

Horticulture, Labor and H-2 ... an Insider's View

As the spring season approaches, the state of labor legislation continues to be a moving target for the horticulture industry.

BY CRAIG REGELBRUGGE

Groundhog Day came and went last month. Punxsutawney Phil saw his shadow and so six more weeks of winter, they say. Fortunately, the famed rodent is wrong more than he is right. Still, Groundhog Day seems an apt metaphor for the state of things in Washington.

The sun rises, we find ourselves on the verge of a(nother) government shutdown. A new short-term “continuing resolution” passes, ensuring a couple more weeks of government funding. One side floats a fix for the DACA issue, the other side trashes it. The sun sets, rises, and the cycle repeats.

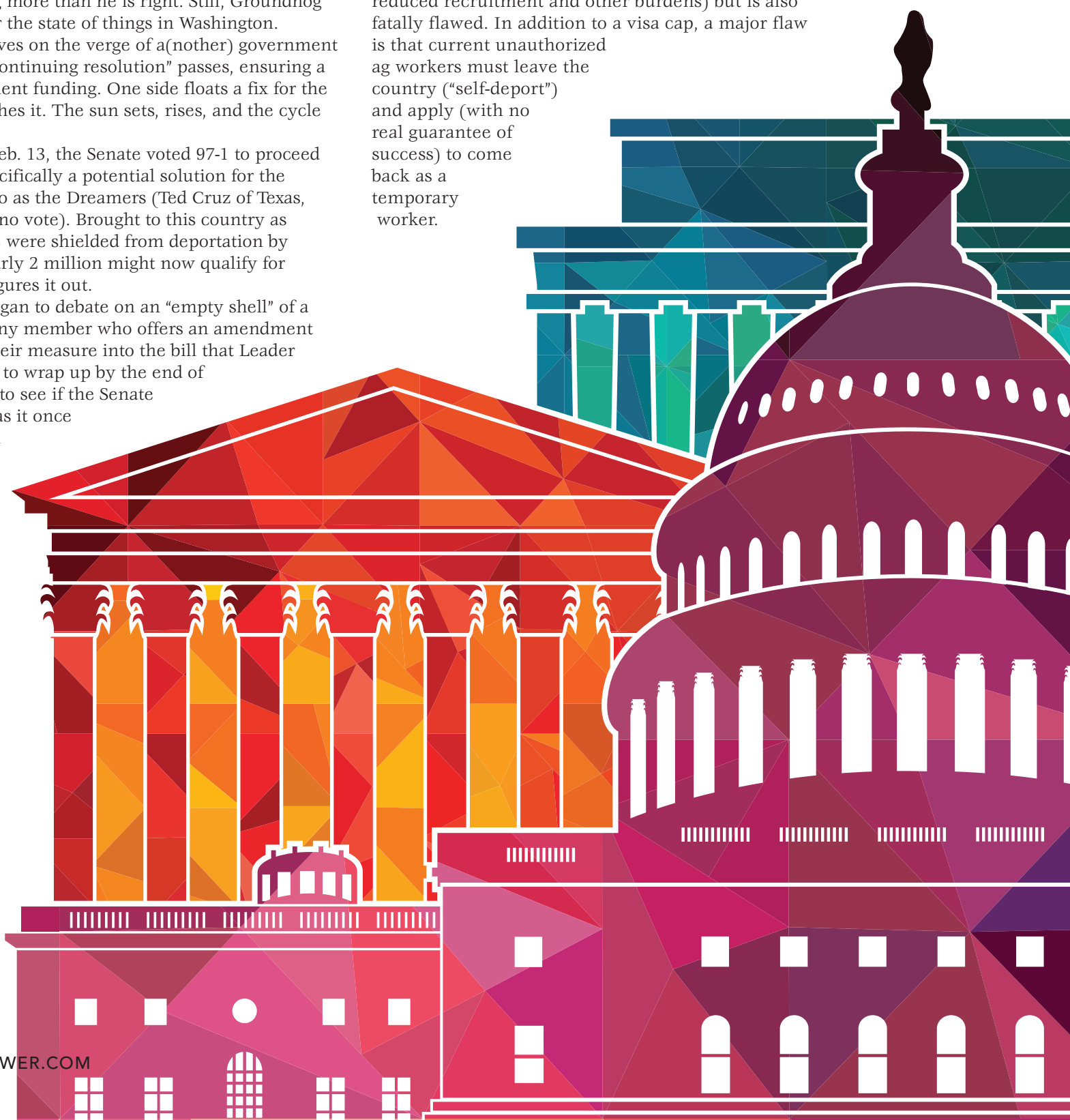
Is this about to change? On Feb. 13, the Senate voted 97-1 to proceed to debate immigration, and specifically a potential solution for the young children often referred to as the Dreamers (Ted Cruz of Texas, professional naysayer, was the no vote). Brought to this country as minors, roughly 700,000 people were shielded from deportation by the Obama administration. Nearly 2 million might now qualify for permanent relief if Congress figures it out.

So in February, the Senate began to debate on an “empty shell” of a bill. The basic ground rule is, any member who offers an amendment that can garner 60 votes gets their measure into the bill that Leader Mitch McConnell (R-KY) hopes to wrap up by the end of the week. It will be interesting to see if the Senate can get back to business more as it once was! And as you read this, we'll probably know how it ended.

