

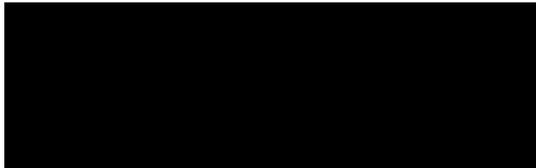
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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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Washington, DC 20529-2090

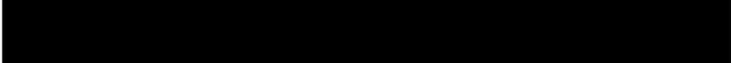


U.S. Citizenship
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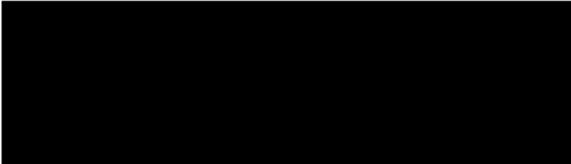


D4

DATE: **JAN 05 2012** OFFICE: CALIFORNIA 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:

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

The petitioner is engaged in construction and it seeks to continue to employ the beneficiaries as carpenters, 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 from September 13, 2010 until September 12, 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, concluding that the petitioner had not established a temporary need for the beneficiaries' services.

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. 78103. 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. The current Petition was filed with United States Citizenship and Immigration Services (USCIS) on September 13, 2010, after the date the new regulations came into effect, thus the revised regulations will be applied to the current petition.

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 regulation at 8 C.F.R. § 214.2(h) provides, in part:

(6) Petition for alien to perform temporary nonagricultural services or labor (H-2B):

(i) Petition. (A) H-2B nonagricultural temporary worker. An H-2B nonagricultural temporary worker is an alien who is coming temporarily to the United States to perform temporary services or labor without displacing qualified United States workers available to perform such services or labor and whose employment is not adversely affecting the wages and working conditions of United States workers.

* * *

(ii) Temporary services or labor:

(A) *Definition.* Temporary services or labor under the H-2B classification refers to any job in which the petitioner's need for the duties to be

performed by the employee(s) is temporary, whether or not the underlying job can be described as permanent or temporary.

(B) *Nature of petitioner's need.* Employment is of a temporary nature when the employer needs a worker for a limited period of time. The employer must establish that the need for the employee will end in the near, definable future. Generally, that period of time will be limited to one year or less, but in the case of a one-time event could last up to 3 years. The petitioner's need for the services or labor shall be a one-time occurrence, a seasonal need, a peak load need, or an intermittent need.

(1) *One-time occurrence.* The petitioner must establish that it has not employed workers to perform the services or labor in the past and that it will not need workers to perform the services or labor in the future, or that it has an employment situation that is otherwise permanent, but a temporary event of short duration has created the need for a temporary worker.

(2) *Seasonal need.* The petitioner must establish that the services or labor is traditionally tied to a season of the year by an event or pattern and is of a recurring nature. The petitioner shall specify the period(s) of time during each year in which it does not need the services or labor. The employment is not seasonal if the period during which the services or labor is not needed is unpredictable or subject to change or is considered a vacation period for the petitioner's permanent employees.

(3) *Peakload need.* The petitioner must establish that it regularly employs permanent workers to perform the services or labor at the place of employment and that it needs to supplement its permanent staff at the place of employment on a temporary basis due to a seasonal or short-term demand and that the temporary additions to staff will not become a part of the petitioner's regular operation.

(4) *Intermittent need.* The petitioner must establish that it has not employed permanent or full-time workers to perform the services or labor, but occasionally or intermittently needs temporary workers to perform services or labor for short periods.

In addition, the regulation at 8 C.F.R. § 214.2(h)(6)(iii)(C) states the following:

The petitioner may not file an H-2B petition unless the United States petitioner has applied for a labor certification with the Secretary of Labor or the Governor of Guam within the time limits prescribed or accepted by each, and has obtained a favorable labor certification determination as required by paragraph (h)(6)(iv) or (h)(6)(v) of this section.

The precedent decision *Matter of Artee Corp.*, 18 I&N Dec. 366 (Comm. 1982), states the test for determining whether an alien is coming “temporarily” to the United States to “perform temporary services or labor” is whether the need of the petitioner for the duties to be performed is temporary. *Matter of Artee* holds that it is the nature of the need, not the nature of the duties, that is controlling.

As a general rule, the period of the petitioner’s need must be a year or less, but in the case of a one-time event could last up to 3 years. The petitioner’s need for the services or labor shall be a one-time occurrence, a seasonal need, a peakload need, or an intermittent need. 8 C.F.R. § 214.2(h)(6)(ii)(B). The petitioner indicates in its statement of temporary need that the employment is peakload.

