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U. S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W. MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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DATE: MAR 08 2012

Office: CALIFORNIA SERVICE CENTER

File:



IN RE:

Petitioner:

Beneficiary:



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 dismissed a subsequent motion to reopen as not meeting the requirements for such a motion. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a corporation operating as a general construction contractor in Guam. It seeks to extend the H-2B employment of one named alien as an electrician, 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, 2009 to March 31, 2010. The Guam Department of Labor determined that the petitioner had submitted sufficient evidence for the issuance of a temporary labor certification. The named alien who is the subject of the petition is national of the People's Republic of China.

The director denied the petition on August 31, 2009. The director correctly found that the alien named as the beneficiary in this H-2B petition is a national of the People's Republic of China and that, as such, by operation of the regulation at 8 C.F.R. § 214.2(h)(6)(i)(E)(1) he would not be eligible for participation in the H-2B visa program, absent a U.S. Citizenship and Immigration Services (USCIS) determination that the weight of factors considered under the regulation at 8 C.F.R. § 214.2(h)(6)(i)(E)(2) establishes that it is in the U.S. interest for this alien to be accepted as the beneficiary of this particular petition. Concluding that the petitioner did not establish that it is in the U.S. interest for the aliens to be eligible as beneficiaries of this H-2B petition, the director denied the petition. The petitioner then filed a timely motion to reopen, which the director dismissed for failure to meet the requirements of a motion to reopen.

At the outset, the AAO finds that the director's dismissal of the petitioner's motion to reopen was not in error, as the decision is based upon a correct application of the pertinent regulations to the submissions constituting the motion. As noted by the director, the regulation at 8 C.F.R. § 103.5(a)(2) states in pertinent part that "[a] motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence." On motion, neither counsel nor the petitioner provided a statement of new facts to be provided in a reopened proceeding; and the statements and the supporting documents submitted on motion relate to facts previously existing and known or knowable by the petitioner when the petition was filed. In this regard, the AAO finds that the director correctly interpreted the meaning of "new facts" in the context of the regulation at 8 C.F.R. § 103.5(a)(2). Further, the AAO finds that, on appeal, the petitioner does not contest, and therefore concedes, the correctness of the director's decision to dismiss the motion on the basis stated in her decision. For these reasons, the AAO will not disturb the director's decision to dismiss the petitioner's motion to reopen.

Aside from its determination on the motion to reopen, and although it is not required to do so, the AAO also finds that the director's initial decision to deny the petition, issued on August 31, 2009, was not in error.

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. 78104 (Dec. 19, 2008). 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. As the current Petition was filed with USCIS on March 30, 2009, 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:

(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)(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.

This petition was filed for eight named aliens from China. 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-2B visa program. China was not listed for that year. As noted above, pursuant to the revised regulations, as of January 18, 2009 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.

At the outset, it is important to note that, as an appropriate factor for consideration under the auspices of 8 C.F.R. § 214.2(h)(6)(i)(E)(2), the AAO takes administrative notice of the countervailing U.S. interest in not allowing Chinese nationals eligibility for the H-2B visa program because of China's practice of consistently refusing or delaying repatriation. U.S. Immigration and Customs Enforcement has identified China 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 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 this factor; and the AAO finds that the factors presented by the petitioner in favor of extending H-2B visa eligibility to the aliens named in this petition do not overcome the weighty U.S. interest in denying H-2B eligibility to nationals of countries consistently refusing or delaying repatriation.

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.

As acknowledged in its brief in support of the appeal and in its letter of reply to the service center's request for additional evidence, the petitioner has not provided evidence demonstrating that workers with the required skills are not available from among foreign workers from a country currently on the list of countries whose nationals are eligible for participation in the H-2B program. Thus, the factor specified at C.F.R. § 214.2(h)(6)(i)(E)(2)(i) has not been established as an element for consideration in this proceeding.

The record of proceeding has established for consideration the positive factor specified at 8 C.F.R. § 214.2(h)(6)(i)(E)(2)(ii), that is, that the beneficiaries have been admitted to the United States previously in H-2B status, and, in fact, were working for the petitioner in H-2B status in Guam when the petition was filed.

Next, the AAO regards the March 4, 2009 letter from the Administrator of the Alien Labor & Processing Division of the Department of Labor of Guam (DOLG) as evidence favorable to the petitioner under the 8 C.F.R. § 214.2(h)(6)(i)(E)(2)(iii) factor, that is, consideration of "[t]he potential for abuse, fraud, or other harm to the integrity of the H-2B visa program through the potential admission of a beneficiary." As the letter states that DOLG has no record of either (a) compliance issues or violations by the petitioner with regard to its participation in the H-2B program in Guam, or (b) violations of the conditions of their H-2B status by the beneficiaries, and as the letter supplements a record of proceeding in which the AAO finds no obvious indicia of abuse, fraud, or other potential harm to the H-2B program by the petitioner or the named beneficiaries, the letter indicates that neither the petitioner nor the beneficiaries are likely threats to the integrity of the H-2B program.

The AAO finds that the evidence presented for consideration under the umbrella of "such other factors as may serve the U.S. interest" at 8 C.F.R. § 214.2(h)(6)(i)(E)(2)(iv) is not sufficient, either in itself or in combination with the other evidence submitted in support of this petition, to establish that it is in the interest of the United States to approve this extension petition.

On appeal, the petitioner asserts that the director's not having specifically addressed the petitioner's contentions about the beneficiary's 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 petitioner's contention that approval of the petition would promote the U.S. interest in developing the type of housing that the beneficiaries would help construct is noted. However, the record of proceeding does not establish that continued employment of the named aliens 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.

Next, the AAO finds that the petitioner has failed to document the extent to which its business would be damaged. 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)). The AAO further finds, however, that even if the petitioner were to establish that the denial of this petition would result in substantial damages to the petitioner, even to the point of causing its demise, the record of proceeding does not establish how such events would have a material impact upon any U.S. interest.

The AAO finds that the totality of factors appropriate for consideration under the regulation at 8 C.F.R. § 214.2(h)(6)(i)(E)((2) does not establish that it is in the U.S. interest for the Chinese aliens to be the beneficiaries of this particular H-2B petition. 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.