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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

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: JUL 22 2010

IN RE: Petitioner: [redacted]
Beneficiaries:

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:

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.

Thank you,

for

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, California Service Center, and certified to the Administrative Appeals Office (AAO) for review pursuant to 8 C.F.R. § 103.4(a). The decision of the director will be withdrawn, and the petition will be approved.

The petitioner is a sheep ranching business that seeks to employ the beneficiary as a sheepherder 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), from November 10, 2009 until November 9, 2010. The Department of Labor (DOL) determined that the petitioner had submitted sufficient evidence for the issuance of a temporary labor certification.

In its November 19, 2009, Notice of Certification, the director noted that the petitioner may not be approved for H-2A classification, because the beneficiary had remained in the United States beyond the 3-year limit allowed in H-2A classification and had failed to remain outside the United States for an uninterrupted period of three months during or after the prior authorized periods of stay.

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. As the current petition was filed with United States Citizenship and Immigration Services (USCIS) on November 9, 2009, after the date the new regulations came into effect, the instant petition is governed by the revised regulations.

Pursuant to the regulations at 8 C.F.R. § 214.2(h)(5)(viii)(C), "Limits on an individual's stay," it states the following:

> Except as provided in paragraph (h)(5)(viii)(B) of this section, an alien's stay as an H–2A nonimmigrant is limited by the term of an approved petition. An alien may remain longer to engage in other qualifying temporary agricultural employment by obtaining an extension of stay. However, an individual who has held H–2A status for a total of 3 years may not again be granted H–2A status until such time as he or she remains outside the United States for an uninterrupted period of 3 months. An absence from the United States can interrupt the accrual

> of time spent as an H–2A nonimmigrant against the 3-year limit. If the accumulated stay is 18 months or less, an absence is interruptive if it lasts for at least 45 days. If the accumulated stay is greater than 18 months, an absence is interruptive if it lasts for at least 2 months. Eligibility under paragraph (h)(5)(viii)(C) of this section will be determined in admission, change of status or extension proceedings. An alien found eligible for a shorter period of H–2A status than that indicated by the petition due to the application of this paragraph (h)(5)(viii)(C) of this section shall only be admitted for that abbreviated period.

In addition, pursuant to the published H-2A Agricultural Temporary Worker Final Rule, the limit of an individual's stay in H-2A classification also applies to H-2A nonimmigrant visa holders that are performing duties as a sheepherder. *See* 73 Fed. Reg. 76891 (Dec. 18, 2008). According to the supplemental section of the H-2A Agricultural Worker Final Rule, under Section 14, "DHS Policy Applicable to H-2A Sheepherders," the comment section stated the following:

> Although DHS recognizes the special nature of this unique type of agricultural work, it does not change the nonimmigrant nature of the H-2A classification. *See* INA section 101(a)(15)(H)(ii)(a), 8 U.S.C. 1101(a)(15)(H)(ii)(a). The statute provides that an H-2A worker is a nonimmigrant who has a residence in a foreign country that he has no intention of abandoning and who is coming temporarily to the United States to perform agricultural labor or services. Without a departure from the United States after reaching the 3-year maximum period of stay, an H-2A worker cannot be considered a nonimmigrant, and his or her stay cannot be considered temporary. All other H-2A workers must depart the United States after reaching the 3-year maximum period of stay, regardless of the employer's need or the degree of skill or experience required of those workers; the same rule should apply to H-2A sheepherders.

Id at 76906.

In other words, pursuant to Section 101(a)(15)(H)(ii)(a) of the Act, the definition of an H-2A temporary worker is "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. . . ." The current petition is for H-2A classification, and the petitioner must establish that the beneficiary is a temporary worker. Thus, the regulations also specifically limit the stay of an H-2A sheepherder in the United States to 3 years.

The supplemental section further states, however, that "[w]ith the effective date of this final rule, DHS will begin to enforce on H-2A sheepherders the same departure requirement applicable to all other H-2A workers." *Id* at FR 76907. In other words, although DHS concludes that the same statutory and regulatory standards for all other H-2A occupations should now be applied to sheepherders, this new requirement will only start "with the effective date" of the final rule on January 17, 2009. *Id.*

Although the final rule states that the three month departure requirement will only be applied to H-2A sheepherders starting January 17, 2009, it fails to discuss exactly how it is to be applied to H-2A sheepherders currently in the United States on that date. As in this matter, for example, the final rule does not specify whether a new three-year limitation should begin to accrue for H-2A sheepherders on January 17, 2009 or whether time spent in H-2A status prior to this date would count towards this three-year period, possibly triggering the three month departure requirement before January 16, 2012.

Looking to the proposed rule for guidance on this issue, it states in pertinent part:

> Under the proposed change, USCIS would not take action against individuals who have already been admitted in H-2A classification to engage in sheepherding activities. Such individuals, however, would be required to depart from the United States at the end of their period of admission in H-2A status and remain outside of this country for the requisite time period . . . before being eligible to obtain H-2A status again.

73 Fed. Reg. 8236 (Feb. 13, 2008). Logically, it could reasonably be presumed that the proposed rule meant to say that "USCIS would not take action against individuals who have already been admitted in H-2A classification to engage in sheepherding activities" *and* who have already spent or will have spent at the end of their approved period of stay three years in the United States without being absent for an uninterrupted period of three months. It did not say this, however, and thus leaves this an open question as to how the rule was to be applied to H-2A sheepherders currently in the United States and seeking additional time in H-2A status.

USCIS issued a public release statement, last updated on December 31, 2009 and entitled "USCIS Grants One-Time Accommodation for Sheepherders in H-2A Status," that stated the following:

> The time spent as an H-2A worker performing labor or services as a sheepherder prior to the effective date of the final rule will not be counted toward the 3-year maximum period of stay. Instead, USCIS is 'starting the clock' on January 17, 2009 for sheepherders who were lawfully present in the United States in H-2A classification on that date.

http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=1c9a1543455e5210VgnVCM100000082ca60aRCRD&vgnextchannel=3381c0ed71f85110VgnVCM1000004718190aRCRD (last accessed July 20, 2010).

This statement was not released until after the director's decision was issued in this matter. The director's interpretation is not at odds with either the plain language of the regulation or the supplemental information, and the AAO can find no fault with the director's decision.

That said, the question before the AAO is one of interpreting the existing regulations. The AAO exercises *de novo* review over this matter. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The agency has expressed its intent to prospectively calculate the three-year maximum period of stay for sheepherders beginning with January 17, 2009, and that interpretation is reasonable and not at odds with the plain language of the regulation. Therefore, the AAO finds that the petitioner in this matter is eligible for H-2A classification on behalf of the beneficiary, valid until November 9, 2010, as requested.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The Administrative Appeals Office concludes that the petitioner has met that burden.

ORDER: The decision of the director is withdrawn. The nonimmigrant visa petition is approved.