



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF L-G-, LLC

DATE: OCT. 1, 2015

APPEAL OF VERMONT SERVICE CENTER DECISION

PETITION: FORM I-129, PETITION FOR A NONIMMIGRANT WORKER

The Petitioner, a bakery, seeks to employ the Beneficiary as a temporary nonagricultural worker in a position to which it assigns the title "Head Baker." *See* Immigration and Nationality Act (the Act) § 101(a)(15)(H)(ii)(b). 8 U.S.C. § 1101(a)(15)(H)(ii)(b). The Director, Vermont Service Center, denied the petition. The matter is now before us on appeal. The appeal will be dismissed.

The Director denied the petition, concluding that the Petitioner had not established that it would be in the interest of the United States to approve the petition, as required by the regulation at 8 C.F.R. § 214.2(h)(6)(i)(E) for approval of an H-2B petition for a beneficiary who is not a national of a country currently designated as one whose nationals could be approved for H-2B classification.

The record of proceeding before us consists of (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 Notice of Motion or Appeal (Form I-290B) and supporting documentation.

Upon review of the entire record of proceeding, we conclude that the Director's denial of the petition on the basis specified in her decision was correct.¹ Accordingly, the appeal will be dismissed.

I. LEGAL FRAMEWORK

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 classification. In pertinent part, the rule amended the DHS regulations by providing the provisions at 8 C.F.R. §§ 214.2(h)(6)(i)(E)(2)(i)-(iv), under which U.S. Citizenship and Immigration Services (USCIS) may approve petitions for H-2B nonimmigrant classification

¹ Since the identified basis for denial is dispositive of the petitioner's appeal, we will not address additional grounds of ineligibility we observe in the record of proceeding.

status only for nationals of countries that the Secretary of Homeland Security, with the concurrence of the Secretary of State, has designated by notice published each year in the *Federal Register*.

The provisions at 8 C.F.R. §§ 214.2(h)(6)(i)(E), *Eligible countries*, read as follows:

- (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)(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.

On January 17, 2014, DHS, with concurrence by the Secretary of State, published a notice in the *Federal Register* designating 63 countries whose nationals are eligible to participate in the H-2B visa program for that coming year. *See* 79 Fed. Reg. 3214 (Jan. 17, 2014). The effective date of the notice was January 18, 2014.

The Petitioner does not dispute that the Beneficiary is a national of France and that France is not among the 63 countries designated in the January 17, 2014 notice.

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 DHS Secretary determines, in his sole and unreviewable discretion, that granting such status would be in the national interest of the United States. 8 C.F.R. § 214.2(h)(6)(i)(E)(2).

II. ANALYSIS

We conduct appellate review on a *de novo* basis (*See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)). Thus, we base our decisions upon our independent review of the entire record of proceeding, without deference to contrary findings and conclusions that may have been reached by the Director. In conducting our *de novo* review, we apply the “preponderance of evidence” standard of review as articulated in the controlling precedent decision, *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010). Accordingly, we examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true. If the Petitioner submits relevant, probative, and credible evidence that leads us to believe that the claim is “more likely than not” or “probably” true, the Petitioner has satisfied the standard of proof.

Also, in reaching our determination, we followed the guidance, which the Petitioner references, in the USCIS Policy Memorandum from Donald Neufeld, Acting Associate Director, Domestic Operations, USCIS, HQ 70/6.2.8, *Publication of the [F]inal [R]ules: H-2A Agricultural Temporary Worker and H-2B Nonagricultural Temporary Worker/Revisions to Adjudicator’s Field Manual (AFM), Chapters 31.4 and 31.5; Appendix 31-4 (AFM Update AD)*, 19 (June 24, 2009), http://www.uscis.gov/sites/default/files/files/nativedocuments/H-2A_24jun09.pdf. (last visited Sept. 24, 2015).

In pertinent part, the Neufeld Memorandum states:

[A] petition filed on behalf of H-2B workers who are not from a country that has been designated as an eligible country may be approved only if USCIS determines that it is in the U.S. interest for a beneficiary of such petition. . . . in order to make this discretionary determination of U.S. interest, USCIS may take into account the following factors, including but not limited to:

- Evidence that a worker with the required skills is not available from a country on the list of eligible countries;
- Evidence that the beneficiary has been admitted to the United States previously in H-2B status and complied with the terms of his/her status;
- Any potential for abuse, fraud, or other harm to the integrity of the H-2B program through the potential admission of these worker(s) that a petitioner plans to hire; and
- There are other factors that would serve the U.S. interest, if any.

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-2B workers from non-eligible countries.

