U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
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U.S. Citizenship and Immigration Services

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FILE: WAC 10 019 50914 Office: CALIFORNIA SERVICE CENTER Date: APR 09 2010

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(P)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(P)(iii)

ON BEHALF OF PETITIONER:

[redacted]

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. 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 $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, partially approved the nonimmigrant visa petition for 14 of the 15 beneficiaries named in the petition and denied the requested classification for the instant beneficiary. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner, a fine arts institution, filed the nonimmigrant petition seeking classification of the beneficiaries under section 101(a)(15)(P)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(P)(iii), as entertainers in a culturally unique program. The petitioner sought to classify 15 beneficiaries as a P-3 entertainment group for a period of approximately six weeks. The fifteen named beneficiaries included singers, musicians who perform classical Indian music, and the instant beneficiary, who is identified in the petitioner's supporting documentation as a sound engineer.

On December 4, 2009, the director approved the petition for fourteen beneficiaries, but denied the requested P-3 classification to the instant beneficiary. The director determined that the beneficiary, in his capacity as a sound engineer, is essential support personnel and thus ineligible for classification as a P-3 culturally unique artist and entertainer. The director emphasized that the petitioner is required to file a separate petition for essential support personnel who will accompany the principal beneficiaries.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On the Form I-290B, Notice of Appeal or Motion, counsel acknowledges that the regulation at 8 C.F.R. § 214.2(p)(2)(i) states that "essential support personnel may not be included on the petition filed for the principal alien(s)." However, counsel states that "the Service Center seems to overlook that the use of the term 'may not' is permissive and not mandatory." Counsel further asserts that other regulatory provisions do in fact "provide for circumstances when such support personnel may or can be included in a petition for P-3 visas along with a group of performers." Counsel also claims that the beneficiary, "although designated as the sound engineer, is also the lead male choral singer and a choreographer." Finally, counsel emphasizes that the beneficiary has been granted P-3 classification previously, and that the denial of the instant petition is inconsistent with prior U.S. Citizenship and Immigration Services (USCIS) decisions. The petitioner submits additional evidence in support of the appeal.

Upon review, the petitioner has not established that the instant beneficiary qualifies as a P-3 artist or entertainer in a culturally unique program, nor has it established that the beneficiary, who serves the P-3 entertainment group in an essential support role, may be included on the petition filed for the principal aliens. Accordingly, the appeal will be dismissed for the reasons discussed below.

I. The Law

Section 101(a)(15)(P)(iii) of the Act, provides for classification of an alien having a foreign residence which the alien has no intention of abandoning who:

> (I) performs as an artist or entertainer, individually or as part of a group, or is an integral part of the performance of such a group, and

(II) seeks to enter the United States temporarily and solely to perform, teach, or coach as a culturally unique artist or entertainer or with such a group under a commercial or noncommercial program that is culturally unique.

The regulation at 8 C.F.R. § 214.2(p)(6)(i) further provides:

(A) A P-3 classification may be accorded to artists or entertainers, individually or as a group, coming to the United States for the purpose of developing, interpreting, representing, coaching, or teaching a unique or traditional ethnic, folk, cultural, musical, theatrical, or artistic performance or presentation.

(B) The artist or entertainer must be coming to the United States to participate in a cultural event or events which will further the understanding or development of his or her art form. The program may be of a commercial or noncommercial nature.

The regulation extends the P-3 classification for aliens who provide essential support to the principal P-3 artists or entertainers. The regulation at 8 C.F.R. § 214.2(p)(3) states, in pertinent part:

Essential support alien means a highly skilled, essential person determined by the Director to be an integral part of the performance of a P-1, P-2, or P-3 alien because he or she performs support services which cannot be readily performed by a United States worker and which are essential to the successful performance of services by the P-1, P-2, [sic] alien. Such alien must have appropriate qualifications to perform the services, critical knowledge of the specific services to be performed, and experience in providing such support to the P-1, P-2, or P-3 alien.

