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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship and Immigration Services

PUBLIC COPY

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FILE: WAC 09 101 50161 Office: CALIFORNIA SERVICE CENTER Date: JUL 15 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.

John F. Grissom
Acting Chief, Administrative Appeals Office

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

The petitioner is a sheep dairy farm that seeks to employ five beneficiaries as sheepherders 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 March 12, 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.

After issuing a notice of intent to deny, the director denied the petition on March 23, 2009, concluding that four beneficiaries are nationals of Ecuador and one beneficiary is a national of Slovakia. Thus, the beneficiaries are 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 Fed. Reg. 77043 (Dec. 18, 2008).

The petitioner is one of the three largest sheep dairies in the United States, raising and milking imported Dutch Friesian milk sheep for the production of cheese. The petitioner also operates a farm tourism center that claims to draw 25,000 tourists a year. At the time the petition was filed, the petitioner explained that it had over 500 pregnant sheep that would begin giving birth in March and continue through April, May, and June. Each sheep would give birth to twins, totaling to approximately 1,000 newborn lambs. The petitioner further explained that once the lambs are born, the ewes must be milked two times a day until November. The petitioner explained that this specialized breed of dairy sheep has several health issues and it can "lose over 50% of the lambs without proper management."

In its response to the director's intent to deny, the petitioner explained that its responsibilities from April until December will include delivering lambs 24 hours a day, milking the sheep, making cheese, ageing cheese, operating the tourism center and selling cheese at 22 farmer markets per week. Due to the birthing of several hundred lambs, in addition to the daily duties of the farm, the petitioner stated that it was necessary to hire additional labor to survive during the months of April through December.

On appeal, the petitioner asserts that is has lost a significant number of newborn lambs due to the denial and the lack of farm labor. Because of these losses, the petitioner states that its income is down by almost 50 percent and that it cannot afford to hire the original five beneficiaries. On appeal, the petitioner withdraws the petition for the four individuals from Ecuador and maintains the petition for the one named beneficiary from the Slovak Republic, [redacted] (date of birth January 4, 1980).

Regarding the grounds for the denial, the petitioner submitted arguments and evidence to counter the director's decision. The petitioner contends that Dutch Friesian milk sheep can only be found in the Netherlands, Germany and some parts of Spain, all countries that are not on the list of eligible H-2A countries. For this reason, the petitioner asserts that foreign workers from

countries on the list of eligible countries cannot be found. The petitioner also stated that "none of the countries on the list have developed any dairy sheep experience" for the specialized type of dairy sheep owned by the petitioner.

The petitioner also explained that it has successfully utilized H-2A workers from Ecuador for the past ten years and "our record is 100% perfect with regard to the return of people to their country at the end of their H2A visa." The petitioner further stated that it is in the interest of the U.S. to "promote small business, agriculture and the production of healthy foods." Finally, the petitioner stated that because it has been unable to find laborers to work as sheepherders, 409 newborn lambs out of 708 born have died, and 43 ewes have been lost to coyote attacks. As a result, the petitioner asserts that its income for this year has declined almost 50 percent. The petitioner explained that due to the shortage of labor and the economic impact of losing so many lambs, it may need to abort earlier pregnancies on 210 ewes and euthanize an additional 290 pregnant ewes who are too late in their pregnancy stage to abort.

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. *See* 73 Fed. Reg. 76891 (Dec. 18, 2008). The final rule became effective on January 17, 2009. *Id.* at 76892. This final rule amends DHS regulations regarding temporary agricultural workers, and their U.S. employers, within the H-2A nonimmigrant classification. The current petition was filed with United States Citizenship and Immigration Services (USCIS) on February 20, 2009, after the date the new regulations came into effect, thus the revised regulations will be applied to the current petition.

Regarding the H-2A "eligible countries," the regulation at 8 C.F.R. § 214.2(h)(5)(i)(F)(*1*) states:

> (*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 Fed. Reg. 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 four named beneficiaries from Ecuador and one named beneficiary from Slovakia. Ecuador and Slovakia were 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.

Regarding the discretionary U.S. interest exception to the list of eligible countries, the director stated in the Notice of Intent to Deny, dated February 26, 2009, that "all of the prongs (A)-(D) listed in 8 C.F.R. § 214.2(h)(5)(i)(F)(*1*)(*ii*) must be considered in this decision."

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:

> 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.

(Emphasis added.)

The AAO agrees with the reasoning of the memorandum. Upon review, the memorandum is consistent with the regulations and the underlying statutory authority. However, the AAO notes that this interpretive memorandum was not available to the director at the time of the original decision.

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[1] Memorandum from Barbara Q. Velarde, Chief, USCIS 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).

Pursuant to the revised regulations at 8 C.F.R. § 214.2(h)(5)(i)(F)(*1*)(ii), 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 discretion, determines that it is in the U.S. interest for that alien to be a beneficiary of such petition.

As referenced above, the regulations list four criteria to be considered when making a U.S. interest determination, noting at the same time that this list is not exhaustive. *See Id.* While each listed criteria must be considered, the petitioner need not necessarily satisfy each and every criteria. Instead, the director must weigh the case-specific positive and negative factors that fall within the enumerated criteria, as well as any additional criteria that may affect his or her U.S. interest determination, and decide whether the petition should be granted as a matter of discretion. Ultimately, the decision may hinge on one critical factor – and that factor may be either positive or negative – when the director weighs the case-specific facts.

