DISCUSSION: The service center director denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a construction company that specializes in residential construction. It seeks to extend the H-2B employment of five named aliens as cement masons, 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 April 1, 2010 until March 31, 2011. 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 June 24, 2010, concluding that the 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 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 Fed. Reg. 49109. This final rule amended DHS regulations regarding temporary nonagricultural and agricultural workers, and their U.S. employers, within the H-2B and H-2A nonimmigrant visa classification. As the current Petition was filed with United States Citizenship and Immigration Services (USCIS) on April 1, 2010, after the date the new regulations came into effect, 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:
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> > (*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)(*1*) 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)(*1*) 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)(*1*) 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.

The petition was filed for five named aliens from China. DHS published a notice in the Federal Register on January 19, 2010, valid for one year, 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. The People's Republic of China was not listed for that year. *See* 75 Fed. Reg. 2879 (Jan. 19, 2010).

As noted above, 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 only 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. 8 C.F.R. § 214.2(h)(6)(i)(E)(*2*).

On June 1, 2009, USCIS issued a policy memorandum discussing 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.

At the outset, it is important to note that the AAO takes notice of the countervailing U.S. interest in declining Chinese nationals eligibility for the H-2B visa program because of China's consistent practice of refusing or delaying repatriation. U.S. Immigration and Customs Enforcement identified the People's Republic of China as one of 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 to encourage countries such as China 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 orders of removal from the United States. *See* 73 Fed. Reg. 78104, 78106, 78109 (December 19, 2008). The AAO assigns heavy weight to the Secretary's stated intent.

The AAO will now turn to the four specified factors at 8 C.F.R. §§ 214.2(h)(6)(i)(E)(*2*)(*i*) through (*iv*) as they relate to this record of proceeding.

First, the factor specified at 8 C.F.R. § 214.2(h)(6)(i)(E)(*2*)(*i*) requires the petitioner to demonstrate that a worker with the required skills is not available from among foreign workers from a country currently whose nationals are eligible for participation in the H-2B program. In this case, the petitioner seeks to employ cement masons with two years experience. As acknowledged in its brief in support of the appeal and in reply to the request for additional evidence, the petitioner has not claimed that workers with the required skills are not available from a country currently on the list of eligible countries. Accordingly, the petitioner has not satisfied the factor specified at C.F.R. § 214.2(h)(6)(i)(E)(*2*)(*i*). Instead, counsel asserts that it is

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[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) ("Velarde Memo").

not necessary for the petitioner to satisfy each of the four factors; instead counsel requests that the H-2B extension be approved based on the evidence presented as to the other factors and the totality of the circumstances.

Second, 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 Stats 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.

Third, the criterion at 8 C.F.R. § 214.2(h)(6)(i)(E)(*2*)(*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. In support of this claim, the petitioner submitted a letter from the Administrator of the Alien Labor and Processing Division of the Department of Labor of Guam (DOLG), dated March 29, 2010, as evidence favorable to the petitioner under the 8 C.F.R. § 214.2(h)(6)(i)(E)(*2*)(*iii*) factor. The letter states that DOLG has no record of either compliance issues or violations by the petitioner with regard to its participation in the H-2B program in Guam, or violations of the conditions of their H-2B status by the beneficiaries.

However, as noted above, the amended H-2B regulations and the annual list of eligible countries specifically link the integrity of the H-2B program with the practice of certain countries that refuse or delay repatriation of their nationals. As a matter of policy, beyond the actual practice of the petitioner, USCIS takes into consideration whether the alien is from a country that cooperates with the repatriation of its nationals. *See* Velarde Memo at 2. DHS has listed China as one of the top five non-cooperating countries. *See* 73 Fed. Reg. 8230, 8243 (Feb. 13, 2008). The AAO concludes that absent a demonstrated U.S. interest, it would undermine the intent of the regulation if USCIS were to grant classification for nationals from non-cooperating countries. Thus, while the petitioner may not have a history of compliance issues, the petitioner has not provided sufficient evidence to overcome the director's concern that China is a top non-cooperating country and poses a threat to the integrity of the H-2B visa program.

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 as U.S. interest. On appeal, counsel for the petitioner states that "Guam's construction industry is cyclical in nature and is currently in a construction boom due to a U.S. military build-up of facilities and personnel." Counsel further contends that "many of the larger contractors on Guam are focusing on military projects rather than the construction of residential housing." Furthermore, counsel states that the petitioner's construction of residential housing projects "serves the U.S. interests by providing additional houses needed to accommodate the increase in the military and civilian population in Guam." In support of the claim, the petitioner submitted local newspaper articles and a series of residential construction contracts.

On appeal, the petitioner asserts that the director's not having specifically addressed the petitioner's contentions about the beneficiaries' role in constructing affordable housing and about the damage that denial of this petition would cause the petitioner indicates that USCIS

"may have neglected to consider the factors which are to be considered under 8 C.F.R. § 214.2(h)(6)(i)(E)(*2*)(*iv*)."

The factors listed in the regulation specifically examine whether it is in the U.S. interest for USCIS to approve the named aliens as beneficiaries of this petition. The petitioner's contention that approval of the petition would promote the U.S. interest in developing the type of residential housing that the beneficiaries would construct is noted. However, the petitioner does not assert that the beneficiaries are directly working on projects tied to the military build up on Guam. Instead, the petitioner notes that there is increased demand for residential construction because other contractors are working on military projects. The connection between the employment of the five named beneficiaries and the U.S. military expansion on Guam is tenuous, at best. The record of proceeding does not establish that continued employment of the named aliens as cement masons is essential to the ultimate construction of such housing, or even that the housing projects in which the aliens would be employed would materially advance the asserted U.S. interest. The AAO also finds that the record of proceeding does not establish that continued employment of the aliens is essential to or would materially advance any other U.S. interest.

Reviewing the totality of factors appropriate for consideration under the regulation at 8 C.F.R. § 214.2(h)(6)(i)(E)(*2*), the AAO concludes that the petitioner has not submitted sufficient evidence to establish the beneficiaries are eligible for H-2B classification as nationals from China, an undesignated country. Therefore, the director's decision will not be disturbed. The appeal is dismissed, and the petition is denied.

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.