U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

[redacted]

DATE: JAN 05 2012 Office: CALIFORNIA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiaries

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

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The director of the California Service Center denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a construction contractor and developer that specializes in residential construction. It seeks to extend the H-2B employment of seven named aliens as cement masons, pursuant to section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(H)(ii)(b), for the period from April 1, 2010 until March 31, 2011. The Guam Department of Labor determined that the petitioner had submitted sufficient evidence for the issuance of a temporary labor certification.

The director denied the petition on January 11, 2011, concluding that the seven aliens named as beneficiaries are nationals of the People's Republic of China and are thus, not eligible to participate in the H-2B visa program, as they are not nationals of the countries that the Secretary of Homeland Security designated as H-2B participating countries.

Section 101(a)(15)(H)(ii)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(ii)(b), defines an H-2B 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 other temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in this country . . . .

The Department of Homeland Security (DHS) published the H-2B Nonagricultural Temporary Worker Final Rule in the Federal Register on December 19, 2008. The final rule became effective on January 18, 2009. *See* 73 Fed. Reg. 78103. This final rule amended DHS regulations regarding temporary nonagricultural and agricultural workers, and their U.S. employers, within the H-2B and H-2A nonimmigrant visa classification. The current Petition was filed with United States Citizenship and Immigration Services (USCIS) on April 11, 2010, 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)(6)(i)(E) states:

> (E) *Eligible countries.* (*1*) H–2B petitions may 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:
>
> > (*i*) 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;
> >
> > (*ii*) The number of final and unexecuted orders of removal against citizens, subjects, nationals, and residents of that country;

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

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

(*2*) A national from a country not on the list described in paragraph (h)(6)(i)(E)(*1*) of this section may be a beneficiary of an approved H–2B petition upon the request of a petitioner or potential H–2B 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:

(*i*) Evidence from the petitioner demonstrating that a worker with the required skills is not available from among foreign workers from a country currently on the list described in paragraph (h)(6)(i)(E)(*1*) of this section;

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

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

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

(*3*) Once published, any designation of participating countries pursuant to paragraph (h)(6)(i)(E)(*1*) 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.

The petition was filed for seven named beneficiaries from China. DHS published a notice in the Federal Register on January 19, 2010, valid for one year, with the list of countries that the Secretary of Homeland Security has designated, with the concurrence of the Secretary of State, as eligible for its nationals to participate in the H-2B visa program. The People's Republic of China was not on the list. *See* 75 Fed. Reg. 2879 (Jan. 19, 2010).

A national from a country not on the list may be a beneficiary of an approved H–2B petition upon the request of a petitioner only if the Secretary of Homeland Security, in his or her sole and unreviewable discretion, determines that it is in the U.S. interest for that alien to be a beneficiary of the petition. 8 C.F.R. § 214.2(h)(6)(i)(E)(*2*).

On June 1, 2009, USCIS issued a policy memorandum discussing 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 takes notice of the countervailing U.S. interest in declining Chinese nationals' eligibility for the H-2B visa program because of China's consistent practice of refusing or delaying repatriation. U.S. Immigration and Customs Enforcement identified the People's Republic of China as one of the top five countries not cooperating in the prompt acceptance of the return of their nationals who no longer have valid status as nonimmigrants in the United States. *See* 73 Fed. Reg. 8230, 8243 (Feb. 13, 2008). Further, DHS has expressly stated that the regulation at 8 C.F.R. § 214.2(h)(6)(i)(E) was developed to encourage countries such as China to reverse their practice of consistently denying or unreasonably delaying the prompt return of their citizens, subjects, nationals, or residents who are subject to a final order of removal from the United States. *See* 73 Fed. Reg. 78104, 78106, 78109 (December 19, 2008). The AAO assigns heavy weight to the Secretary's stated intent.

The AAO will now consider the four specified factors at 8 C.F.R. §§ 214.2(h)(6)(i)(E)(*2*)(*i*) through (*iv*) as they relate to this record of proceeding.

