



U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: NOV 02 2010

IN RE: Petitioner: [REDACTED]
Beneficiaries: [REDACTED]

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. The fee for a Form I-290B is currently \$585, but will increase to \$630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the \$630 fee. 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 nonimmigrant visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied, although the matter is moot due to the passage of time.

The petitioner is engaged in horse training and horse racing, and it seeks to employ the beneficiaries as stable attendants 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), for the period from November 20, 2009 until April 1, 2010. The Department of Labor (DOL) certified a temporary labor certification for 40 stable attendants valid from November 20, 2009 until April 1, 2010.

On February 16, 2010, the director denied the petition based on the fact that the beneficiaries are nationals of India 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. *See* 73 Fed. Reg. 77043 (Dec. 18, 2008).

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 FR 78103. This final rule amends DHS regulations regarding temporary nonagricultural and agricultural workers, and their U.S. employers, within the H-2B and H-2A nonimmigrant classification. The current petition was filed with United States Citizenship and Immigration Services (USCIS) on November 20, 2009, 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)(I) 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)(I) 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)(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-2B petition. *See* 73 FR 77043. The list is composed of countries that are important for the operation of the H-2B 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.* The list was expanded in January 2010, but still does not include India.

As noted by the director in her decision, the petition was filed on behalf of beneficiaries from India. India is not on the list of eligible countries. As noted above, pursuant to the revised regulations, as of January 18, 2009, 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 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 such petition.

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 countries 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.

On appeal, counsel for the petitioner states that “as mentioned Petitioner is requesting an extension of stay and therefore the beneficiaries are exempted from the list of designated as participating countries, and beneficiaries who are from India are not required to show national interest.” Although counsel contends that a petition to extend H-2B status is exempt from establishing eligibility under 8 C.F.R. § 214.2(h)(6)(i)(E), counsel fails to present any regulations or corroborating evidence to support this claim. As stated in the H-2B Nonagricultural Temporary Worker Final Rule in the Federal Register on December 19, 2008, “the final rule modifies the proposal to preclude DHS from approving an H-2B petition filed on behalf of aliens from countries that consistently deny or unreasonably delay the prompt return of their citizens, subjects, nationals, or residents who are subject to a final order of removal from the United States. The final rule affects the approval of “an H-2B petition” and does not differentiate from a petition to extend H-2B status from a new employment petition. The final rule does not have an exception for petitions that seek to extend H-2B status. In addition, the final rule stated that it became effective on January 18, 2009. *See* 73 FR 78103. Thus, DHS believes that the same statutory and regulatory standards for all H-2B petitions will be applied, and the policies will start “with the effective date” of the final rule on January 18, 2009.

The AAO now turns to a consideration of whether the petitioner may qualify under one of the four criteria listed under 8 C.F.R. § 214.2(h)(6)(i)(E)(2)(i). The first criterion requires a demonstration 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. However, the petitioner did not present any evidence to establish that a worker with the required skills is not available among foreign workers from a country currently on the list. The petitioner wishes to employ stable attendants and it does not

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).

require any minimum education and only one month experience in the job offered, thus, it is possible to find this type of worker from a country that is listed on the eligible country list. The petitioner did not provide any evidence to establish that a worker from a country currently on the list could not be found to fill the proposed position. The petitioner did not provide sufficient evidence that would satisfy 8 C.F.R. § 214.2(h)(6)(i)(E)(2)(i).

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 States previously in H-2B status. The petitioner submitted visa documentation for each of the beneficiaries and all of the beneficiaries were previously admitted into the United States in H-2B status.

Under 8 C.F.R. § 214.2(h)(6)(i)(E)(2)(iii), 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-2B 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. U.S. Immigration and Customs Enforcement has identified India as among 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 as an attempt to encourage countries such as India 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 this factor; and the AAO finds that the factors presented by the petitioner in favor of H-2B visa eligibility for the aliens named in this petition do not overcome the weight of the U.S. interest in denying H-2B eligibility to nationals of countries consistently refusing or delaying repatriation.

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. The petitioner did not articulate how a U.S. interest might be served by the approval of this petition. 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)).

It is noted that the petitioner requested the beneficiary's services from November 20, 2009 until April 1, 2010. Therefore, the period of requested employment has passed.

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. The petition is denied although the matter is moot due to the passage of time.