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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**

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FILE: WAC 09 113 51510 Office: CALIFORNIA SERVICE CENTER

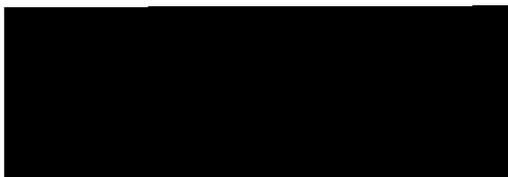
Date: **AUG 02 2010**

IN RE: Petitioner:
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:



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 \$585. 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 [REDACTED] that seeks to extend the employment of the beneficiaries as carpenters pursuant to section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(H)(ii)(b) for the period from March 25, 2009 to March 25, 2010. 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 September 9, 2009, concluding that the five 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.

Section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act (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 FR 49109. 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 March 10, 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)(1) 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.

As noted by the director in its decision, the petition included five named beneficiaries from China. DHS published a notice in the Federal Register on December 19, 2008, 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. China was not listed for that year. As noted above, pursuant to the revised regulations, 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 sole and unreviewable discretion, determines that it is in the U.S. interest for that alien to be a beneficiary of such petition.

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)(I). The first prong 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. 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; however, the petitioner did not submit any documentation to establish that workers from a country currently on the list could not be found to fill the proposed carpenter positions. The petitioner did not provide sufficient evidence to establish 8 C.F.R. § 214.2214.2(h)(6)(i)(E)(I)(i).

The AAO turns to the criterion at 8 C.F.R. § 214.2(h)(6)(i)(E)(I)(ii), which 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.

The criterion at 8 C.F.R. § 214.2(h)(6)(i)(E)(I)(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. Although the current petition is for H-2B status, DHS has listed China as the top five non-cooperating countries. *See* 73 Fed. Reg. 8230, 8243 (Feb. 13, 2008). In addition, the petitioner did not provide evidence to establish this criterion. 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, the criterion under 8 C.F.R. § 214.2(h)(6)(i)(E)(I)(iv), requires evidence to establish other factors that may serve as U.S. interest. The petitioner stated that the beneficiaries are necessary for its business operations. However, the petitioner did not establish a U.S. interest. Again, 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. at 165.

Therefore, for the reasons related in the preceding discussion, the petitioner does not submit sufficient evidence to establish the beneficiaries are eligible for H-2B classification as nationals from China, an undesignated country.

As always, the burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The appeal is dismissed. The petition is denied.