The regulation at 8 C.F.R. § 214.2(p)(6)(iii)(B) prescribes the following evidentiary requirements for a petition for a P-3 essential support alien:

(1) A consultation from a labor organization with expertise in the area of the alien's skill;

(2) A statement describing the alien(s) prior essentiality, critical skills and experience with the principal alien(s); and

(3) A copy of the written contract or a summary of the terms of the oral agreement between the alien(s) and the employer.

With respect to the filing of P classification petitions in general, the regulation at 8 C.F.R. § 214.2(p)(2)(i) states, in pertinent part:

Essential support personnel may not be included on the petition filed for the principal alien(s). These aliens require a separate petition.

Finally, the regulation at 8 C.F.R. § 214.2(p)(2)(iv)(F) states:

> *Multiple beneficaries*. More than one beneficiary may be included in a P petition if they are members of a group seeking classification based on the reputation of the group as an entity, or if they will provide essential support to P-2, P-2 or P-3 beneficiaries performing in the same location and in the same occupation.

II. Discussion

The record of proceeding includes the Form I-129, Petition for a Nonimmigrant Worker, and supporting documentation, a request for additional evidence (RFE) dated November 10, 2009, the petitioner's response to the RFE, the director's decision dated December 4, 2009, denying the requested P-3 classification to the instant beneficiary, the petitioner's appeal, and additional evidence submitted in support of the appeal.

The sole issue addressed by the director was whether the petitioner properly included the beneficiary, a sound engineer, in the same petition as the principal P-3 entertainment group. The director determined that the petitioner is required to file a separate petition on behalf of the instant beneficiary, requesting that he be granted P-3 classification as essential support personnel, pursuant to 8 C.F.R. § 214.2(p)(2)(i) and 8 C.F.R. § 214.2(p)(6)(iii)(B). On appeal, the petitioner claims for the first time that the beneficiary is a lead male chorus singer and choreographer for the P-3 group, as well as its sound engineer, and is thus clearly qualified for P-3 classification. Therefore, the AAO will first address whether the petitioner has established that the beneficiary is an artist or entertainer coming to the United States for the purpose of developing, interpreting, representing, coaching, or teaching a unique or traditional ethnic, folk, cultural, musical, theatrical, or artistic performance or presentation.

A. The Beneficiary's Role in the P-3 Entertainment Group

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on October 28, 2009, on behalf of 15 beneficiaries identified collectively as '[redacted] The petition was accompanied by resumes or other biographical data for each beneficiary, the majority of which identified the beneficiaries as singers and/or musicians. The biographical data information provided for the beneficiary indicates that he has 12 years of job experience in sound engineering and electrical works. Under "extracurricular activities" the beneficiary indicates that he is "interested in music (singing)."

In the request for additional evidence issued on November 10, 2009, the director requested additional information regarding the individual beneficiaries and evidence that the beneficiaries have previously performed together as a group. In a letter dated November 18, 2009, counsel stated the following with respect to the instant beneficiary:

> [The beneficiary] is the sound and electrical engineer for [redacted] orchestral ensemble and has toured extensively as an integral part of the group for nearly ten years. He is also a singer and has a keen interest in music.

In a separate document, the petitioner listed all fifteen beneficiaries and each individual's role within the group. The beneficiary is identified as "sound engineer." The list identifies the remaining beneficiaries as singers or musicians specializing in various instruments.

The director denied the petition, in part, on December 4, 2009, determining that the beneficiary is essential support personnel and, unlike the other beneficiaries included in the petition, is not an artist or entertainer coming to the United States for the purpose of developing, interpreting, representing, coaching, or teaching a unique or traditional ethnic, folk, cultural, musical, theatrical, or artistic performance or presentation, pursuant to 8 C.F.R. § 214.2(p)(6)(i)(A).

On appeal, counsel asserts that the beneficiary "is an integral part of the group and is a performing artist as well as a sound engineer for the group." The petitioner submits a declaration from its owner, [redacted] who states:

> [The beneficiary] is also an artist, a vocalist/lead singer in the orchestra, and a choreographer, besides being a sound engineer. He is an integral part of SBP group and SBP does not travel without him. The orchestra consists of several Indian and Western instruments and the appropriate placement, tuning, phasing in and out, and combinations present a culturally unique challenge which cannot be performed by any sound or electrical engineer. . . .

