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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**

D4



FILE: EAC 09 222 52127 Office: VERMONT SERVICE CENTER Date: **AUG 03 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:

SELF-REPRESENTED

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, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed, although moot due to the passage of time.

The petitioner is a manufacturer of raw sugar and blackstrap molasses that seeks to employ the beneficiaries as evaporator attendants/mechanics 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 from September 30, 2009 to January 31, 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 September 4, 2009, concluding that the ten unnamed beneficiaries are nationals of Panama 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. 77729 (Dec. 19, 2008).

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 August 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.

On December 19, 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 77729. 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 18, 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.*

As noted by the director in his decision, the petition was filed on behalf of beneficiaries from Panama. Panama was not on the list of eligible countries for the current year. As noted above, DHS will only approve petitions for H-2B 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.

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.

As noted by the director in her decision, the petition was filed on behalf of ten unnamed beneficiaries from Panama. Panama was not on the list of eligible countries for the current year. As noted above, DHS will only approve petitions for H-2B 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.

Under the regulations, the petitioner must name all beneficiaries who are nationals of countries not designated as participating countries. *See* 8 C.F.R. § 214.2(h)(2)(iii). As Panama has not been designated as a participating country this year, the petitioner is therefore required to name all beneficiaries in the initial petition. In reviewing the Form I-129, the petitioner indicated ten unnamed beneficiaries from Panama. In response to the director's request for evidence, the petitioner submits the names of all the beneficiaries.

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.

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).

workers to fill the proposed position. On appeal, the petitioner states that “this type of skill set is only available from countries that produce raw sugar from sugar cane.” The petitioner further states that they currently have workers from Costa Rica and the Dominican Republic but they cannot locate other workers from these countries because “there is work for these workers in their own countries so there is only a limited amount of workers that are willing to travel outside of their native country in order to work.” Finally, the petitioner stated that it tried to locate workers from other countries and only found workers from Panama.

The fact that the petitioner was able to find workers from Costa Rica and the Dominican Republic evidences the fact that workers with the required skills are available from a country currently on the list. In addition, the petitioner claims that it tried to locate workers from other countries but was unsuccessful but the petitioner did not provide any evidence to corroborate this claim. The petitioner’s statements are insufficient 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)(5)(i)(F)(I)(ii)(A).

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. On the Form I-129, the petitioner indicated that it is filing for 10 unknown workers from Panama. In addition, in Section 2 of the Form I-129, the petitioner answered no to the question as to whether any of the workers were admitted to the United States previously in H-2A or H-2B status. In response to the director’s request for evidence, the petitioner submitted a list of 10 returning workers. However, the Form I-129 stated that the 10 workers were unknown. It is not clear if the list submitted in response to the director’s request for evidence is a list of the beneficiaries for the current petition. 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).

Under 8 C.F.R. § 214.2(h)(5)(i)(F)(I)(ii)(C), 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-2A 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. Panama was not listed as a non-cooperating country. On appeal, the petitioner states that there is no fraud, abuse or other harm to the integrity of the H-2B visa program because “our workers follow the guidelines of the visa process.” The petitioner explained that the workers always return home after the completion of the program. The petitioner did not provide supporting evidence to corroborate this assertion. 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. The petitioner also submitted a letter from [REDACTED], the Commissioner of the [REDACTED]. The author stated in the letter that the petitioner has “depended on H-2B workers from Panama for several years in order to obtain the necessary skilled sugar processing labor to operate their mill.” The author also stated that “it would be devastating to Louisiana’s sugar industry if the [the petitioner] does not operate this fall due to not being able to get the needed workers from Panama.” Neither the author of the letter nor the petitioner provides evidence of the impact on U.S interest if the Panamanian H-2B workers are not approved. The petitioner did not articulate how a U.S. interest might be served by the approval of this petition. In addition, the petitioner has found temporary workers from other countries such as Costa Rica and the Dominican Republic that will assist with eh business operations and would not completely shut down its operations. 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, because the petitioner has failed to submit sufficient evidence to establish the beneficiaries are eligible for H-2B classification as nationals from an undesignated country, this petition must be denied.

It is noted that the petitioner requested the beneficiary’s services from September 30, 2009 to January 31, 2010. Therefore, the period of requested employment has passed.

An incomplete record as it relates to favorable or unfavorable factors effecting an exercise of discretion is an insufficient basis for granting discretionary relief. *See Matter of Ducret*, 15 I&N Dec. 620, 623 (BIA 1976). 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. The petition is denied.