

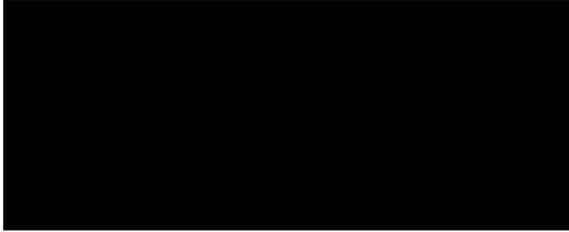
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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
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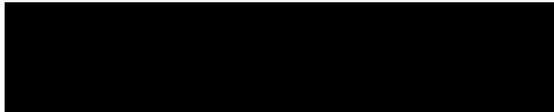


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FILE: WAC 09 084 51007 Office: CALIFORNIA SERVICE CENTER Date:

MAY 11 2010

IN RE: Petitioner:
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.

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 farm that seeks to employ the beneficiaries as combine operator/truck driver pursuant to section 101(a)(15)(H)(ii)(a) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(H)(ii)(b) for the period from January 1, 2009 to December 23, 2009. The Department of Labor (DOL) determined that the petitioner had submitted sufficient evidence for the issuance of a temporary labor certification by the Secretary of Labor.

The director denied the petition on March 5, 2009, concluding that the twelve unnamed beneficiaries are nationals of Denmark, and are thus ineligible to participate in the H-2A visa program pursuant to the list of eligible countries provided by the Secretary of Homeland Security.

On appeal, the petitioner states that it has used nationals of Denmark for the H-2A program since 1998. The petitioner also submitted a list of six names of the individuals it wishes to sponsor for the H-2A visa. The petitioner also stated that it cannot find U.S. workers to fill the proffered position, and it has never been questioned by the department of labor regarding its temporary need for H-2A workers.

Section 101(a)(15)(H)(ii)(a) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(ii)(a), 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 1954 (26 U.S.C. 3121) and agriculture as defined in section 3(f) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(f)), of a temporary or seasonal nature....

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 classifications. The current petition was filed with United States Citizenship and Immigration Services (USCIS) on February 2, 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)(5)(i)(F)(l)(i) states:

(F) *Eligible Countries.* (l)(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.

As noted by the director in her decision, the petition included twelve unnamed beneficiaries from Denmark. 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-2A visa program. Denmark was not listed for the year this petition was filed. 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.

In addition, under section eight of the revised H-2B regulations, the petitioner must name all beneficiaries who are national of countries not designated as participating countries. As Denmark has not been designated as a participating country for this year, the petitioner is required to name all beneficiaries in the initial petition.

In reviewing the Form I-129, the petitioner indicated twelve unnamed beneficiaries from Denmark. On appeal, the petitioner submits the names of six beneficiaries. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). The AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director. As the beneficiaries are nationals of a country not listed in the Federal Register, and the petitioner did not name the beneficiaries, the petitioner did not overcome the director's decision.

Furthermore, 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. Pursuant to 8 C.F.R. § 214.2(h)(5)(i)(F)(1)(ii), that determination is based on factors such as:

(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)(1)(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.

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)(5)(i)(F)(1)(ii). 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, the petitioner stated “I have never had a response from any other country that you show on the list of approved except Canada.” However, the petitioner did not submit any documentation 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 to establish 8 C.F.R. § 214.2(h)(5)(i)(F)(1)(ii)(A).

The AAO turns to the criterion at 8 C.F.R. § 214.2(h)(5)(i)(F)(1)(ii)(B), which requires evidence that the beneficiaries have been admitted to the United States previously in H-2A status. In the petition, the petitioner stated that it is requesting an H-2A visa for twelve unnamed beneficiaries. On appeal, the petitioner submits the names of six beneficiaries, and states that two of the named beneficiaries are returning workers. The petitioner did not, however, present evidence of the fact that two of the named beneficiaries are returning workers.

The criterion at 8 C.F.R. § 214.2(h)(5)(i)(F)(1)(ii)(C), requires a demonstration that the potential for abuse, fraud, or other harm to the integrity of the H-2A visa program could not occur with the admission of the beneficiaries. This cannot be determined in the case of unnamed beneficiaries.

Finally, the criterion under 8 C.F.R. § 214.2(h)(5)(i)(F)(1)(ii)(D), requires evidence to establish other factors that may serve the U.S. interest. The petitioner stated that the beneficiaries are necessary for its business operations. While the petitioner's statement is plausible, the petitioner did not establish a U.S. interest.

For the reasons related in the preceding discussion, the petitioner has failed to name the beneficiaries of the undesignated country of Denmark in the initial petition, and does not submit sufficient evidence to establish the beneficiaries are eligible for H-2A classification as nationals from 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.