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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: [REDACTED] Office: VERMONT SERVICE CENTER Date: NOV 19 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:



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, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a restaurant that seeks to employ the beneficiaries as tandoori chefs 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 December 23, 2009 until September 30, 2012. The Department of Labor (DOL) certified a temporary labor certification for 2 restaurant cooks valid from December 23, 2009 until September 30, 2010.¹

The director denied the petition based on the fact that the beneficiaries are nationals from either Nepal or India and thus, are 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. 77043 (Dec. 18, 2008).

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 78103. 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 February 8, 2010, 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) 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.

¹ In the Final Determination cover letter by DOL, the period of certification is from December 23, 2009 until September 30, 2012. However, on each page of the certified temporary labor certification, the validity period is from December 23, 2009 until September 30, 2010. Given that this validity period was written six times on the certified temporary labor certification, the AAO will utilize the latter validity period.

(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 January 19, 2010, 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. 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, 2010, the list includes the following countries: Argentina, Australia, Belize, Brazil, Bulgaria, Canada, Chile, Costa Rica, Croatia, Dominican Republic, Ecuador, El Salvador, Ethiopia, Guatemala, Honduras, Indonesia, Ireland, Israel, Jamaica, Japan, Lithuania, Mexico, Moldova, The Netherlands, Nicaragua, New Zealand, Norway, Peru, Philippines, Poland, Romania, Serbia, Slovakia, South Africa, South Korea, Turkey, Ukraine, United Kingdom, Uruguay.

As noted by the director in her decision, the petition was filed on behalf of one beneficiary from India and one beneficiary from Nepal. India and Nepal are not on the list of eligible countries for the current year. As noted above, pursuant to the revised regulations, as of January 18, 2010, 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 or her sole and unreviewable discretion, determines that it is in the U.S. interest for that alien to be a beneficiary of such petition.

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.² 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.

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)(2)(i). The first criterion 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. However, the petitioner did not present sufficient evidence to establish that a worker with the required skills is not available among foreign workers from a country currently on the list. In a letter in response to the director's request for evidence counsel for the petitioner contends that "Indian Tandoori (Grill) Chefs are not available from among foreign workers from a country on the H-2B Eligible Countries List because of the specialty of the profession." Counsel further states that while it may be possible to find a Tandoori chef from Canada or the UK "due to the vast Indian community present in these two countries," "online research shows that Canada and the UK also suffer a shortage of Indian Chefs and Cooks." The petitioner submitted job postings for chefs in Canada but this is not sufficient evidence to establish that Canada is facing a shortage of Tandoori Grill chefs. Several countries have Tandoori Grill restaurants and thus, the petitioner did not present sufficient 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)(6)(i)(E)(2)(i).

The AAO turns to the criterion at 8 C.F.R. § 214.2(h)(6)(i)(E)(2)(ii), which requires evidence that the beneficiaries have been admitted to the United States previously in H-2B status. In response to the director's request for evidence, counsel stated that the "beneficiaries have never been admitted to the United States previously in H-2B status." Instead, it appears that the

² 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).

beneficiaries from Nepal and India previously entered the United States in B-2 status, not in H-2B status. Thus, the petitioner did not present evidence to establish this criterion.

Under 8 C.F.R. § 214.2(h)(6)(i)(E)(2)(iii), 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. U.S. Immigration and Customs Enforcement has identified India 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)(6)(i)(E) was developed as an attempt to encourage countries such as India 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). On appeal, counsel for the petitioner states that the petitioner is a legitimate business and has “bona fide intentions with no chance of fraud, abuse and integrity of the H-2B visa program.” In this case, counsel contends that the petitioner will not be abusive to the H-2B program. The AAO finds that the factors presented by the petitioner in favor of H-2B visa eligibility to the aliens named in this petition do not overcome the U.S. interest in denying H-2B eligibility to nationals of countries consistently refusing or delaying repatriation.

Finally, the criterion under 8 C.F.R. § 214.2(h)(6)(i)(E)(2)(iv), requires evidence to establish other factors that may serve the U.S. interest. In response to the director’s request for evidence, counsel for the petitioner contends that hiring the beneficiaries will serve U.S. interests because “it will help train local workers in this field of specialty cooking. It will help a U.S. business in keeping up with its growth. In return, success of each business helps boost the U.S. economical interest.” The petitioner does not provide sufficient evidence of the impact on the U.S. economy if the Indian and Nepali H-2B workers are not approved. 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 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.