<sup>38</sup> Despite these explicit regulations and rules, employer abuses remain rampant among the H-2B program, in part due to the ineffective enforcement on behalf of WHD and due to inconsistencies with international human and labor standards.

*B. Abuses Experienced by Migrant Horse Workers*

Migrant workers are far from protected under the rules and regulations of the H-2B program. According to a recent study published by the Economic Policy Institute, migrant guest workers, despite their *legal* status in the United States, are among the most exploited laborers in the nation because visa programs—like the H-2B program—create employment relationships that leave workers powerless to defend and uphold their rights.<sup>39</sup>

*1. Recruitment Abuses*

The abuses that migrant workers face begin long before they arrive on U.S. soil.<sup>40</sup> Despite the fact that recruitment fees are illegal, many migrant workers are forced to pay high fees to labor recruiters that promise employment opportunities in the United States.<sup>41</sup> Local recruiters will initially make contact with a worker's home community where they advertise lucrative job opportunities in the United States.<sup>42</sup> Then, interested workers end up paying a lump-sum fee to the recruiter, which is usually not itemized, in order to potentially be selected as candidates.<sup>43</sup> By not having these lump sums itemized, recruiters are able to charge workers high amounts without any explanation.<sup>44</sup> However, most workers usually do not have the appropriate funds readily available and end up borrowing this money either from family and friends or from private lenders.<sup>45</sup> Private lenders are usually associated with the original recruiter, who often charge unfair

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<sup>38</sup> *Id.*

<sup>39</sup> Costa, *supra* note 4 at 3.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *The American Dream Up for Sale*, *supra* note 24 at 9.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

interest rates.<sup>46</sup> After a hopeful worker pays the local recruiter, they are directed to a larger recruitment agency to complete all of the necessary paperwork and receive a formal job offer.<sup>47</sup> This cycle suggests that workers begin their journeys in the U.S. highly indebted and become entirely focused on earning enough money to settle their debts and somehow make a profit.<sup>48</sup> Essentially, these workers are paying for the *possibility* of employment and not a guaranteed job position.

29 CFR § 503.16 explicitly prohibits employers from charging transportation or visa fees, yet many migrant workers bear the burden of these costs.<sup>49</sup> Take for example the case of Juan José Rosales, a migrant worker from Mexico who was recruited to work under an H-2B visa.<sup>50</sup> Juan was forced to pay approximately \$500 to cover the costs of visa and passport processing fees, transportation fees, and lodging fees—yet Juan was never reimbursed.<sup>51</sup> For some migrant workers, \$500 is just a fraction of the costs they must pay.<sup>52</sup> The amount that migrant workers pay in fees varies upon the industry and their country of origin.<sup>53</sup> For example, migrant workers from Guatemala working in the forestry industry pay on average about \$2,000 in fees.<sup>54</sup> A Mexican migrant worker designated for the Maryland crab industry paid \$750 in recruitment fees while an Indian migrant worker designated for construction work paid \$20 thousand.<sup>55</sup>

The Wage and Hour Division has made it abundantly clear that employers are not allowed to shift costs to their employees if they directly benefit from them.<sup>56</sup> Thus, the problem is not that there is a lack of rules for employers to follow, but rather a lack of enforcement. If employers use a recruitment agency, they are

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<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *The American Dream Up for Sale: A Blueprint for Ending International Labor Recruitment Abuse*, INT'L LAB. RECRUITMENT WORKING GRP. 1, 9 (Feb. 2013) [https://www.aft.org/sites/default/files/wysiwyg/international\\_labor\\_recruitment\\_abuse.pdf](https://www.aft.org/sites/default/files/wysiwyg/international_labor_recruitment_abuse.pdf) [<https://perma.cc/6JTF-U7HY>].

<sup>49</sup> 29 C.F.R. § 503.16 (2015).

<sup>50</sup> *The American Dream Up for Sale*, *supra* note 24 at 18.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 25.

<sup>53</sup> *Id.* at 23.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 25.

<sup>56</sup> John L. McKeon, *Field Assistance Bulletin No. 2009-2 Travel and Visa Expenses of H-2B Workers Under the FLSA*, U.S. DEP'T OF LABOR WAGE & HOUR DIV. (Aug. 21, 2009) <https://www.dol.gov/agencies/whd/field-assistance-bulletins/2009-2> [<https://perma.cc/K5EU-4WZ7>].

required by law to disclose that information with the Department of Labor; however, the Department of Labor is rarely able to conduct investigative efforts into recruitment abuses.<sup>57</sup> Additionally, recruitment agencies outside of the U.S. can easily hide their practices from foreign monitoring.<sup>58</sup> Unfortunately, this means that the Department of Labor relies on workers to do the enforcing for them through private legal action.<sup>59</sup> With no enforcement, defiant employers and recruiters are rarely reprimanded, meaning the cost of noncompliance is extremely low and the probability of exploitation and abuse is extremely high.<sup>60</sup> Recruitment abuse is the first form of exploitation that migrant workers face and, unfortunately, it is not the last.

