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

(b)(6)

U.S. Citizenship and Immigration Services

DATE: JUN 18 2013 Office: CALIFORNIA SERVICE CENTER

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,

James Blinzinger, for

Ron Rosenberg
Acting 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 petition will be denied.

On the Form I-129 visa petition, the petitioner describes itself as a 32-employee construction contracting company established in 1992. In order to employ the beneficiaries in what it designates as cement mason positions from September 9, 2009 until September 9, 2010, the petitioner seeks to classify them as temporary nonagricultural workers pursuant to section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(ii)(b).

The director denied the petition, concluding that the petitioner had failed, given that the beneficiaries are nationals of a country which was not designated as an H-2B participating country by the Secretary of Homeland Security at the time this petition was filed, to establish that approval of the petition would nonetheless be in the national interest of the United States.

The record of proceeding before the AAO contains the following: (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's decision denying the petition; and (5) the Form I-290B and supporting documentation.

Upon review of the entire record of proceeding, the AAO finds that the petitioner has failed to overcome the director's ground for denying this petition. Accordingly, the appeal will be dismissed, and the petition will be denied.

Beyond the decision of the director, the AAO finds an additional aspect which, although not addressed in the director's decision, nevertheless also precludes approval of the petition, namely, the petitioner's failure to establish a temporary need for the services of the beneficiary based upon a peakload need. For this additional reason, the petition may not be approved.[1]

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, in pertinent part, as follows:

> [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)(6) states, in pertinent part, the following:

> *Petition for alien to perform temporary nonagricultural services or labor (H-2B)—*

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[1] The AAO conducts appellate review on a *de novo* basis (*See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)), and it was in the course of this review that the AAO identified this additional ground for denial.

(b)(6)

(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.

* * *

(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 [her] 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.

* * *

(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 accordance with the precedent decision *Matter of Artee Corp.*, 18 I&N Dec. 366 (Comm. 1982), the test for determining whether an alien is coming "temporarily" to the United States in order to "perform temporary services or labor" is whether the need of the petitioner for the duties to be performed is temporary. Accordingly, pursuant to *Matter of Artee* it is the nature of the petitioner's need, rather than the nature of the duties, that controls.

The beneficiaries are nationals of the People's Republic of China (hereinafter "China"). On December 19, 2008, the Department of Homeland Security (hereinafter "DHS"), with concurrence by the Secretary of State, published a notice in the Federal Register designating the countries whose nationals are eligible to participate in the H-2B visa program. *See* 73 Fed. Reg. 77729 (Dec. 19, 2008). China was not one of the listed countries. *Id.* An individual who is a national of an unlisted country may only be granted nonimmigrant status under section 101(a)(15)(H)(ii)(b) of the Act if the Secretary of Homeland Security determines, in her sole and unreviewable discretion, that granting such status would nonetheless be in the national interest of the United States. 8 C.F.R. § 214.2(h)(6)(i)(E)(2).

U.S. Citizenship and Immigration Services (USCIS) has issued policy guidance discussing the evidence required to satisfy the U.S. national interest requirement for beneficiaries from

countries not listed by the Secretary as among those whose nationals are eligible to participate in the H-2B visa program. *See* 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* (Jun. 1, 2009) (hereinafter "Velarde memo"). The Velarde memo states, in pertinent part, 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 takes notice of the strong countervailing U.S. interest in denying Chinese nationals eligibility to participate in the H-2B visa program due to China's consistent practice of refusing or delaying repatriation of its nationals. U.S. Immigration and Customs Enforcement has 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, 78109 (Dec. 19, 2008). The AAO assigns heavy weight to the statements and intent of the Secretary of Homeland Security.

As indicated above, the regulation at 8 C.F.R. §§ 214.2(h)(6)(i)(E)(*2*)(*i*)-(*iv*) lists four factors which may be taken into account when determining whether it is in the national interest of the United States to approve a petition filed on behalf of an alien who is a national of a country not listed by the Secretary of Homeland Security as one whose nationals are eligible to participate in the H-2B visa program. The AAO shall address each factor separately.

