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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

[redacted]

D4

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 service center director denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a construction company 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 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 October 5, 2010, concluding that the named beneficiaries are nationals of the People's Republic of China and are thus, not eligible to participate in the H-2B visa program pursuant to the list of eligible countries provided by the Secretary of Homeland Security; and, the evidence submitted with the petition is not credible and sufficient to establish that the petitioner has complied with the terms and conditions of employment.

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 March 31, 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 18, 2010, and again on January 18, 2011, 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 listed for either year.

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.

At the outset, it is important to note that 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 to 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 orders 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, the factor specified at 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 currently whose nationals are eligible for participation in the H-2B program. In this case, the petitioner seeks to employ carpenters with two years experience. As acknowledged in its brief in support of the appeal and in reply to the request for additional evidence, the petitioner has not claimed that cement masons are not available from a country currently on the list of eligible countries. Accordingly, the petitioner has not satisfied the factor specified at C.F.R. § 214.2(h)(6)(i)(E)(*2*)(*i*). Instead, counsel asserts that it is not necessary for the petitioner to satisfy each of the four factors; counsel requests that the H-2B extension be approved based on the evidence presented as to the other factors and the totality of the circumstances.

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[1] Memorandum from [redacted]

Second, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(6)(i)(E)(*2*)(*ii*), which requires evidence that the beneficiaries have been admitted to the United Stats 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, the criterion at 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 Administrator of the Alien Labor and Processing Division of the Department of Labor of Guam (DOLG), dated March 29, 2010, as evidence favorable to the petitioner under the 8 C.F.R. § 214.2(h)(6)(i)(E)(*2*)(*iii*) factor. The letter states that DOLG has no record of either compliance issues or violations by the petitioner with regard to its participation in the H-2B program in Guam, or violations of the conditions of their H-2B status by the beneficiaries.

However, as noted above, 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, beyond the actual practice of the petitioner, 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. Thus, while the petitioner may not have a history of compliance issues, 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 as U.S. interest. On appeal, counsel for the petitioner states that the petitioner was awarded projects to work with the Guam Housing Urban Renewal Authority and the inability of the petitioner to complete these projects will create great harm to the petitioner. In addition, counsel for the petitioner stated that "the unprecedented U.S. military build-up on Guam to relocate the 8,000 Marines and their 9,000 dependents from Okinawa to Guam as well as the increases in other U.S. military personnel on Guam requires the construction of thousands of new homes for off-base housing for both U.S. military personnel and the increased number of civilian workers and their families needed to undertake the U.S. military build-up." Counsel further contends that "many of the larger contractors on Guam are focusing on military projects rather than the construction of residential housing." Furthermore, counsel states that the petitioner's construction of residential housing projects "serves the U.S. interests by providing additional houses needed to accommodate the increase in the military and civilian population in Guam." In support of the claim, the petitioner submitted local newspaper articles and a series of residential construction contracts.

On appeal, the petitioner asserts that the director's not having specifically addressed the petitioner's contentions about the beneficiaries' role in constructing affordable housing and about the damage that denial of this petition would cause the petitioner indicates that USCIS

"may have neglected to consider the factors which are to be considered under 8 C.F.R. § 214.2(h)(6)(i)(E)(*2*)(*iv*)."

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. However, the petitioner does not assert that the beneficiaries are directly working on projects tied to the military build up on Guam. Instead, the petitioner notes that there is increased demand for residential construction because other contractors are working on military projects. 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 carpenters is essential to the ultimate construction of such housing, 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 the beneficiaries are eligible for H-2B classification as nationals from China, an undesignated country. Therefore, the director's decision will not be disturbed.

The second issue is whether the petition and all evidence submitted with it is credible and sufficient to establish that the petitioner has complied with the terms and conditions of employment.

In the director's decision, she noted that according to the petitioner's quarterly wage reports, the petitioner's H-2B employees have not been compensated at the rate of pay stated on the Form I-129 and the Application for Temporary Alien Labor Certification. In addition, the director noted that some beneficiaries were not listed at all on some of the quarterly wage reports.

On appeal, the petitioner explained that some employees were not listed on all quarters of the wage reports because they were waiting to receive a social security number. The petitioner also stated that the quarterly wage reports for the third and fourth quarter of 2009 and the first quarter of 2010 were "prepared in-house and have now been reviewed by the Petitioner's CPA who was retained in April 2010." Upon review of the amended quarterly wage reports, some beneficiaries still received wages that were below the wages reported on the Form I-129 and the temporary labor certification. 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, on appeal, the petitioner noted that for the second quarter of 2010, the rainfall was below average and the beneficiaries worked overtime. However; even though the beneficiaries' received a higher pay in the second quarter of 2010, this does not compensate for the fact that in the three previous quarters the beneficiaries were not receiving the correct wage. On appeal, the

petitioner did not submit documentation sufficient to overcome the director's concern. 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)).

As noted by the director, even though the beneficiaries worked over-time during the second quarter of 2010, this does not compensate the beneficiaries for the wages not paid during the third and fourth quarters of 2009.

On the Form I-129, the petitioner must indicate whether the employment offered to the beneficiaries' is full-time or part-time, and the wages paid per week. The petitioner must sign the Form I-129 and must certify under penalty of perjury that the information on the form is all true and correct. In addition, the petitioner received a certified temporary labor certification that indicated the wages it promised to pay to the beneficiaries. The petitioner must comply with the certified temporary labor certification and the Form I-129 during the entire period of employment. The petitioner did not provide sufficient evidence to overcome the director's finding that the petitioner did not pay the beneficiaries the wages stated in the certified temporary labor certification and the Form I-129 for the entire period of employment. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

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. The petition is denied.