## 2. *Wage Deficiencies*

Once in the United States, many workers find themselves exploited for their labor when they receive wages at rates significantly lower than what was advertised to them.<sup>61</sup> Focusing back to the case of Juan José Rosales, he found himself significantly underpaid from what was promised.<sup>62</sup> Juan’s recruiter told him that he would be paid seven to eight dollars per hour, but after working over seventy-two hours per week, Juan was on average receiving approximately \$270 per week—a rate of three dollars and seventy-five cents per hour.<sup>63</sup> Even worse, once in the U.S., migrant workers can be *legally* underpaid.<sup>64</sup> The laws and regulations governing the H-2B program allow employers “to pay migrant workers much less than the local average wage.”<sup>65</sup> An obvious solution to the problem would be for migrant workers to denounce their employers and demand their right to prevailing

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<sup>57</sup> *The American Dream Up for Sale*, *supra* note 24, at 25.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 18.

<sup>62</sup> *Id.*

<sup>63</sup> *The American Dream Up for Sale: A Blueprint for Ending International Labor Recruitment Abuse*, INT’L LAB. RECRUITMENT WORKING GRP. 1, 18 (Feb. 2013) [https://www.aft.org/sites/default/files/wysiwyg/international\\_labor\\_recruitment\\_abuse.pdf](https://www.aft.org/sites/default/files/wysiwyg/international_labor_recruitment_abuse.pdf) [<https://perma.cc/6JTF-U7HY>].

<sup>64</sup> See Daniel Costa, *Temporary work visa programs and the need for reform*, ECONOMIC POLY INST. 1, 23 (Feb. 03, 2021) (emphasis added) <https://files.epi.org/pdf/217871.pdf> [<https://perma.cc/D4ZC-8F7R>].

<sup>65</sup> *Id.*



wages be honored, but there are complex matters at work that prevent migrant workers from doing this.<sup>66</sup>

Migrant workers often stay silent when faced with employer abuses out of fear of employer retaliation and deportation—despite the fact they maintain legal status—because the H-2B program unjustifiably links a migrant worker’s legal status to their employer.<sup>67</sup> If a migrant worker loses their job, they lose their legal status.<sup>68</sup> Like with all other employer abuses, 29 CFR § 503.16 prohibits employers from blacklisting, retaliating against, or threatening workers who file claims against them.<sup>69</sup> Yet, the amount of workers who file complaints against their employers is slim.<sup>70</sup> The risk of losing their legal status, and potentially being blacklisted from returning for the following year, is all too great for migrant workers; thus, workers find themselves in a vicious cycle of accumulating more debt to be able to pay off their previous debt.<sup>71</sup> A common issue that will come up throughout this Note is this link between a migrant worker’s legal status and his/her employer. This link affects multiple aspects of a migrant worker’s life, including their health and safety.

### 3. Health Hazards

Migrant workers have been recognized as some of the most vulnerable members of society, partially because the jobs that they hold that are known as 3-D jobs: “dirty, dangerous, and demanding (sometimes degrading or demeaning). . .”<sup>72</sup> The dangerous aspects of a migrant worker’s job can have detrimental effects to a migrant worker’s health. In fact, a study published by the Annual Review found “migrant workers have higher rates of negative occupational exposures, leading to poor health outcomes, workplace injuries, and occupational fatalities.”<sup>73</sup> Specifically, migrant workers who are employed as animal production workers and “involved in the

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<sup>66</sup> Costa, *supra* note 4, at 3.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> 29 C.F.R. § 503.16 (2015).

<sup>70</sup> Costa, *supra* note 4, at 3.

<sup>71</sup> *Id.*

<sup>72</sup> Sally C. Moyce & Marc Schenker, *Migrant Workers and Their Occupational Health and Safety*, ANN. REV. PUB. HEALTH 351, 352 (2018) <https://www.annualreviews.org/doi/pdf/10.1146/annurev-publhealth-040617-013714> [<https://perma.cc/U4SM-DR6M>].

