

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

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

DATE **MAY 26 2011** Office: VERMONT SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiaries:

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:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

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 sustained and the petition will be approved.

The petitioner is an Italian restaurant that seeks to employ the beneficiary as an Italian-style chef pursuant to section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(H)(ii)(b).

The director denied the petition. The director noted that the beneficiary is a national of Italy and thus not eligible to participate in the H-2B visa program, as he is not a national of the countries that the Secretary of Homeland Security designated as H-2B participating countries.

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 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.

On appeal, the petitioner has presented additional evidence and argument. Upon review, the petitioner has overcome the concerns addressed in the director's decision and submitted sufficient evidence to establish that the beneficiary is eligible for H-2B classification as a national from an undesignated country.

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").

First, the petitioner submitted evidence and persuasively argued that a worker with the required skills is not available from a country among those designated by the Secretary as H-2B participating countries. 8 C.F.R. § 214.2(h)(6)(i)(E)(2)(i).

Second, 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. 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; see also 73 Fed. Reg. 8230, 8243 (Feb. 13, 2008).*

On appeal, counsel credibly argues that the potential for abuse, fraud, or other harm to the integrity of the H-2B visa program would not occur with the admission of this beneficiary. Counsel notes that Italy is a "Democratic Society" and participates in the Visa Waiver Program with the United States. Counsel notes that the Visa Waiver Program is "only open to countries which meet various security and other requirements, such as enhanced law enforcement and security-related data sharing with the United States and timely reporting of both black and issued lost and stolen passports." Counsel cites to additional reports and statistics which further demonstrate that the integrity of the H-2B visa program would not be harmed with the admission of this beneficiary.

Each request for a U.S.-interest exception is fact-dependent and must be considered on a case-by-case basis. As a matter of Secretary's sole and unreviewable discretion, the AAO concludes that it is in the U.S. interest for this alien to be a beneficiary of the petition, even though he is not a national of a designated H-2B participating country.

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

ORDER: The appeal is sustained. The petition is approved.