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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]

D3

FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: DEC 29 2010

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

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:**

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 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, although the matter is moot due to the passage of time.

The petitioner is a farm that seeks to employ the beneficiaries as 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 November 2, 2009 to November 1, 2010. 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 March 8, 2010, 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).

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 December 14, 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)(I)(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)(I)(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)(I)(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.* In January 2010, 11 additional countries were added to the list: Croatia, Ecuador, Ethiopia, Ireland, Lithuania, The Netherlands, Nicaragua, Norway, Serbia, Slovakia and Uruguay.

As noted by the director in her decision, the petition was filed on behalf of four named beneficiaries from China. China was not on the list of eligible countries for the one-year period beginning 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)(I)(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)(I)(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)(I)(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

At the outset, it is important to note that, as an appropriate factor for consideration under the auspices of 8 C.F.R. § 214.2(h)(5)(i)(F)(I)(ii), the AAO takes administrative notice of the countervailing U.S. interest in not allowing Chinese nationals eligibility for the H-2A visa program because of China's practice of consistently refusing or delaying repatriation. U.S. Immigration and Customs Enforcement has identified China 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)(5)(i)(F) was developed as an attempt 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 this factor.

Pursuant to 8 C.F.R. § 214.2(h)(5)(i)(F)(I)(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, counsel for the petitioner states that the petitioner included 11 articles as evidence that beneficiaries from approved countries cannot be found. In response to the director's RFE, counsel stated that "while some varieties of Chinese vegetables are grown in certain participating countries, available growers experienced with all 30 varieties of the Chinese vegetables are not found anywhere except mainland China, Hong Kong, Singapore and Taiwan." However, the petitioner did not submit sufficient data or supporting evidence to corroborate this claim. Counsel goes on to discuss the production of Chinese vegetables in Canada, Japan, UK, Belize, Philippines and Romania, and it provided articles from the internet. One article discussed the Australia-China Trade in vegetables, but it is dated September 27, 2006, over three years prior to filing the current petition, and may not be still relevant. The second and third articles discuss China's increase in fruit and vegetable production. There is no doubt that China is a large producer of Chinese vegetables but this article does not support the claim that other countries do not grow these vegetables. The fourth article is a website print-out of Cherry Farms, a "UK oriental vegetable specialist," that produces oriental vegetables. Thus, this evidences the fact that designated countries are producing Chinese vegetables. The petitioner submitted a directory of vegetable growers/producers in the cordillera administrative region in the Philippines, which again, indicates that Chinese vegetables are grown in other countries. 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)).

The petitioner claims that it is impossible to find beneficiaries that can grow all 30 varieties of Chinese vegetables from a country that is designed on the list; however, the petitioner did not present sufficient evidence to corroborate this claim. The petitioner alludes that that Chinese vegetables are not grown in any country listed because they are not countries of Asian origin. However, other countries may grow Chinese vegetables just as the petitioner is growing these vegetables in the United States. The petitioner did not provide evidence to establish that Chinese vegetables are not grown in any of the countries listed as eligible countries. Moreover, the petitioner fails to acknowledge or recognize the Asian nations that were on the list and that likely grow the Chinese vegetables in question. The petitioner did not provide any evidence that would satisfy 8 C.F.R. § 214.2(h)(5)(i)(F)(I)(ii)(A).

Pursuant to 8 C.F.R. § 214.2(h)(5)(i)(F)(I)(ii)(B), the second criterion requires the petitioner to submit evidence that the beneficiaries have been admitted to the United States previously in H-

2A status. In the petition, the petitioner stated that the beneficiaries have not previously been admitted into the United States in H-2A status. Thus, the second criterion has not been met.

The criterion at 8 C.F.R. § 214.2(h)(5)(i)(F)(I)(ii)(C) 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. U.S. Immigration and Customs Enforcement has identified China 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)(5)(i)(F) was developed as an attempt 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).

In response to the RFE, counsel for the petitioner contends that “in recent years as China’s GDP has grown at a very healthy pace more of its nationals can afford to travel overseas and are inclined to return home after spending time abroad.” Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner’s burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Thus, the petitioner has not provided sufficient evidence to overcome the director’s concern that China is a non-cooperating country and would pose a threat to the integrity of the H-2A visa program.

Finally, the fourth criterion under 8 C.F.R. § 214.2(h)(5)(i)(F)(I)(ii)(D), requires evidence to establish other factors that may serve the U.S. interest. In response to the RFE, counsel for the petitioner stated that “with expanded production after the four beneficiaries are admitted to the United States, petitioner expects to add 10 or more positions to the payroll year-round.” In addition, counsel contends that the approval of the petition will “promote exchange of know-how in vegetable farming,” and “promotes the production and instruction of more varieties of vegetables to the public.” Counsel further stated that approval of the petition will help small business owners and “make the United States more competitive in vegetable export. The record of proceeding does not, however, establish that employment of the named aliens is essential to the domestic development of Chinese vegetables, or even that the project in which the aliens would be employed would materially advance the U.S. interest.

The AAO finds that based on the totality of factors appropriate for consideration under the regulation at 8 C.F.R. § 214.2(h)(5)(i)(F)(I)(ii), the petitioner does not submit sufficient evidence to establish the beneficiaries are eligible for H-2A classification as nationals from China, an undesignated country. Therefore, the director’s decision will not be disturbed. The appeal is dismissed, and the petition is denied.

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.