<sup>73</sup> *Id.*

housing, grazing, breeding and/or feeding of animals, experience the highest nonfatal injury rate across all agricultural industries.<sup>74</sup> Additionally, studies examining large animal injuries at trauma centers found that over half of all large animal-related injuries “resulted from being kicked, crushed, thrown, or falling from a horse.”<sup>75</sup> Another study found the “wide range of injury experiences and hazards experienced by thoroughbred workers include[s] musculoskeletal injury, horse kicks, and horse bites.”<sup>76</sup> Employer records obtained by researchers showed that thoroughbred horse workers also experienced general injuries, like “sprains, sprains, or tears; and injuries to the upper limbs and extremities.”<sup>77</sup> These studies suggest that migrant workers in the equine industry are among the most likely to experience greater non-fatal injuries across all agricultural industries.<sup>78</sup>

However, employer-based injury data has limitations, as workers are not individually interviewed and “often the only injuries that are recorded are those involving medical attention.”<sup>79</sup> At the individual level, workers may also resist reporting injuries and illnesses to supervisors due to concerns about “insecure immigration status, precarious work situations, minimal/no sick leave, management practices..., language barriers, and poor access to healthcare.”<sup>80</sup> A study of injury logs on horse farms found that Latinos were less likely than non-Latino workers to report injuries overall, but, but it was unclear if this was a consequence of workers experiencing fewer injuries or not reporting them to management.<sup>81</sup> Based on these studies, it appears that the amount of injuries experienced by migrant workers in the thoroughbred industry is unusually high.<sup>82</sup> A study published in the *Journal of Immigrant Minority Health* revealed that 43 percent—almost half of the total sample of workers—experienced at least one kind of

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<sup>74</sup> Jennifer E. Swanberg et al., *From the Horse Worker's Mouth: A Detailed Account of Injuries Experienced by Latino Horse Workers*, J. IMMIGRANT MINORITY HEALTH 513, 514 (June 2016).

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 514.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 513.

<sup>79</sup> *Id.* at 514.

<sup>80</sup> Jennifer E. Swanberg et al., *From the Horse Worker's Mouth: A Detailed Account of Injuries Experienced by Latino Horse Workers*, J. IMMIGRANT MINORITY HEALTH 513, 514 (June 2016).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 516.

injury which received medical attention and 34 percent of workers experienced an injury that received first aid.<sup>83</sup> According to this study, these injury rates are “much higher than what has been found in other studies of Latino workers in hazardous industries such as poultry processing plants.”<sup>84</sup> These results demonstrate just how dangerous the equine industry can be for migrant workers.<sup>85</sup>

In this study, thoroughbred managers and migrant workers were asked what tasks they felt were the most hazardous.<sup>86</sup> An examination of injury rates confirmed that the “routine horse tasks” cited by the study’s participants were the most hazardous jobs on the farm.<sup>87</sup> The most common horse-related injuries were caused by horse kicks; jerking, pulling, or twisting a body part; or horse bites.<sup>88</sup> Despite employees’ beliefs that these tasks are the most dangerous, migrant workers are infrequently provided with any protective gear like helmets and padded vests.<sup>89</sup> A simple solution could be for workers to ask for more protective gear. However, migrant workers are usually not in the position to make any demands.<sup>90</sup> Migrant workers tend to complain less about hazardous working conditions due to threats of physical violence, job insecurity, and immigration status uncertainty.<sup>91</sup> Unfortunately, the above factors have been worsened by the COVID-19 pandemic, and migrant workers are still feeling the effects of being a part of one of the most vulnerable working communities.

#### 4. *The COVID-19 Pandemic*

The COVID-19 pandemic has only amplified the exploitation of migrant workers. In fact, migrant workers are “disproportionately susceptible to falling dangerously ill from the virus since many of them live in overcrowded, employer-provided

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<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 517.

<sup>85</sup> *Id.*

<sup>86</sup> Jennifer E. Swanberg et al., *From the Horse Worker’s Mouth: A Detailed Account of Injuries Experienced by Latino Horse Workers*, J. IMMIGRANT MINORITY HEALTH 513, 517 (June 2016).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 516.

<sup>89</sup> *Id.* at 518.

<sup>90</sup> Moyce & Schenker, *supra* note 72, at 355–56.