To establish that the nature of the need is “peakload,” the petitioner must demonstrate that it regularly employs permanent workers to perform the services or labor at the place of employment and that it needs to supplement its permanent staff at the place of employment on a temporary basis due to a seasonal or short-term demand and that the temporary additions to staff will not become a part of the petitioner’s regular operation. 8 C.F.R. § 214.2(h)(6)(ii)(B)(3).

In determining whether an employer has demonstrated a temporary need for an H-2B worker, it must be determined whether the job duties, which are the subject of the temporary application, are permanent or temporary. If the duties are permanent in nature, the petitioner must clearly show that the need for the beneficiary’s services or labor is of a short, identified length, limited by an identified event. Based on the evidence presented, a claim that a temporary need exists cannot be justified.

In the letter of support, dated September 10, 2010, the petitioner stated that it “specializes in the residential construction.” The petitioner also listed its current projects for the construction of residences. The petitioner submitted home contracts between the petitioner and clients, and permits obtained by the petitioner. The petitioner also stated that it has a “peakload demand for the employment of H-2B workers to supplement its permanent U.S. workers due to the current construction boom on Guam.” The petitioner submitted several articles regarding the military build-up on Guam.

The petitioner has not carefully documented the peakload situation through data on its annual historical need for additional supplemental labor, its usual workload and staffing needs, and the special needs created by the current situation or contracts. The petitioner did not submit any documentation of its staffing, including permanent and temporary employees, for the past years in order to document an actual temporary and peakload need. It is impossible to determine a peakload need without evidence of the petitioner’s normal business operations.

Moreover, the petitioner has not demonstrated that its need to supplement its permanent staff on a temporary basis is due to a short-term demand and that the temporary additions to the staff will not become a part of the petitioner’s regular operation. The petitioner stated that it currently has construction projects that will reach \$1,944,999.00 in gross construction revenue. The petitioner also noted that the revenue in 2010 will be much higher than the gross construction revenues of \$775,500.00 in 2009. The petitioner did not submit the gross construction revenues in the past years in order to determine if 2009 was an abnormal year or to show that there is in fact an

increase in revenue in 2010. Even if the evidence indicated that there is an increase in projects in 2010, this is not sufficient evidence to establish a need for temporary workers. The petitioner failed to provide any evidence as to when the temporary need would end.

The petitioner implies that it will end after the military relocation ends but there is no evidence to support this claim. The petitioner failed to provide evidence to indicate that its need is temporary in nature. 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 petitioner has not documented a temporary need through data on its past contracts to indicate that its current contracts have created a short-term demand. The petitioner did not submit any evidence to establish that the new construction contracts are a temporary event of short duration that the petitioner would not normally have.

Moreover, the U.S. Department of Labor Field Memorandum No. 25-98, dated April 27, 1998, states in pertinent part: "The existence of a single short term contract in an industry such as construction does not, by itself, document temporary need if the nature of the industry is for long term projects which may have many individual contracts for portions of the overall project . . ."

Generally, the petitioner has a permanent need to have workers available to fulfill its contracts, on a continuing basis, since that is the nature of the business. The petitioner has not established that it will not continually need to have someone perform these services in order to keep its business operational. The petitioner's need for carpenters will always exist.

Beyond the decision of the director, the petitioner will be denied because 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.

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.

(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.

The petition was filed on September 13, 2010 for six named beneficiaries from China. DHS published a notice in the Federal Register on January 18, 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 on the list. *See* 75 Fed. Reg. 2879 (Jan. 19, 2010).

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.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

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").

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 takes notice of the countervailing U.S. interest in declining a Chinese national's 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 to 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 consider 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, 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 whose nationals are eligible for participation in the H-2B program. In this case, the petitioner seeks to employ carpenters 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 not necessary for the petitioner to satisfy each of the four factors; 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, 8 C.F.R. § 214.2(h)(6)(i)(E)(2)(ii) requires evidence that the beneficiaries have been admitted to the United States 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, 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 Processing and Certification Division of the Department of Labor of Guam (DOLG). 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.

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 regulation at 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. On appeal, the petitioner states that it "requires the temporary services of the Beneficiaries to meet its peakload demand for its construction services due to the current U. S. military build-up on Guam." In support of the claim, the petitioner submitted local newspaper articles and a series of residential construction contracts.

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. The petitioner does not, however, 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 six 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 carpenters 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.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(noting that the AAO reviews appeals on a *de novo* basis).

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.