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

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APR 06 2010

FILE: WAC 09 079 50918 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiaries: [redacted]

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:

[redacted]

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).

Perry Rhew
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 dismissed, although the petition is moot due to the passage of time.

The petitioner is a farm that seeks to employ the beneficiaries as farm workers 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 until November 15, 2009. The Department of Labor (DOL) determined that the petitioner had submitted sufficient evidence for the issuance of a temporary labor certification.

On February 23, 2009, the director denied the petition, in part, concluding that three beneficiaries are nationals of Nicaragua and are 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 Fed. Reg. 77043 (Dec. 18, 2008).[1]

On appeal, counsel for the petitioner explained that the petitioner hired Nicaraguan workers in the past as H-2A workers and trained them on "farm-related tasks such as irrigation, combine and other farm machine operations, calving, planting, and harvesting." Counsel further stated that the workers "remained in status throughout their stay and left the United States on the day that their status expired." Counsel contends that it is in the public interest to employ the beneficiaries' as H-2A workers.

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 1986, agriculture as defined in section 3(f) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(f)), and the pressing of apples for cider on a farm, 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

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[1] The petitioner requested H-2A classification for 5 workers, however, two workers are nationals of Mexico and were approved since Mexico is on the list of eligible countries for H-2A classification. The petitioner was denied for the three nationals of Nicaragua. Although the appeal is based on the three nationals from Nicaragua, the petitioner's declaration submitted on appeal requests H-2A classification for only two named beneficiaries from Nicaragua; therefore, the current appeal will be limited to the two named workers.

Citizenship and Immigration Services (USCIS) on March 3, 2009, after the date the new regulations came into effect; thus the revised regulations govern the current petition.

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

> *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 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 named beneficiaries from Nicaragua. Nicaragua was not on the list of eligible countries for the one year effective on January 17, 2009. 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.

Under the special procedure provisions, section eight of the supplemental information for the revised H-2A regulations indicates that the petitioner must name all beneficiaries who are nationals of countries not designated as participating countries. *See* 73 Fed. Reg. 76891, 76903. This is essential, for example, to determine whether "it is in the U.S. interest for that alien to be a beneficiary" of the H-2A petition and to verify whether the beneficiary has previously been admitted to the United States in H-2A status. *See* 8 C.F.R. § 214.2(h)(5)(i)(F)(*1*)(ii).

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)(*1*)(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 discretion, determines that it is in the U.S. interest for that alien to be a beneficiary of such petition. As noted above, 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)(*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. workers to fill the proposed position.

On appeal, counsel for the petitioner states that the petitioner "cannot obtain workers with reasonably equivalent skills from other countries at a reasonable cost and in a timely manner." Counsel also stated that since the Nicaraguan workers have previously worked with the petitioner, they have "knowledge, skills, and abilities that other foreign workers do not have and cannot be expected to have." The petitioner did not submit any corroborating documentation to establish that a worker from a country currently on the list could not be found to fill the proposed position. The petitioner states that it could not find a beneficiary from a country listed but did not provide evidence to establish that a farm worker is not available from among foreign workers from a country currently on the list. On the contrary, the inclusion of two farm workers from Mexico in the petition demonstrates that the petitioner was able to find farm workers from a listed country. The petitioner also contends that the beneficiaries have already been trained in the duties to be performed for the petitioner, but it did not indicate that training new employees would be difficult or impossible, especially when it managed to train previous H-2A workers. The petitioner did not provide sufficient evidence that would 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 Stats previously in H-2A status. On appeal, counsel for the petitioner states that the H-2A workers had been previously admitted to the United States in H-2A status and complied with all the requirements of the H-2A program. The petitioner submitted the H-2A visas for the two beneficiaries.

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), Nicaragua was not listed as a non-cooperating country. The petitioner also stated in its affidavit that the "workers showed an awareness of the limitations of their status in the United

States and obeyed all restrictions imposed by their status." However, this is not sufficient evidence to overcome the overall goal of the new H-2A regulation to list countries that have been cooperative with the H-2A program.

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. The petitioner did not articulate specifically how a U.S. interest might be served by the approval of this petition. Instead, the petitioner stated an interest to its operations since the workers have already been trained and it will be more efficient and less costly to hire them 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 requested H-2A classification for beneficiaries from the then undesignated country of Nicaragua in the initial petition, and has not submitted sufficient evidence to establish the beneficiary is eligible for H-2A classification as a national from an undesignated country, this petition must be denied.

An incomplete record as it relates to favorable or unfavorable factors effecting an exercise of discretion is an insufficient basis for granting discretionary relief. *See Matter of Ducret*, 15 I&N Dec. 620, 623 (BIA 1976). As always, the burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the appeal will be dismissed, and the director's decision to deny the petition will be affirmed.

As a final note, according to the H-2A Agricultural Temporary Worker Final Rule, the list of foreign countries whose nationals are eligible to participate in the H-2A visa program must be renewed each year. On January 10, 2010, the new list of eligible countries was published in the Federal Register, with an effective date of January 18, 2010, and valid for one year. The new published list currently indicates Nicaragua is an eligible country for H-2A classification. Therefore, if the petitioner filed a new petition, after January 18, 2010, and requested employment during this one year period for Nicaraguan nationals, it would not be denied again for petitioning for nationals from an undesignated country. However, the petitioner will still need to establish that it is otherwise eligible for H-2A classification.

ORDER: The appeal is dismissed.