<sup>91</sup> *Id.*

housing and must travel long hours in crowded conditions to their work sites.”<sup>92</sup> To make matters worse, the need for migrant workers during the COVID-19 pandemic is at an all-time high.<sup>93</sup> While the need for labor has increased, protections for these workers have not.<sup>94</sup> The Office of the State Veterinarian from the Kentucky Department of Agriculture Migrant issued guidelines for horse breeders in the state.<sup>95</sup> These guidelines were designed “to minimize risk of infection among farm staff and related personnel charged with transporting and handling horses...[w]ith vans and individuals visiting multiple facilities each day during the breeding season, it is important to adopt standard practices in how people and horses visiting sheds are managed.”<sup>96</sup> The guidelines advocated for precautions which included: attendants must wear disposable gloves, breeding equipment must be disinfected, documentation must be done electronically, and no outside individuals must be let inside the shed.<sup>97</sup> These guidelines were endorsed by organizations like the Kentucky Horse Council and The Jockey Club.<sup>98</sup> While these guidelines are surely necessary for curbing the transmission of the virus, they lacked protections for workers. The guidelines were also not distributed with any additional translations, making it difficult for migrant workers to even be aware of the guidelines, which are supposedly designed to protect them.<sup>99</sup> These guidelines will do little to protect workers if they are unable to understand them. Additionally, migrant workers are many times worse-off in the COVID-19 pandemic than American employees because they have been excluded from stimulus relief programs and many are not receiving hazard pay.<sup>100</sup> Essentially, inaccessibility of services; language and

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<sup>92</sup> Rachel Stone, *Meatpacking Union Says H-2B Change Is 'Betrayal' of Workers*, LAW 360 (May 20, 2022, 5:57 PM), <https://www.law360.com/articles/1275450/meatpacking-union-says-h-2b-change-is-betrayal-of-workers> [https://perma.cc/97PS-KL9K].

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> Janet Patton, *Kentucky's Horse Industry Can't Stop for COVID-19: 'The Mares are Foaling Right Now'*, LEXINGTON HERALD LEADER (Mar. 28, 2020, 1:21 PM), <https://www.kentucky.com/news/coronavirus/article241558361.html> [https://perma.cc/6QZ4-CBZQ].

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*; *COVID-19 Guidelines*, KY. HORSE COUNCIL <https://www.kentuckyhorse.org/COVID-19-Guidelines> (last viewed Oct. 28, 2021) [https://perma.cc/Z5WH-HUTK].

<sup>99</sup> Moyce & Schenker, *supra* note 72 at 355–56.

<sup>100</sup> Costa, *supra* note 64 at 36.

cultural barriers; cost; and a lack of migrant-inclusive health policies all increase migrant workers' health risks related to COVID-19.<sup>101</sup>

### *B. Ineffective Enforcement*

There are multiple weaknesses within the H-2B program which can be attributed to the abuses and exploitations that migrant workers face. One of the biggest weaknesses is enforcement, or more specifically, the way in which enforcement is carried out. A report published by the Economic Policy Institute divides enforcement into two different types, (1) pre-arrival enforcement and (2) post-arrival enforcement.<sup>102</sup> Pre-arrival enforcement occurs at the beginning of the process, “before guestworkers arrive from abroad and during the time when employers apply for workers and go through bureaucratic processes such as labor market certification or attestation.”<sup>103</sup> Post-arrival enforcement occurs after migrant workers arrive.<sup>104</sup> Post-arrival enforcement can include government investigation or audits which find violations that result in government fines, criminal charges, or debarment from using the program in the future.<sup>105</sup>

The report explains that pre-arrival enforcement is often ineffective and may only amount to a “government rubber stamp because the structure of the program assumes that most employers have a bona fide need for a guestworker.”<sup>106</sup> The report also states that post-arrival enforcement is “geared toward ensuring that guestworkers are treated and paid fairly by their employers according to program rules, and that employers and recruiters of guestworkers adhere to any other applicable program rules. . . .”<sup>107</sup> Post-arrival enforcement may come about through either “direct complaints to government agencies from guestworkers or their representatives, or via government-initiated inspections or

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<sup>101</sup> UNITED NATIONS CHILDREN'S FUND [UNICEF], *COVID-19 does not discriminate, nor should our response* (Mar. 20, 2020), <https://www.unicef.org/press-releases/covid-19-does-not-discriminate-nor-should-our-response> [https://perma.cc/F773-Q4W3].