[redacted] reiterates that the beneficiary is "a lead male singer" who has performed with the P-3 group in the United States previously, and who has been granted several P-3 visas in the past. The petitioner submits copies of the beneficiary's previous P-3 visas issued in 2004, 2006 and 2008, all of which were sponsored by the petitioning organization.

The petitioner also submits a resume for the beneficiary in which he states that he is "the main male chorus singer with the [redacted] music group since 1997," and that he has worked as sound engineer for the group during the same period. The beneficiary indicates that he has performed with this group in the United States in June 2000, August 2004, June 2006 and July 2008.

Upon review, the petitioner has not established that the beneficiary is an artist or entertainer coming to the United States for the purpose of developing, interpreting, representing, coaching, or teaching a unique or traditional ethnic, folk, cultural, musical, theatrical, or artistic performance or presentation, and is thus not eligible for P-3 classification pursuant to 8 C.F.R. § 214.2(p)(6)(i)(A).

The evidence before the director clearly indicated that the beneficiary's role with the group is that of a sound engineer. While the beneficiary's biographical information indicated that he is "interested in music (singing)" as an "extracurricular activity," the petitioner has provided no explanation as to why none of the initial evidence or evidence submitted in response to the request for evidence identified the beneficiary as a "lead male singer" for the group. Counsel also identified the beneficiary as the group's "sound and electrical engineer." Counsel stated that the beneficiary is "also a singer and has a keen interest in music," but this statement falls short of claiming that the beneficiary has ever performed with the P-3 group as a singer.

Based on the evidence before the director, the reasonable conclusion to be reached is that the beneficiary is a sound engineer whose role with the group is in an essential support capacity.

The petitioner and counsel now claim for the first time on appeal that the beneficiary is the "lead male choral singer" and has been performing with the group since 1997 as a singer. The only evidence submitted to support this claim is a revised resume for the beneficiary, which must be considered self-serving and contradictory. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

If the beneficiary has in fact served as the lead male choral vocalist for [redacted] orchestral group for over ten years, then it is reasonable to expect the petitioner to provide some documentary evidence to corroborate the new claims it makes on appeal. Such evidence might include performance programs from prior concerts listing the beneficiary among the performers. 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 AAO does not discount the possibility that the beneficiary does serve as both a performer and a sound engineer for the P-3 group, but this claim has been so poorly presented and feebly documented in the current record that we cannot make an affirmative determination.[1]

The petitioner has not submitted sufficient evidence on appeal to overcome the director's finding that the beneficiary's role with the P-3 group is that of a sound engineer, an essential support role.

B. Inclusion of P-3 Essential Support Personnel on Petitions for P-3 Artists and Entertainers

The primary issue addressed by the director is whether the petitioner may include a P-3 essential support worker on a petition for the primary P-3 entertainment group.

The director concluded that the regulation at 8 C.F.R. § 214.2(p)(2)(i) clearly states that essential support personnel may not be included on the petition filed for the principal, and therefore denied P-3 classification to the instant beneficiary.

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[1] The AAO notes that the petitioner signed the petition under penalty of perjury. If it is determined that the beneficiary is not the lead male choral vocalist, as claimed on appeal, then the assertion will constitute a material misrepresentation which may impact the group's future admissions to the United States. A nonimmigrant's admission and continued stay in the United States is conditioned on the full and truthful disclosure of all information requested by U.S. Citizenship and Immigration Services. 8 C.F.R. § 214.1(f).

In denying the petition, the director also cited to the supplementary information accompanying the publication of the final O and P visa rule amending the regulations at 8 C.F.R. § 214.2 to reflect changes made by the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Public Law 102-232 (December 12, 1991), in which legacy Immigration and Naturalization Service (INS) observed:

> Multiple Beneficiaries – 214.2(p)(2)(iv)(F)
>
> The interim rule contained the requirement that essential support personnel could not be included on the petition for the principal alien or aliens, but instead, should be filed on a separate petition. Sixty-nine commenters suggested that this procedure resulted in an unnecessary expense to petitioners who were required to submit two petitions for almost every entertainment act. These commenters suggested that in order to avoid this unnecessary expense, essential support personnel should be included in the petition for the principal alien. The Service is aware of the expense involved in filing these petitions but cannot adopt the suggestion. The Service is required by the Act to furnish an annual report to Congress addressing the occupations contained in P petitions. The only way that the Service can properly track these occupations is to require the submission of separate petitions for essential support personnel.

