U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Service Center Operations
Washington, DC 20529-2060

U.S. Citizenship and Immigration Services

June 1, 2009

Memorandum

TO: Service Center Directors

FROM: Barbara Q Velarde /s/
Chief, Service Center Operations

SUBJECT: 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

Purpose:

This memo elaborates on the adjudicator's responsibility to thoroughly consider the evidence submitted in support of a request that a national from a country not eligible to participate in the H-2A or H-2B programs be accorded H-2A or H-2B status. This memo further provides some of the factors to be taken into consideration when making the discretionary decision whether to grant H-2A or H-2B status to such aliens.

Background:

DHS's final H-2A and H-2B rules were published in the Federal Register on December 18 and 19, respectively. *See* 73 FR 75891 and 73 FR 78104, respectively. The H-2A and H-2B final rules went into effect on January 17, and January 18, 2009, respectively. Those rules limit eligibility for H-2A and H-2B classification to beneficiaries who are from certain countries listed as eligible for H-2A and H-2B classification. *See* 8 CFR 214.2(h)(5)(i)(F) and 8 CFR 214.2(h)(6)(i)(E).

Notices listing the countries eligible for H-2A and H-2B classification were also published in the Federal Register on December 18, 2008 and December 19, 2008, respectively, and went into effect on January 17, 2008 and January 18, respectively. *See* 73 FR 77043 and 73 FR 77729. In these initial notices, the Secretary of Homeland Security, with the concurrence of the Secretary of State, designated nationals from the following countries as eligible to participate in the H-2A and H-2B visa programs (same countries for both programs): 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; and the United Kingdom.

The list of eligible countries will be updated by DHS regularly. Organizations or individuals, including members of Congress, interested in having a country added to the H-2A list should send a letter to the DHS Office of Policy (addressed to the Assistant Secretary for Policy) requesting such addition.

There is a limited exception to the normal requirement that the beneficiary of an approved H-2A or H-2B petition (whichever is applicable) be a national of a country listed in the Federal Register notice. Persons who are nationals of countries not listed as eligible for H-2A or H-2B classification (whichever is applicable) may still be beneficiaries of an approved H-2A or H-2B petition, ***in the discretion*** of the Secretary of Homeland Security, upon her determination that it is in the U.S. interest to be the beneficiary of such petition. *See* 8 CFR 214.2(h)(5)(i)(F)(1)(ii) and 8 CFR 214.2(h)(6)(i)(E)(2). (emphasis added)

Guidance:

This guidance highlights the largely discretionary nature of the adjudication related to whether the evidence submitted by a petitioner on behalf of beneficiaries from countries **not** listed as eligible for H-2A or H-2B classification satisfies the "U.S. interest" requirement. The regulations list four factors that USCIS should take into consideration when determining whether the U.S. interest requirement has been met [See 8 CFR 214.2(h)(5)(i)(F)(1)(ii) and (6)(i)(E)(2)]:

1. Evidence that the beneficiary has been admitted to the United States previously in H-2A or H-2B status and complied with the terms of his/her status;
2. Evidence that a worker with the required skills is not available from a country on the list of eligible countries;
3. Potential for abuse, fraud, or other harm to the integrity of the H-2A or H-2B program through the potential admission of these worker(s) that a petitioner plans to hire; and
4. Other factors that would serve the U.S. interest, if any.

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.

Petitions filed on behalf of beneficiaries from non-eligible countries that do not initially provide sufficient evidence to overcome the requirements of 8 CFR 214.2(h)(5)(i)(F)(1)(ii) or (6)(i)(E)(2) will be issued a request for evidence allowing 30 days to respond to USCIS.

Adjudicators are advised to carefully review any evidence submitted with a petition (or submitted in response to a request for evidence) that addresses the four factors of the U.S. interest requirement. Although the Adjudicator should consider all four factors, the case should be reviewed based upon the totality of the circumstances and not based upon failure to satisfy all four of the factors listed above.

Additionally, due to the potentially novel and sensitive nature of the U.S. interest determination, consultation with Headquarters is encouraged in unique or complex cases.

Use

This memorandum is intended solely for the instruction and guidance of USCIS personnel in performing their duties relative to adjudications. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law or by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner. In addition, the instructions and guidance in this memorandum are in no way intended to and do not prohibit enforcement of the immigration laws of the United States.