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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[redacted]

MAR 02 2010

FILE: WAC 09 099 51452 Office: CALIFORNIA SERVICE CENTER Date:

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:

[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.

The petitioner is a farm that seeks to employ the beneficiaries as oriental vegetable growers 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 10, 2009 to November 29, 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 26, 2009, concluding that the beneficiaries are nationals of China 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).

On appeal, the petitioner states that it conducted sufficient recruitment for the job offered and there were no "willing, able and qualified U.S. workers for this position." The petitioner further states that "it was also hard to find a qualified worker among foreign workers from a country currently on the list," since the position requires candidates with "at least three months of experience in growing, planting and harvesting various Oriental vegetables." The petitioner goes on to state that in order to grow oriental vegetables, "the worker must have experience in fully understanding the specific characters of the seeds, how to and when to plant the seeds properly." Finally, the petitioner contends that an individual from an eligible country does not have the experience because "these countries are not growing Oriental vegetables."

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 Citizenship and Immigration Services (USCIS) on February 18, 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 two named beneficiaries from China.[1] China 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.

Therefore, 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;

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[1] 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). As China has not been designated as a participating country this year, the petitioner was therefore required to name all beneficiaries in the initial petition.

(*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, the petitioner states that "it was also hard to find a qualified worker among foreign workers from a country currently on the list," since the position requires candidates with "at least three months of experience in growing, planting and harvesting various Oriental vegetables." The petitioner further states that in order to grow the oriental vegetables, "the worker must have experience in fully understanding the specific characters of the seeds, how to and when to plant the seeds properly." Finally, the petitioner contends that an individual from an eligible country does not have the experience because "these countries are not growing Oriental vegetables." However, 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 alludes that that oriental vegetables are not grown in any country listed because they are not countries of Asian origin. However, other countries may grow Oriental vegetables just as the petitioner is growing these vegetables in the United States. The petitioner did not provide evidence to establish that Oriental vegetables are not grown in any of the countries listed as eligible countries. Moreover, the petitioner fails to acknowledge or recognize that Indonesia, Japan, the Asia Pacific Nations that were on the list and likely grow the oriental vegetables in question. The petitioner did not provide any 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. In the petition, the petitioner stated that it is requesting an H-2A visa for two named beneficiaries. The petitioner did not provide evidence to confirm whether the beneficiaries had been previously admitted to the United States in H-2A status.

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), China was listed as a non-cooperating country. However, the petitioner did not provide any evidence to overcome this finding. 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)(*1*)(*ii*)(D), requires evidence to establish other factors that may serve as U.S. interest. 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 requested H-2A classification for beneficiaries of the undesignated country of China in the initial petition, and has not submitted sufficient evidence to establish the beneficiaries are eligible for H-2A classification as nationals 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.

ORDER: The appeal is dismissed.