<sup>102</sup> Costa, *supra* note 4, at 29.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

audits.”<sup>108</sup> While post-enforcement policies and regulations can help protect migrant workers from abuse and exploitation, they can also be completely ineffective. Enforcement measures, which require guestworkers to file complaints regarding employer violations, such as wage theft and health and safety violations, or measures that depend on other forms of whistleblowing, can “fail to achieve their goals because they require guestworkers who are in the country of destination on temporary visas to assume a significant amount of risk to file a complaint.”<sup>109</sup>

As discussed above, the risk of a migrant worker losing their job is many times a nonstarter, especially if their legal status is linked to their employment status.<sup>110</sup> What is even more concerning is that a migrant worker’s efforts to level the playing field can result in a severance of employment and a lack of justice.<sup>111</sup> The report published by the Economic Policy Institute states, “[i]f a guestworker’s employer discovers that the guestworker has filed a complaint, the employer could terminate the employment relationship with the worker, rendering the guestworker removable before having a chance to fully pursue and litigate the claim.”<sup>112</sup> Audits and other “government-initiated oversight actions and investigations” can also be a form of post-enforcement policies.<sup>113</sup> These kinds of enforcement activities can ensure that the employers who are investigated are complying with federal regulations; however, they are limited as well.<sup>114</sup>

The problem with using audits and other government-initiated oversight actions is that there are not enough government employees in these labor agencies.<sup>115</sup> This shortage of government agents does not allow for effective investigative efforts on behalf of the government. There are simply not enough agents to investigate the status of all migrant workers in the United States and the

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<sup>108</sup> Daniel Costa, *Employers Increase Their Profits and Put Downward Pressure on Wages and Labor Standards by Exploiting Migrant Workers*, ECONOMIC POL’Y INST. 1, 29 (Aug. 27, 2019) <https://files.epi.org/pdf/174093.pdf> [<https://perma.cc/JAU7-9FDZ>].

<sup>109</sup> *Id.* at 30.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> Daniel Costa, *Employers Increase Their Profits and Put Downward Pressure on Wages and Labor Standards by Exploiting Migrant Workers*, ECONOMIC POL’Y INST. 1, 30 (Aug. 27, 2019) <https://files.epi.org/pdf/174093.pdf> [<https://perma.cc/JAU7-9FDZ>].

<sup>115</sup> *Id.*

worksites at which they are employed.<sup>116</sup> Perhaps the lack of enforcement could be due to the disproportionate amount of spending within the immigration system in the United States. A report done by the Migration Policy Institute in 2012 found the government spent a total of \$18 billion on enforcing immigration laws while only \$1.6 billion was spent enforcing labor standards.<sup>117</sup> While it is unclear what the source of inefficiency is in the H2-B program, one thing is clear, the Wage and Hour Division needs substantial reform or additional resources.

### *1. Wage and Hour Division Enforcement*

The Wage and Hour Division under the DOL is tasked with the enforcement of the H-2B program's regulations and rules.<sup>118</sup> The Wage and Hour Division is one of the very few government entities that regulate labor standards for migrant workers.<sup>119</sup> The Wage and Hour Division has approximately 1,700 total employees (not all of whom are investigators), but it is responsible for enforcing the laws that "protect over 135 million workers in more than 7.3 million establishments throughout the United States and its territories."<sup>120</sup> This data is one of the biggest indicators that the Wage and Hour Division does not have the necessary resources to be able to effectively enforce the policies and rules that regulate employer practices. In fact, the Office of the Inspector General conducted a report of the Wage and Hour Division finding major improvements need to be made.<sup>121</sup>

The audit found that the Wage and Hour Division has not yet established a "risk-based process" for determining which H-2B applications to audit.<sup>122</sup> The report stated, "[t]he current selection process does not use data analytics or account for risk when selecting applications to audit. . . DOL has not documented any

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<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> Daniel Costa, *Employers Increase Their Profits and Put Downward Pressure on Wages and Labor Standards by Exploiting Migrant Workers*, ECONOMIC POL'Y INST. 1, 31 (Aug. 27, 2019) <https://files.epi.org/pdf/174093.pdf> [<https://perma.cc/JAU7-9FDZ>].

<sup>121</sup> U.S. DEP'T OF LABOR OFF. OF INSPECTOR GEN., *DOL Needs to Improve Debarment Processes to Ensure Foreign Labor Program Violators are Held Accountable*, 1, 2 (Sept. 30, 2020) [https://www.oversight.gov/sites/default/files/oig-reports/06-20-001-03-321\\_WHD%20Debarment\\_Final%20Rpt\\_093020.pdf](https://www.oversight.gov/sites/default/files/oig-reports/06-20-001-03-321_WHD%20Debarment_Final%20Rpt_093020.pdf) [<https://perma.cc/E7CS-4TEC>].