First, 8 C.F.R. § 214.2(h)(6)(i)(E)(*2*)(*i*) requires the petitioner to demonstrate that a worker with the required skills is not available from among foreign workers from a country whose nationals are eligible for participation in the H-2B program. In this case, the petitioner seeks to employ cement masons with two years experience. On appeal, counsel for the petitioner explained that the petitioner has always employed workers from China and "to employ similarly skilled labor from other countries requires Petitioner to establish contact with manpower agencies in these countries or to go to these countries to search and recruit for labor on its own." Counsel also stated that it is "impossible" for the petitioner to replace the workers in the middle of construction. Counsel explained that it would be very difficult to recruit workers from an eligible country; the petitioner did not, however, submit any documentation to establish that a

[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) ("Velarde Memo").

worker from a country currently on the list could not be found to fill the proposed position. Accordingly, the petitioner has not satisfied the factor specified at C.F.R. § 214.2(h)(6)(i)(E)(2)(*i*).

Second, 8 C.F.R. § 214.2(h)(6)(i)(E)(*2*)(*ii*) requires evidence that the beneficiaries have been admitted to the United States previously in H-2B status. Since the petitioner is filing for an extension of employment in H-2B status, the beneficiaries have been admitted to the United States previously in H-2B status.

Third, 8 C.F.R. § 214.2(h)(6)(i)(E)(*2*)(*iii*) requires a demonstration that the potential for abuse, fraud, or other harm to the integrity of the H-2B visa program could not occur with the admission of the beneficiaries. In support of this claim, the petitioner submitted a letter from the president of the Guam Contractors Association [redacted] stating that he supports "wholeheartedly the H-2B visa extension petitions filed . . . on behalf of construction workers from the People's Republic of China."

The amended H-2B regulations and the annual list of eligible countries specifically link the integrity of the H-2B program with the practice of certain countries that refuse or delay repatriation of their nationals. As a matter of policy, USCIS takes into consideration whether the alien is from a country that cooperates with the repatriation of its nationals. *See* Velarde Memo at 2. DHS has listed China as one of the top five non-cooperating countries. *See* 73 Fed. Reg. 8230, 8243 (Feb. 13, 2008). The AAO concludes that absent a demonstrated U. S. interest, it would undermine the intent of the regulation if USCIS were to grant classification for nationals from non-cooperating countries. The petitioner has not provided sufficient evidence to overcome the director's concern that China is a top non-cooperating country and poses a threat to the integrity of the H-2B visa program.

Finally, the criterion under 8 C.F.R. § 214.2(h)(6)(i)(E)(*2*)(*iv*) requires evidence to establish other factors that may serve the U.S. interest. On appeal, counsel for the petitioner states that Guam has a "chronic shortage of skilled labor," and "maintaining continuity of current construction projects serves vital interests of the local economy as well as that of the federal government as Guam is at the beginning of a massive military buildup." In support of the claim, the petitioner submitted local newspaper articles and a series of residential construction contracts.

The factors listed in the regulation specifically examine whether it is in the U. S. interest for USCIS to approve the named aliens as beneficiaries of this petition. The petitioner's contention that approval of the petition would promote the U. S. interest in developing the type of residential housing that the beneficiaries would construct is noted. The petitioner does not assert that the beneficiaries are directly working on projects tied to the military build up on Guam. The connection between the employment of the seven named beneficiaries and the U. S. military expansion on Guam is tenuous, at best. The record of proceeding does not establish that continued employment of the named aliens as cement masons is essential to the ultimate construction necessary for the military, or even that the housing projects in which the aliens would be employed would materially advance the asserted U. S. interest. The AAO also finds

that the record of proceeding does not establish that continued employment of the aliens is essential to or would materially advance any other U. S. interest.

Reviewing the totality of factors appropriate for consideration under the regulation at 8 C.F.R. § 214.2(h)(6)(i)(E)(*2*), the AAO concludes that the petitioner has not submitted sufficient evidence to establish that the beneficiaries are eligible for H-2B classification as nationals from China, an undesignated country. Therefore, the director's decision will not be disturbed.

As always, 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 not met that burden.

ORDER: The appeal is dismissed.