The situation in the House is more uncertain. Leaders there, as in the Senate, have generally called for a narrow approach to the DACA situation that addresses the President's “four pillars” — border security, limit family-based immigration, eliminate the diversity visa lottery and provide a path to residency and eventual citizenship for roughly 1.8 million Dreamers. Meanwhile, retiring House Judiciary Committee chairman Bob Goodlatte (R-VA) has his own view. He is pushing a vast immigration enforcement bill with a narrower DACA fix.

Goodlatte would also replace the existing H-2A program agricultural visa program with a

new H-2C program. The new proposed program has some seemingly attractive features (lower wages, no housing, reduced recruitment and other burdens) but is also fatally flawed. In addition to a visa cap, a major flaw is that current unauthorized ag workers must leave the country (“self-deport”) and apply (with no real guarantee of success) to come back as a temporary worker.



Two things are wrong with this approach. One, it ignores the reality that most of the workforce now has — family and years of commitment to their jobs. Cutting these ties to leave would be a supreme act of trust. Then there is the practical logistics challenge. Last year, fewer than 200,000 workers entered on H-2A visas. Yet at peak times, as has been the case for years, the visa petition and issuance processes max out, and delays can get serious. Imagine adding 1 to 1.5 million current workers to the line. The system would surely crash.

Right now, it's tough to say what will happen, but a DACA fix that is kept narrow will have a better chance of success. And if this fails, Congress will probably muster the votes to extend limited DACA-like protection for a couple years along with some border security investments, and move on.

WHETHER TO H-2?

The state of play aside, many in our industry are assessing their options in the face of a worsening labor situation. For more and more growers, that may mean H-2A, the agricultural worker visa program for seasonal (less than 10 months) labor needs. Nursery and greenhouse growers generally have access to the program, though it comes with strings attached.

What are some of those strings? First, the program requires that you provide and pay for worker housing. This is the single biggest impediment for many growers, but one you have to figure out to continue your evaluation. The program also requires that you cover transportation costs and daily subsistence.

Next, be aware that you must pay an elevated minimum wage known as the "Adverse Effect Wage Rate" (AEWR). Current AEWRs range from \$10.46 in Arizona and New Mexico, to \$14.37 in Hawaii. Most states fall in the \$12 to \$13 range. Importantly, you must also pay the AEWR to any domestic worker doing any single job task in common with your H-2A workers (known as "corresponding employment").

There are other costs as well. Most employers engage

an experienced attorney to get set up, and use an agent to help with the paperwork process. Positions must be advertised. There are application and visa fees. In short, not the low-cost solution, but the good news is you lay your head on the pillow at night without lying awake worrying about an immigration compliance audit or raid.

I say all these things not to scare you, but just to make it clear that you really must do your homework before turning to H-2A. AmericanHort provides a special legal advisory service for premium members to request guidance and tips.

Given the worsening labor situation, despite the bureaucratic and cost challenges, H-2A is growing by leaps and bounds. The number of positions for which H-2A workers were requested topped 200,000 in FY2017, a 16 percent increase and quadruple the historic need a decade ago. Double digit increases are expected to continue. The good news being, H-2A does not have a Congressionally-imposed visa cap!

ANY RELIEF IN SIGHT?

While some AmericanHort H-2A reform priorities will require Congress to act, much can be done to improve the program through policy and administrative rule changes. Here, the good news is that AmericanHort has cultivated solid relationships with key White House and federal agency staff. We expect that a regulatory review process launched by President Trump when he met last April with a small group of farmers including AmericanHort board chairman Tom Demaline will lead to at least some relief in the months ahead.

H-2B (AD TO WORSE)

While our greenhouse and nursery members usually turn to H-2A as a labor relief option, the H-2B program is indirectly important. This is because half of the 66,000 seasonal worker visas issued each year under this non-ag program are used by the landscape industry. If you're a grower whose plants are being professionally installed, chances are good that many of them are touched by an H-2B visa holder.

Unfortunately, the 66,000 visa cap is Congressionally mandated, and this spring is shaping up to be a bloodbath. January 1 was the first date that employers could initiate the application process with the United States Department of Labor. On that day, more than 80,000 positions were requested for jobs with April 1 dates of need. Yet only 33,000 visas are available. It's a looming train wreck.

On H-2B, the response plan has several elements. There are broad reform bills introduced (S.792 and H.R.2004). But in the short term, it is more likely relief will come in smaller pieces. For instance, the Department of Homeland Security still has the temporary authority to approve visas above the cap number. Changing definitions for some industries such as forestry, and even landscape plant installation, could give more employers access to use the uncapped H-2A program as an alternative.

So just like the stormy spring weather that's soon to arrive, the labor forecast looks to be volatile.

Stay tuned. ■

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DID YOU KNOW?

AmericanHort is the horticulture industry's advocate in Washington.

As growers look for help wading through many of the confusing issues related to labor, AmericanHort's Advocacy team is available to help make sense of things.

One of the association's programs is Voter Voice. This is a grassroots advocacy program that allows horticulture professionals to connect easily with their elected leaders on issues affecting their business.

One click of a button allows members to send messages to those elected to serve. While AmericanHort's team is a constant presence on Capitol Hill, your efforts to contact your representatives on key issues makes that presence even stronger. You can learn more about the program at www.americanhort.org/page/votervoice.

The motto of AmericanHort's Lighthouse Program: "Informed. Engaged. Effective." This program is designed to strengthen the industry's voice and influence, and to raise awareness of critical and emerging industry issues through more than 40 state partner associations. For more information on the Lighthouse Program, please visit www.americanhort.org/page/lighthouse.