For example, with respect to the third factor enumerated at 8 C.F.R. § 214.2(h)(5)(i)(F)(*1*)(*ii*)(C), the director may reasonably decide to give great weight to the fact that the beneficiary aliens in a petition are from a country that does not cooperate with the repatriation of its nationals, such as the People's Republic of China, India, Vietnam, Pakistan, or Laos. *See* 73 FR 8230, 8243 (listing the top five non-cooperating countries according to U.S. Immigration and Customs Enforcement); *see also* Department of Homeland Security, Office of Inspector General, *Detention and Removal of Illegal Aliens,* OIG-06-33 at page 17 footnote 37 (April 2006), available online at http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_06-33_Apr06.pdf (listing the primary problem countries as China, India, Vietnam, Laos, Ethiopia, Eritrea, Iran, and Jamaica).[2]

Upon review, the AAO concludes that the petitioner has satisfied multiple criteria listed at 8 C.F.R. § 214.2(h)(5)(i)(F)(*1*)(*ii*).

Pursuant to 8 C.F.R. § 214.2(h)(5)(i)(F)(*1*)(*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.

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[2] The AAO suggests that the most appropriate use of this regulation would be to specifically address the ongoing problem of countries refusing to accept or unreasonably delaying the acceptance of their nationals who have been ordered removed. The underlying statutory authority for the regulation directs the Secretary of State to discontinue the issuance of any immigrant or nonimmigrant visas to citizens, subjects, nationals, and residents of a country upon notification by the Secretary of Homeland Security that the government of that country refuses to accept their return. INA sec. 243(d), 8 U.S.C. 1253(d); *see also* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) sec. 307, Pub. L. No. 104-208, 110 Stat. 3456 (September 30, 1996). While it is important to encourage interested parties to apply for the annual eligible countries list, it does not further the policy objectives of the statute to indiscriminately deny petitions for alien beneficiaries who are from countries that cooperate with the repatriation of their nationals.

workers to fill the proposed position. The petitioner also posted the job openings with a state work force office, however, no U.S. worker applied for the position.

In response to the director's intent to deny, the petitioner explained that the breed of sheep raised on the petitioner's sheep dairy farm "cannot be found anywhere in the world except Netherlands, Germany and some in Spain," all countries that are not on the H-2A eligible countries list. The petitioner also explained that sheepherding requires experience and for this reason, the petitioner always employs returning workers since they have experience and can train the other sheepherders. The petitioner provided sufficient evidence to satisfy 8 C.F.R. § 214.2(h)(5)(i)(F)(*1*)(*ii*)(*A*).

Pursuant to 8 C.F.R. § 214.2(h)(5)(i)(F)(*1*)(*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. On appeal, the petitioner stated that it is requesting an H-2A visa for one named beneficiary who previously was admitted into the United States in J-1 nonimmigrant classification and as a B-1 visitor. The beneficiary was not previously admitted into the United States as an H-2A nonimmigrant.

Under 8 C.F.R. § 214.2(h)(5)(i)(F)(*1*)(*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). Slovakia was not listed as a non-cooperating country.

In addition, the petitioner explained that it has applied for H-2A classification every year since 2000, and has received approval for each petition. The petitioner submitted copies of the approval notices for the previously approved H-2A petitions. In addition, the petitioner contends that all the beneficiaries have returned to their home countries and have not violated the H-2A regulations. Thus, the petitioner satisfies 8 C.F.R. § 214.2(h)(5)(i)(F)(*1*)(*ii*)(C).

Finally, the fourth criterion under 8 C.F.R. § 214.2(h)(5)(i)(F)(*1*)(*ii*)(D), requires evidence to establish other factors that may serve as U.S. interest. In response to the director's February 26, 2009, request for information, the petitioner explained the U.S. interest in approving this petition is to "allow agricultural businesses to function and thrive;" "promote the production and availability of healthy, natural foods to the public;" "allow New Jersey to promote its agricultural products to other states;" "encourage interstate tourism and agri-tourism;" and, "encourage small businesses to thrive and contribute to the state's economy." On appeal, the petitioner also stated that it is one of the three largest sheep dairies in the United States but it has experienced a loss of 50 percent of its annual income due to the shortage of labor due to the H-2A petition denial. As

discussed above, the petitioner also explains the lack of farm labor has caused the death of 409 newborn lambs out of the total 708 born, and that 43 ewes have been lost to coyote attacks. The petitioner has satisfied the fourth criterion under 8 C.F.R. § 214.2(h)(5)(i)(F)(*1*)(*ii*)(D).

The director also determined that the petitioner had not established that the beneficiaries possessed the requisite education listed on the labor certification and denied that portion of the petition. The director noted that the petitioner required four years of grade school, four years of high school and six months of experience in the position offered. The beneficiary graduated from Agriculture University in Nitra, Slovakia, and received seven months of training with the petitioner in 2007. The beneficiary is qualified to fill the offered position. The AAO will withdraw this portion of the decision with regard to this remaining beneficiary.

Upon review, the AAO has determined that the remaining H-2A beneficiary meets the requirements of the U.S. interest exception. As such, the director's denial shall be withdrawn and the petition approved as a matter of discretion.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has sustained that burden.

ORDER: The appeal is sustained. The petition is approved.