The Petitioner has not provided any independent documentary evidence that qualifies for consideration under the provision at 8 C.F.R. § 214.2(h)(6)(i)(E)(I) for “evidence demonstrating that a worker with the required skills is not available from among foreign workers from a country currently on the list [of designated countries].” In this regard, we note the Petitioner’s claim that it would have been cost-prohibitive for it to have to recruit for a head baker in French-style baking. However, the regulations do not mandate any particular type of evidence under this provision. Further, the Petitioner has not provided evidence to substantiate its implicit claims (1) that recruitment efforts in all 63 countries would substantiate that a worker with the required skills is not available in at least one of those countries, and (2) that only recruitment efforts in all 63 countries would substantiate that a worker with the required skills is not available in at least one of those countries. Moreover, we have considered the Petitioner’s assertion that only France can provide a worker with required skills, but we find no evidence in the record from any authoritative source that establishes that claim as accurate. Accordingly, we accord no significant weight to this assertion, or for that matter, any other material assertion whose accuracy is not supported by the evidence of record. 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'l Comm'r 1972)).

As a corollary matter, because the record of proceeding does not contain documentary evidence substantiating the claim that the Petitioner's owner should be regarded as expert on the issue of the availability outside of France of the type of worker that the Petitioner seeks, and also because the Petitioner does not present persuasive evidence regarding the availability of that type of worker among the countries on the list of eligible countries, we do not accord any significant weight to the statements of the Petitioner's owner with regard to the worker-availability issue.

In addition, we are not persuaded by counsel's contention that "information about French culinary arts" in the related documents submitted on appeal demonstrates that the proffered position is so specialized that one must expect that "only those from France would itself could sufficiently qualify." Upon reading all of those documents, we did not find a factual basis for counsel's contention, and we do not regard counsel's arguments as evidence. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the Petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). We find that the content of the documents addressing French culinary arts does indicate that distinct characteristics that distinguish French cuisine from other cuisines around the world, but does not provide a substantive basis for the Petitioner's claim that only France can provide a worker suitable for the position in question.

Next, we agree with the Petitioner that the fact that the Beneficiary has not been admitted to the United States previously in H-2B status does not in itself preclude approval of the petition or weigh against the petition, as submission of such evidence for favorable consideration under 8 C.F.R. § 214.2(h)(6)(i)(E)(2)(ii) is not mandatory.

With regard to the third factor for our consideration ("Any potential for abuse, fraud, or other harm to the integrity of the H-2B program through the potential admission of these worker(s) that a petitioner plans to hire") we do not accord any significant weight to the Beneficiary's positive history as a nonimmigrant, as that history is not evidence of the Beneficiary's adherence to the particular requirements and conditions of the H-2B program. Further, we accord no weight to counsel's unsubstantiated claim that the risks for abuse are no higher in the H-2B program than in the J-1 program, in which the Beneficiary has participated. In any event, even if the Petitioner had established that the risks were higher in the J-1 program - and it has not - we would not find that factor either dispositive in itself or, in the evidentiary record before us, sufficient to tilt the totality of the evidence in favor of us finding that approval of the petition would be in the interest of the United States.

We have not excluded any piece of evidence from our consideration. If evidence did not appear to fit within the first three factors, we considered it for evidentiary value under the fourth factor, that is,

for the extent that it otherwise demonstrated that approval of the petition would be in the interest of the United States.

We find that the Petitioner has not demonstrated why we should accord any significant weight to the fact that France is a member of the Visa Waiver program, particularly in light of the facts that DHS promulgates regulations dealing with the Visa Waiver program and that the Petitioner has not produced any evidence that a country's designation for the Visa Waiver program is based upon evaluation of the same factors considered in the process of determining the eligibility of a particular country's nationals for the H-2B program. Also, as the promulgator of both the Visa Waiver regulations and the aforementioned country-list, DHS would have been aware of the factors cited by the Petitioner when DHS published the country list.

In the same vein, we find that the evidence of record as to France's relative prosperity, standing in the world, relationships with the United States, and other positive attributes does not establish any conflict or inconsistency with the fact that DHS has not included France on the list of eligible countries.

Another element of our consideration was possible harm to the Petitioner if the petition were not approved. Upon review of the entire record, we see that the Petitioner has already retained rental space for the new bakery location and has substantially invested in equipment for the new bakery's operation. However, we did not find evidence sufficient to show the nature and extent of harm that the Petitioner would incur if it were not able to employ the Beneficiary as head baker.

Upon consideration of each item of evidence in the record of proceeding for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, we conclude that the weight of the evidence is not sufficient for us to find that approval of the Petition would be in the best interest of the United States. In accordance with that discretionary determination, the appeal will be dismissed.

Finally, we find little weight in Petitioner's counsel's contention that promulgation of the regulation at 8 C.F.R. § 214.2(h)(6)(i)(E)(2) was beyond the DHS's authority and was therefore "inarguably an impermissible abuse of the DHS's discretion without any basis in immigration law." Counsel has provided no statute, regulation, case law, precedent decision, or other legal authority to support her declaration; and contrary to counsel's argument, the regulation in question does appear to be in the nature of a condition upon admission of nonimmigrants.

III. CONCLUSION AND ORDER

In visa petition proceedings, it is the Petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

Matter of L-G-, LLC

ORDER: The appeal is dismissed.

Cite as *Matter of L-G-, LLC*, ID# 13722 (AAO Oct. 1, 2015)