U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B4

[redacted]

FILE: WAC 09 077 50857 Office: CALIFORNIA SERVICE CENTER Date: DEC 0 1 2009

IN RE: Petitioner: [redacted]
Beneficiaries:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(ii)(a) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(ii)(a)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

for

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a fish hatchery that seeks to employ the beneficiary as a fish hatchery worker pursuant to section 101(a)(15)(H)(ii)(a) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(H)(ii)(a) for the period from February 16, 2009 to December 15, 2009. The Department of Labor (DOL) determined that the petitioner had submitted sufficient evidence for the issuance of a temporary labor certification.

The director denied the petition on February 10, 2009, concluding that the beneficiary is a national of Hungary and thus, not eligible to participate in the H-2A visa program pursuant to the list of eligible countries provided by the Secretary of Homeland Security. *See* 73 FR 77043 (December 18, 2008).

On appeal, the petitioner states that the beneficiary has worked for the petitioner for the past four years during peak production. The petitioner explains that the beneficiary is a "key member" of the staff and handles "spawning and production of our largemouth bass." He is responsible for "training our bass to accept an artificial feed in the lab and he handles all disease treatment and grading." He supervises the lab and "produces a live invertebrate culture for feeding recently hatched bass fry." In addition, the beneficiary has "specialized training" on the computerized blood analyzer called a Coulter Counter.

Section 101(a)(15)(H)(ii)(a) of the Act defines an H-2A temporary 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, as defined by the Secretary of Labor in regulations and including agricultural labor defined in section 3121(g) of the Internal Revenue Code of 1954 (26 U.S.C. 3121) and agriculture as defined in section 3(f) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(f)), of a temporary or seasonal nature...

The Department of Homeland Security (DHS) published the H-2A Agricultural Temporary Worker Final Rule in the Federal Register on December 18, 2008. The final rule became effective on January 17, 2009. *See* 73 FR 76891. This final rule amends DHS regulations regarding temporary agricultural workers, and their U.S. employers, within H-2A nonimmigrant classification. The current Petition was filed with United States Citizenship and Immigration Services (USCIS) on January 27, 2009, after the date the new regulations came into effect, thus the revised regulations will be applied to the current petition.

The regulation at 8 C.F.R. § 214.2(h)(5)(i)(F) states:

> (F) *Eligible Countries.* (*1*)(*i*) H–2A petitions may only be approved for nationals of countries that the Secretary of Homeland Security has designated as

participating countries, with the concurrence of the Secretary of State, in a notice published in the Federal Register, taking into account factors, including but not limited to:

(*A*) The country's cooperation with respect to issuance of travel documents for citizens, subjects, nationals and residents of that country who are subject to a final order of removal;

(*B*) The number of final and unexecuted orders of removal against citizens, subjects, nationals and residents of that country;

(*C*) The number of orders of removal executed against citizens, subjects, nationals and residents of that country; and

(*D*) Such other factors as may serve the U.S. interest.

(*ii*) A national from a country not on the list described in paragraph (h)(5)(i)(F)(*1*)(*i*) of this section may be a beneficiary of an approved H–2A petition upon the request of a petitioner or potential H–2A petitioner, if the Secretary of Homeland Security, in his sole and unreviewable discretion, determines that it is in the U.S. interest for that alien to be a beneficiary of such petition. Determination of such a U.S. interest will take into account factors, including but not limited to:

(*A*) Evidence from the petitioner demonstrating that a worker with the required skills is not available either from among U.S. workers or from among foreign workers from a country currently on the list described in paragraph (h)(5)(i)(F)(*1*)(*i*) of this section;

(*B*) Evidence that the beneficiary has been admitted to the United States previously in H–2A status;

(*C*) The potential for abuse, fraud, or other harm to the integrity of the H–2A visa program through the potential admission of a beneficiary from a country not currently on the list; and

(*D*) Such other factors as may serve the U.S. interest.

(*2*) Once published, any designation of participating countries pursuant to paragraph (h)(5)(i)(F)(*1*)(*i*) of this section shall be effective for one year after the date of publication in the Federal Register and shall be without effect at the end of that one-year period.

On December 18, 2008, with the concurrence of the Secretary of State, the Secretary of Homeland Security published the list of designated countries whose nationals can be the beneficiaries of an approved H-2A petition. *See* 73 FR 77043. The list is composed of countries that are important for the operation of the H-2A program and are cooperative in the repatriation of their citizens, subjects, nationals or residents who are subject to a final order of removal from the United States. Effective for one year, commencing on January 17, 2009, the list includes the following countries: Argentina; Australia; Belize; Brazil; Bulgaria; Canada; Chile; Costa Rica; Dominican Republic; El Salvador; Guatemala; Honduras; Indonesia; Israel; Jamaica; Japan; Mexico; Moldova; New Zealand; Peru; Philippines; Poland; Romania; South Africa; South Korea; Turkey; Ukraine; United Kingdom. *Id.*

As noted by the director in her decision, the petition was filed on behalf of a beneficiary from Hungary. Hungary was not on the list of eligible countries for the current year. As noted above, DHS will only approve petitions for H-2A nonimmigrant status for nationals of countries designated by means of this list or by means of the special procedure allowing petitioners to request approval for particular beneficiaries if the Secretary of Homeland Security determines that it is in the U.S. interest.