<sup>122</sup> *Id.*

risk factors considered before initiating an audit; thus, it is difficult to determine if the applications audited were the most likely to result in violations eligible for debarment.”<sup>123</sup> In other words, the current systems which are in place have failed to effectively identify noncompliant employers that should be debarred from the program.<sup>124</sup> The report goes on to explain that the Department could not “provide reasonable assurance that it identified violators and held them accountable to ensure the protection of U.S. workers, foreign workers, and employers who followed laws and regulations.”<sup>125</sup> This is a gross miscarriage of justice, as employment accountability is one of the greatest protections against migrant worker abuses. If employers are not held accountable, they will continue their abusive policies, and the findings from the Inspector General indicate noncompliant employers have been getting away with these abuses for many years.<sup>126</sup>

The above studies and reports suggest that enforcement of labor standards in the United States is sub-par at best. The various systems and policies that were designed to protect migrant workers are instead functioning as protections for employers. The above failures of the H-2B program help shed light on the ineffectiveness of current migrant worker protections and the importance of alternative solutions. Migrant workers should be given the necessary tools to effectively combat the abuses and exploitations they face in the United States. These protections and additional solutions will be discussed more in-depth in part II of this Note.

## II. SOLUTIONS

This Note has discussed some of the current issues that may arise from current H-2B policies. Under this system, equine migrant workers are left essentially defenseless. Kentucky is highly reliant on migrant workers, to the point that without them, there would be dire financial consequences for the equine industry.<sup>127</sup> This reliance should prompt legislators to enact

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<sup>123</sup> *Id.* at 3.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *See id.* at 2.

<sup>127</sup> *See Mitchell, supra* note 6.



policies to protect migrant workers. While there are many different potential recommendations for change, efforts should primarily focus on the law and enacting change through the legislature.<sup>128</sup> Migrant workers should be given the tools to combat employer abuses and exploitations. Critics and scholars alike agree that the H-2B visa program has its flaws; however, instead of addressing the root of the problem, past administrations have only offered band-aid solutions.<sup>129</sup> The following recommendations for change require congressional action but are necessary to create fair and humane working conditions for migrant workers.

#### *A. Freedom of Association*

Current H-2B standards reflect a great inefficiency among the enforcement of fair labor standards for migrant guest workers.<sup>130</sup> If nothing else, legislatures should seriously consider de-linking a migrant worker's status from their employers. As Daniel Costa stated in a report by the Economic Policy Institute, ineffectiveness of enforcement in the United States "increases the importance of freedom of association and collective bargaining for migrant workers."<sup>131</sup> Legislatures could effectively provide migrant workers the tools needed to protect themselves from employer abuses through freedom of association.<sup>132</sup> Under the current H-2B policy, workers are inextricably linked to their employer.<sup>133</sup> If workers are fired for retaliating against employer abuse, they lose their legal status, leaving them susceptible to deportation.<sup>134</sup> So much of a migrant worker's action is governed by the fear linked with their immigration status.<sup>135</sup> Any action which would risk their legal status is usually not an option for them. Freedom of association by default breaks the link between a worker's legal and employment status. Thus, de-linking a migrant worker's legal status from the employer who exploits them would allow workers to terminate employment, change sponsors, and

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<sup>128</sup> Costa, *supra* note 4 at 26.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 30.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> Daniel Costa, *Employers Increase Their Profits and put downward pressure on wages and labor standards by exploiting migrant workers*, ECONOMIC POLY INST. 1, 30 (Aug. 27, 2019) <https://files.epi.org/pdf/174093.pdf> [<https://perma.cc/JAU7-9FDZ>].

<sup>135</sup> *See id.*

effectively gain access to justice and redress. This would also mean that migrant workers would no longer be pressured by the risk of losing their legal status. Additionally, freedom of association is not a drastic or unheard-of solution. In fact, the idea had been introduced into the House of Representatives through the Seasonal Worker Solidarity Act of 2020.<sup>136</sup>

The Seasonal Worker Solidarity Act of 2020, was introduced by House Representative Joaquin Castro at the end of December 2020, but unfortunately it was not passed.<sup>137</sup> The act included a section delineating a migrant workers ability to change employers upon notification to DOL.<sup>138</sup> The Act goes on to state that upon notification to the DOL, migrant workers would be given a sixty-day grace period where they could work as long as they were in the process of securing alternative employment.<sup>139</sup> The language in this Act provides a great framework for implementing freedom of association. Under this new policy, a migrant worker would be allowed the opportunity to change employers to escape abusive treatment while still retaining legal status in the country.<sup>140</sup> Furthermore, by requiring workers to first submit a reviewable petition to the DOL, a migrant worker's ability to abuse the system would be minimized. However, if workers found themselves needing immediate removal from an abusive work environment, they could leave without fear of deportation due to the policy's sixty-day grace period.<sup>141</sup> An exploited and abused migrant worker with freedom of association would also have greater confidence to carry out complaints against noncompliant employers.