59 Fed. Reg. 41818-01, 1994 WL 422027

On appeal, counsel asserts that the director based her decision solely on the regulation at 8 C.F.R. § 214.2(p)(2)(i), and failed to consider the regulatory provision for the filing of petitions on behalf of multiple beneficiaries at 8 C.F.R. § 214.2(p)(iv)(F).

Counsel has misinterpreted the meaning of this regulatory provision. The regulation at 8 C.F.R. § 214.2(p)(iv)(F) provides that multiple beneficiaries may be included on a single P petition if they are members of the same performing or entertainment group, while multiple essential support personnel may be included on a single petition if they will be performing their duties in the same occupation and in the same location. It does not create a scenario in which principal P-3 performers and their essential support personnel may be included on the same petition. Based on the supplementary information accompanying the implementation of the current regulation, legacy INS clearly rejected suggestions that petitioners be permitted to file for principal P aliens and P essential support personnel on the same petition. Furthermore, this interpretation is consistent with the regulation at 8 C.F.R. § 214.2(p)(2)(i), which plainly and unequivocally provides that "[e]ssential support personnel may not be included on the petition filed for the principal alien(s)."

Counsel's assertion on appeal that the words "may not" were intended to be "permissive and not mandatory" is not persuasive. *See Black's Law Dictionary* 1000 (8th Ed. 2004)(noting that the word "may" has often held to be synonymous with "shall" or "must.") The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

The AAO acknowledges the petitioner's statement that it would cause financial hardship for the petitioner to file a separate petition for the beneficiary and to pay the cost and fees associated with such a petition. However, the

supplementary information that accompanied the current P regulations shows that Congress took these concerns into account and determined that separate petitions for P-3 performers and P-3 essential support personnel are required, notwithstanding any financial hardship that may result.

Based on the foregoing discussion, the AAO finds that the director properly denied P-3 classification to the instant beneficiary based on his role as essential support personnel to the principal P-3 group, consistent with 8 C.F.R. § 214.2(p)(2)(i). Accordingly the appeal will be dismissed.

C. Prior Approvals and Conclusion

The AAO acknowledges that USCIS previously approved at least three P-3 petitions filed by the petitioner on behalf of the instant beneficiary. The prior approvals do not preclude USCIS from denying an extension of the original visa based on reassessment of the beneficiary's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Each nonimmigrant petition filing is a separate proceeding with a separate record of proceeding and a separate burden of proof. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, USCIS is limited to the information contained in that individual record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Despite any number of previously approved petitions, USCIS does not have any authority to confer an immigration benefit when the petitioner fails to meet its burden of proof in a subsequent petition. *See* section 291 of the Act.

As discussed above, the petitioner's initial filing and response to the request for evidence clearly indicated that the beneficiary is the sound engineer for the principal P-3 entertainment group. The petitioner now indicates on appeal that the beneficiary has been a performer with the group for over ten years. It is unclear whether the beneficiary has been presented as a performer or as a sound engineer in previous petitions. If the petitioner has consistently indicated that the beneficiary is a sound engineer working in an essential support capacity, and has included him on the same petitions with the principal P-3 group members in the past, such approvals would constitute material and gross error on the part of the director. Neither the director nor the AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988).

Based on the evidence in the current record indicating that the beneficiary will be employed in an essential support capacity in the United States, the AAO finds that the director was justified in departing from the previous petition approvals and denying the beneficiary the requested classification in this matter.

This decision is without prejudice to the petitioner's filing of a new Form I-129 Petition requesting classification of the beneficiary as a P-3 essential support alien, pursuant to 8 C.F.R. § 214.2(p)(6)(iii).

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.