The first factor, which is described at 8 C.F.R. § 214.2(h)(6)(i)(E)(*2*)(*i*), requires the petitioner to demonstrate that a worker with the requisite skills is not available from a country whose nationals are eligible for participation in the H-2B program. In this case, the petitioner seeks to employ cement masons with two years of experience. As the petitioner has not claimed that workers with the required skills are not available from a currently-listed country, it has not satisfied the factor described at 8 C.F.R. § 214.2(h)(6)(i)(E)(*2*)(*i*).

The second factor, which is set forth at 8 C.F.R. § 214.2(h)(6)(i)(E)(*2*)(*ii*), requires the petitioner to submit evidence that the beneficiaries were previously admitted to the United States in H-2B

status. As the petitioner is filing for an extension of the beneficiaries' current H-2B status, this factor has been satisfied.

The third factor, which is set forth at 8 C.F.R. § 214.2(h)(6)(i)(E)(*2*)(*iii*), requires USCIS to take into consideration the potential for abuse, fraud, or other harm to the integrity of the H-2B visa program if the beneficiaries of the petition are admitted. As evidence of eligibility under this factor, the petitioner submitted a March 24, 2009 letter from the Administrator of the Alien Labor and Processing Division of the Department of Labor of Guam (DOLG), which states that DOLG has no record of compliance issues or violations by the petitioner with regard to its participation in the H-2B program in Guam, and no record of violations by the beneficiaries of their H-2B status.

However, as noted above, the amended H-2B regulations and 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, and beyond the actual practice of this particular 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. Again, DHS has listed China as one of the top five non-cooperating countries. 73 Fed. Reg. 8230, 8243. Absent a demonstrated U.S. national interest, it would undermine the intent of the regulation if USCIS were to grant classification for nationals from non-cooperating countries. Thus, while this particular petitioner may have no history of compliance issues, it has not provided sufficient evidence to overcome the director's concern regarding Chin's current status as a top-five non-cooperating country. The petitioner has therefore not satisfied 8 C.F.R. § 214.2(h)(6)(i)(E)(*2*)(*iii*).

Finally, the fourth factor, which is described at 8 C.F.R. § 214.2(h)(6)(i)(E)(*2*)(*iv*), requires the petitioner to submit evidence establishing "other factors" which may serve the U.S. national interest. In determining whether a petitioner has satisfied the fourth factor, circumstances which are to be 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-2B workers from non-eligible countries. *See* Velarde memo at 2.

On appeal, counsel for the petitioner states that "the petitioner specializes in the residential construction which serves the U.S. interest by providing additional housing which is needed for the U.S. military build-up on Guam." Counsel argues further that the houses built by the petitioner "are known to be desirable to U.S. military buyers." Counsel also claims that the petitioner's construction of 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.

The petitioner also argues that because the director did not specifically address its statements regarding the beneficiaries' roles in constructing affordable housing and the damage denial of this petition would cause to the petitioner, 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 alien as a beneficiary of this petition. While the petitioner's contention that approval of the petition would promote the U.S. national interest because it constructs housing needed to support the U.S. military buildup in Guam is noted, the petitioner does not assert, or submit evidence to establish, that the beneficiaries would be working on projects tied directly to the U.S. military buildup. Instead, the petitioner claims that there is increased demand for residential construction because other contractors are working on military projects. However, the connection between the employment of the named beneficiaries and the U.S. military expansion in Guam is tenuous, at best. The evidence contained in the record of proceeding does not establish that that the housing projects on which the beneficiaries would work would materially advance the asserted U.S. interest or, for that matter, that their continued employment is essential to the ultimate construction of such housing. *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 evidence contained in the record of proceeding does not establish that continued employment of the beneficiaries is essential to, or would materially advance, any other U.S. national interest. The petitioner has not satisfied 8 C.F.R. § 214.2(h)(6)(i)(E)(*2*)(*iv*).