On June 1, 2009, USCIS issued a policy memorandum regarding the evidence required to satisfy the U.S. interest requirement for beneficiaries from countries not listed on the H-2A and H-2B eligible counties list. [1] Specifically, the memorandum states the following:

> Each request for a U.S. interest exception is fact-dependent, and therefore must be considered on a case-by-case basis. Although USCIS will consider any evidence submitted to address each factor, USCIS has determined that it is not necessary for a petitioner to satisfy each and every factor. Instead, a determination will be made based on the totality of circumstances. For factor no. 3, USCIS will take into consideration, among other things, whether the alien is from a country that cooperates with the repatriation of its nationals. For factor no. 4, circumstances that are given weight, but are not binding, include evidence substantiating the degree of harm that a particular U.S. employer, U.S. industry, and/or U.S. government entity might suffer without the services of H-2A or H-2B workers from non-eligible countries.

The AAO now turns to a consideration of whether the petitioner may qualify under the four criteria listed under 8 C.F.R. § 214.2(h)(5)(i)(F)(l)(ii). Pursuant to the revised regulations, a national from a country not on the list may be a beneficiary of an approved H–2A petition upon the request of a petitioner if the Secretary of Homeland Security, in his sole and unreviewable

[1] Memorandum from Barbara Q. Velarde, Chief, Service Center Operations, *Clarification of evidence required to satisfy the U.S. interest requirement for beneficiaries from countries not listed on the H-2A or H-2B Eligible Countries List* (June 1, 2009).

discretion, determines that it is in the U.S. interest for that alien to be a beneficiary of such petition. According to 8 C.F.R. § 214.2(h)(5)(i)(F)(*1*)(*ii*), the petitioner must submit:

> (*A*) Evidence from the petitioner demonstrating that a worker with the required skills is not available either from among U.S. workers or from among foreign workers from a country currently on the list described in paragraph (h)(5)(i)(F)(*1*)(*i*) of this section;
>
> (*B*) Evidence that the beneficiary has been admitted to the United States previously in H–2A status;
>
> (*C*) The potential for abuse, fraud, or other harm to the integrity of the H–2A visa program through the potential admission of a beneficiary from a country not currently on the list; and
>
> (*D*) Such other factors as may serve the U.S. interest.

Pursuant to 8 C.F.R. § 214.2(h)(5)(i)(F)(*l*)(*ii*)(A), the first criterion requires the petitioner to demonstrate that a worker with the required skills is not available either from among U.S. workers or from among foreign workers from a country currently on the list. The petitioner received a certified labor certification which establishes that the petitioner could not find U.S. workers to fill the proposed position. However, the petitioner did not submit any documentation to establish that a worker from a country currently on the list could not be found to fill the proposed position. The petitioner did not provide any evidence that would satisfy 8 C.F.R. § 214.2(h)(5)(i)(F)(*l*)(*ii*)(*A*).

Pursuant to 8 C.F.R. § 214.2(h)(5)(i)(F)(*l*)(*ii*)(B), the second criterion requires the petitioner to submit evidence that the beneficiaries have been admitted to the United States previously in H-2A status. In the petition, the petitioner stated that it is requesting an H-2A visa for a beneficiary that previously was submitted in H-2A classification.

Under 8 C.F.R. § 214.2(h)(5)(i)(F)(*l*)(*ii*)(C), the third criterion requires the petitioner to address whether there is a potential for abuse, fraud, or other harm to the integrity of the H-2A visa program if the beneficiaries are admitted into the United States. With this factor, USCIS will generally consider whether the beneficiaries are nationals of a country that cooperates with the repatriation of its nationals. Pursuant to the proposed rule at 73 Fed. Reg. 8230, 8243 (Feb. 13, 2008), the intention of creating the H-2A eligible country list is to, "encourage more nations to promptly accept the return of their nationals who no longer have valid status as nonimmigrants in the United States. However, the actual impact is expected to be negligible because very few H-2A workers are from such countries." *See* 73 Fed. Reg. 8230, 8243 (Feb. 13, 2008). Hungary was not listed as a non-cooperating country. However, the petitioner did not provide any evidence to address this criterion. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings.

Matter of Soffici, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Finally, the fourth criterion under 8 C.F.R. § 214.2(h)(5)(i)(F)(*l*)(*ii*)(D), requires evidence to establish other factors that may serve the U.S. interest. The petitioner stated that the beneficiary is a "key member" of the staff and is "very valuable to our operation." However, the petitioner did not articulate how a U.S. interest might be served by the approval of this petition. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165.

Therefore, because the petitioner has failed to submit sufficient evidence to establish that the beneficiary is eligible for H-2A classification as a national from an undesignated country, this petition must be dismissed.

As always, the burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The appeal is dismissed.