### *B. Enforcement Measures*

The presented data shows that current enforcement standards by WHD are abysmal.<sup>142</sup> The current standards make the most effective tool of enforcement against non-compliant

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<sup>136</sup> Seasonal Worker Solidarity Act of 2020, H.R. 8954, 116th Cong. (2020).

<sup>137</sup> *Id.*

<sup>138</sup> Seasonal Worker Solidarity Act of 2020, H.R. 8954 § 218A(q)(2), 116th Cong. (2019).

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *See id.*

<sup>142</sup> *The American Dream Up for Sale*, *supra* note 24 at 5.

employers private legal action initiated by migrant workers.<sup>143</sup> However, private civil actions are often outside the realm of possibility for migrant workers, as this puts their legal status in jeopardy.<sup>144</sup> To this end, legislators should enact policies which force federal agencies to improve their auditing procedures and increase their focus on barring employers who violate labor standards.

The Seasonal Worker Solidarity Act of 2020, proposed a number of solutions to protect temporary migrant workers other than freedom of association.<sup>145</sup> Among the proposed solutions, the Act required the Secretary of Labor to carryout random audits every fiscal year “of not less than five percent of all H-2B employers and not less than fifty percent of all employers employing more than fifty H-2B workers.”<sup>146</sup> The Acts goes on to further state, “[t]he Secretary of Labor shall give priority to the audit of employers with a workforce in which at least 15 percent of workers have H-2B status.”<sup>147</sup> The report done by the Office of the Inspector General specifically stated that WHD ineffectively audited employers because it did not use a “risk-based process.”<sup>148</sup> Giving priority to auditing employers with a large number of migrant workers proactively implements a risk-based process.

While a larger migrant guest worker population does not necessarily mean employers are more inclined to violate labor standards, it is worth investigating an employer who has a significantly larger proportion of migrant workers than U.S. workers.<sup>149</sup> As illustrated above, employers who circumvent fair labor standards purposefully choose migrant workers over U.S. workers due to a migrant worker’s inability to complain and seek redress.<sup>150</sup> Thus, if there is an employer whose entire workforce is compiled of at least 15 percent of H-2B workers; government agencies should investigate and make sure employers are not hiring a large amount of migrant workers with the intention of saving profit at the expense of fair labor standards.

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<sup>143</sup> *Id.* at 25.

<sup>144</sup> *Id.* at 44.

<sup>145</sup> Seasonal Worker Solidarity Act of 2020, H.R. 8954, 116th Cong. (2020).

<sup>146</sup> *Id.* at § 218A(g)(4).

<sup>147</sup> *Id.*

<sup>148</sup> U.S. DEP. OF LAB. OFF. OF INSPECTOR GEN., *supra* note 121.

<sup>149</sup> *Id.*

<sup>150</sup> *The American Dream Up for Sale*, *supra* note 24 at 44.

*C. Permanent Pathway*

If legislators really want to effect change within the H-2B program, they should amend current regulations to allow migrant workers to self-petition into a more permanent status. The equine industry has well-documented labor shortages.<sup>151</sup> Advocates have stated that the equine industry will always need migrant workers and this solution could benefit both migrant workers and employers.<sup>152</sup> The equine industry could specifically benefit from migrant workers receiving permanent status. If migrant workers were not required to leave the country seasonally, the equine industry would have an easier time filling labor shortages and could in turn generate greater revenue.

The United States already has similar policies offering permanent statuses for migrant workers.<sup>153</sup> H-1B workers are offered a pathway to permanent residence.<sup>154</sup> However, this process must be initiated by an employer.<sup>155</sup> Only allowing employers to petition for migrant workers creates a power imbalance. Under this model, a migrant worker's legal status would still be inextricably linked to their employer. Allowing migrant workers to self-petition is imperative. Migrant workers are already at a disadvantage in their ability to protect themselves.<sup>156</sup> Thus, giving additional power to employers would be detrimental to migrant workers' rights. Like freedom of association, pathways to more permanent statuses have been discussed before in past legislation.<sup>157</sup> This recommendation had been reintroduced in the Seasonal Worker Solidarity Act of 2020 and it was also discussed by the Model International Mobility Convention.<sup>158</sup>

The Model International Mobility Convention was drafted by the Columbia Global Policy Initiative to compile effective

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<sup>151</sup> See Blackburn, *supra* note 6.