When considered in the aggregate, the relevant evidence does not establish that approval of the petition would be in the national interest of the United States despite DHS's decision not to include China on the list of H-2B eligible countries. As stated previously, the AAO assigns heavy weight to the statements and intent of DHS in keeping China from the list and, upon consideration of the factors enumerated at 8 C.F.R. §§ 214.2(h)(6)(i)(E)(*2*)(*i*)-(*iv*) in their totality, the AAO finds that the petitioner has failed to establish that its employment of the beneficiaries is essential to, or would materially advance, any other U.S. interest.[2] Accordingly, the appeal will be dismissed and the petition will be denied on this basis.

Beyond the decision of the director, the AAO also finds that petitioner had not established that it has a temporary, peakload need for the services of the beneficiaries. In order to establish that the nature of its need is a temporary one based upon a peakload need pursuant to 8 C.F.R. § 214.2(h)(6)(ii)(B)(*3*), the petitioner must demonstrate the following: (1) that it regularly employs permanent workers to perform the services or labor at the place of employment; (2) 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 (3) that the temporary addition to staff will not become a part of the petitioner's regular operation. 8 C.F.R. § 214.2(h)(6)(ii)(B)(*3*).

As the evidence of record establishes that the petitioner regularly employs permanent workers to perform the pertinent services or labor at the place of employment, the petitioner has satisfied one of the elements of proof at 8 C.F.R. § 214.2(h)(6)(ii)(B)(*3*) which must all be met to establish an H-2B peakload need. However, the petitioner has satisfied neither of the remaining two criteria.

To satisfy the second required element of the H-2B peakload criterion at 8 C.F.R. § 214.2(h)(6)(ii)(B)(*3*), the petitioner must establish that it needs to supplement its

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[2] As noted above, this determination is not subject to review. *See* 8 C.F.R. §§ 214.2(h)(6)(i)(E)(*2*).

permanent staff at the place of employment on a temporary basis due to a seasonal or short-term demand.

In this instance, the petitioner has not shown that it is experiencing an unusual increase in the demand for its services that is different from its ordinary workload need for cement masons. The petitioner has not carefully documented a peakload need 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. Although the petitioner states that the influx of people into Guam is another reason to hire additional temporary workers, it has not presented sufficient evidence to establish a concurrent increase of contracts that would require additional workers. Furthermore, the record contains no evidence linking any of the petitioner's construction projects to the U.S. military buildup in Guam. *See Matter of Soffici*, 22 I&N Dec. 158 at 165.

For all of these reasons, the petitioner has failed to satisfy the second element of the peakload criterion described at 8 C.F.R. § 214.2(h)(6)(ii)(B)(*3*).

The third element described at 8 C.F.R. § 214.2(h)(6)(ii)(B)(*3*) for establishing that the nature of its need for the services of the beneficiary is a temporary one based upon a peakload need requires the petitioner to demonstrate that the temporary addition to its staff will not become a part of its regular operations. In this regard, the AAO finds that because the evidence of record does not establish a definable end-date for the petitioner's need for additional cement masons to supplement its permanent staff of cement masons, it has not demonstrated that the temporary additions will not become a part of its regular operation. To the contrary, the petitioner's need for cement masons to perform the duties described on the Form I-129 will always exist.

For all of these reasons, the petitioner has failed to satisfy the third criterion described at 8 C.F.R. § 214.2(h)(6)(ii)(B)(*3*) for establishing that the nature of its need for the services of the beneficiaries is a temporary one, based upon a peakload need.

The petitioner has therefore failed to satisfy all three criteria described at 8 C.F.R. § 214.2(h)(6)(ii)(B)(*3*), and it has consequently failed to establish that its need for the services of the beneficiaries is a temporary one, based upon a peakload need, as required by section 101(a)(15)(H)(ii)(b) of the Act and 8 C.F.R. § 214.2(h)(6)(i)(A).

For this additional reason, the petition may not be approved.

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 at 145 (noting that the AAO conducts appellate review on a *de novo* basis).

Moreover, when the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that the AAO abused its discretion with respect to all of

the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*. 345 F.3d 683.

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed. The petition is denied.