<sup>152</sup> *Id.*

<sup>153</sup> See Immigration Nationality Act, 8 U.S.C. § 1182 (2013).

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *The American Dream Up for Sale*, *supra* note 24 at 44.

<sup>157</sup> See Seasonal Worker Solidarity Act of 2020, H.R. 8954, 116th Cong (2020); GLOB. POL'Y INITIATIVE, COLUMBIA UNIV., *Model International Mobility Convention*, (2017) <https://mobilityconvention.columbia.edu/> [<https://perma.cc/H5ER-ZSMQ>].

<sup>158</sup> Seasonal Worker Solidarity Act of 2020, H.R. 8954, 116th Cong. (2020); *Model International Mobility Convention*, *supra* note 157.

migration policies to be adopted by the international community.<sup>159</sup> Article 83 of the convention states:

1. Migrant workers, investors and residents shall be eligible to apply for regular permanent residence after a specified period of time not exceeding five years. 2. After seven years States of employment or residence must offer permanent residence to migrant workers, investors and residents who have met all the conditions of their residency and/or employment together with all applicable laws of the State of employment or residence.<sup>160</sup>

The convention goes on to further assert that, after a specified period of legal residence, states should offer migrant workers and their families the ability to apply for citizenship.<sup>161</sup> The Seasonal Worker Solidarity Act of 2020 proposed similar language, stating that after eighteen months, migrant workers would be allowed the opportunity to self-petition for permanent residence.<sup>162</sup> The reality is that the U.S. already has systems in place to inspect and review these self-petitions—there would be no need for additional forms.<sup>163</sup> The guidelines determining whether an individual would be eligible for permanent residence status, or, rather, factors which would render a migrant worker ineligible, could be determined by § 1182 of the pre-existing Immigration Nationality Act (“INA”), which outlines the factors that would make a migrant worker ineligible for permanent residence.<sup>164</sup> Amending the INA to provide a pathway to permanence for H-2B workers would not drastically shift the current policy in place. The same individuals the policy aims to exclude would continue to be excluded. This new policy would simply give certain migrant workers, who are upstanding working individuals, the ability to stay in this country and continue offering their much-needed services to the equine industry.<sup>165</sup> If done right, a pathway to a more permanent status

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<sup>159</sup> *Model International Mobility Convention*, *supra* note 157.

<sup>160</sup> *Id.* at 48.

<sup>161</sup> *Id.*

<sup>162</sup> Seasonal Worker Solidarity Act of 2020, H.R. 8954, 116th Cong. (2020).

<sup>163</sup> Immigration Nationality Act, 8 U.S.C. §1182 (2013).

<sup>164</sup> Immigration Nationality Act, 8 U.S.C. § 1182 (2013).

<sup>165</sup> *See* Blackburn, *supra* note 6.

could be extremely beneficial not only to migrant workers, but to employers as well.

#### CONCLUSION

In conclusion, the equine industry is entirely too dependent upon migrant workers under the H-2B visa program to keep ignoring employer abuses and exploitations. Without migrant workers, the equine industry would crumble.<sup>166</sup> Year after year, the equine industry scrambles to find sufficient laborers to get the job done.<sup>167</sup> Advocates have said there will always be a need for migrant labor.<sup>168</sup> Additionally, the H-2B program is in dire need of reform.<sup>169</sup> Enforcement of H-2B regulations is highly ineffective, allowing employer abuses of migrant workers to go undetected.<sup>170</sup> Lack of enforcement coupled with employer greed leaves migrant workers utterly defenseless against exploitation.<sup>171</sup>

Furthermore, the current remedies offered to migrant workers are ineffective, due to lack of government funded resources offered to migrant workers.<sup>172</sup> There is no distant future in which the equine industry will stop relying on migrant labor, thus advocates of the equine industry should support the reformation the H-2B visa program. This reform must start with legislators, because the best way to effect change is through the law. These changes should include policy changes, like de-linking the status of migrant workers from their employers and including a pathway to permanence in the United States.<sup>173</sup> This would not only benefit migrant workers, but employers as well. For decades the United States has grown reliant on migrant workers and profited off of their labor.<sup>174</sup> In return, migrant workers have faced inhumane working conditions, utterly low working wages, and no form of redress.<sup>175</sup> It is time for legislators to address this terrible scenario and effect change that will protect one of the most vulnerable working communities.

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<sup>166</sup> Mitchell, *supra* note 6.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *The American Dream Up for Sale*, *supra* note 24.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> Costa, *supra* note 4.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *The American Dream Up for Sale*, *supra* note 24.