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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



Dg

DATE: **APR 20 2012** Office: VERMONT SERVICE CENTER

FILE:

IN RE: Petitioner:
Beneficiary:

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:



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 Director, Vermont Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking classification of the beneficiary 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 a performing artist in a culturally unique program. The petitioner is self-described as a Chinese culture and performing arts center. It seeks to employ the beneficiary as a performing artist for a period of one year. The beneficiary was previously granted P-3 status and the petitioner now seeks to extend his status.

The director denied the petition, concluding that the petitioner was unable to provide requested corroborating evidence to demonstrate that the beneficiary would perform in the events listed in the submitted itinerary. The director also requested that the petitioner submit evidence that it has secured sufficient physical premises from which to conduct its business. The director stated that the petitioner has failed to establish that it has contracted employment with the beneficiary for the proposed itinerary of events.

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 appeal, the petitioner emphasizes that the beneficiary is “. . . one of the most active Chinese Opera performers in the tri-states area,” and that he is “internationally acclaimed.” The petitioner submits additional evidence in support of the appeal.

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.

Congress did not define the term “culturally unique,” leaving that determination to the expertise of the agency charged with the enforcement of the nation’s immigration laws. By regulation, the Immigration and Naturalization Service (now U.S. Citizenship and Immigration Services (USCIS)), defined the term at 8 C.F.R. § 214.2(p)(3):

Culturally unique means a style of artistic expression, methodology, or medium which is unique to a particular country, nation, society, class, ethnicity, religion, tribe, or other group of persons.

The regulation at 8 C.F.R. § 214.2(p)(3) states, in pertinent part:

Competition, event or performance means an activity such as an athletic competition, athletic season, tournament, tour, exhibit, project, entertainment event or engagement. Such activity could include short vacations, promotional appearances for the petitioning employer relating to the competition, event or performance, and stopovers which are incidental and/or related to the activity. An athletic activity or entertainment event could include an entire season of performances. A group of related activities will also be considered an event.

The regulation at 8 C.F.R. § 214.2(p)(2)(ii) states that all petitions for P classification shall be accompanied by:

- (A) The evidence specified in the specific section of this part for the classification;
- (B) Copies of any written contracts between the petitioner and the alien beneficiary or, if there is no written contract, a summary of the terms of the oral agreement under which the alien(s) will be employed;
- (C) An explanation of the nature of the events or activities, the beginning and ending dates for the events or activities, and a copy of any itinerary for the events or activities; and
- (D) A written consultation from a labor organization.

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 at 8 C.F.R. § 214.2(p)(6)(ii) states that a petition for P-3 classification shall be accompanied by:

- (A) Affidavits, testimonials, or letters from recognized experts attesting to the authenticity of the alien's or group's skills in performing, presenting, coaching, or teaching the unique or traditional art form and giving the credentials of the expert, including the basis of his or her knowledge of the alien's or group's skill, or
- (B) Documentation that the performance of the alien or group is culturally unique, as evidenced by reviews in newspapers, journals, or other published materials; and
- (C) Evidence that all of the performances or presentations will be culturally unique events.

Pursuant to 8 C.F.R. § 214.2(p)(2)(iv)(A), a petition which requires the alien to work in more than one location must include an itinerary with the dates and locations of the performances.

II. Discussion

The first issue addressed by the director is whether the petitioner submitted evidence to satisfy the regulatory requirement at 8 C.F.R. § 214.2(p)(2)(ii)(C). The petitioner is required to provide an explanation of the nature of the events or activities, the beginning and end dates for such activities, and a copy of any itinerary for the events or activities.

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on October 25, 2010. The petitioner, which claims to have ten (10) employees, indicated on Form I-129 that the beneficiary will be “participating in cultural programs by company for the rest of 2010 year and the entire 2011 year, as outlined in the enclosed itinerary.” The petitioner indicated that the beneficiary will work at the petitioner’s address at [REDACTED]. The petitioner stated that the beneficiary will work full-time at a weekly salary of \$350. The petitioner requested a one-year petition validity commencing on November 1, 2010.

In a letter dated September 15, 2010, the petitioner stated that the beneficiary will be involved in the following activities and events:

[The beneficiary] will participate in different performing activities related to traditional art and cultural exchange programs, which is organized by [the petitioner] or its corporate partners; instructing traditional arts classes in schools or in the community etc.

In support of the petition, the petitioner submitted an itinerary of “Projected Major Cultural Events and Programs” for 2010-2011. The itinerary lists a total of 36 events for the period between June 2010 and December 2011, including exact dates for events. The events include Chinese music, opera, dance, magic and acrobatics performances. The event locations include Central Park, New York Fashion Institute, Ruiman Library, Six Flags Outdoor Center, the Taiwan Center in Flushing, “Asian Center” in New York City, Lincoln Center, FIT Theatre, New York, Huaxia Art Center, Flushing Town Hall, FIT Theater, Flushing Senior Center, a high school auditorium, Greenwich Library, Chinese American Art Council, Brooklyn Library, and Chinatown Community Center in New York.

On November 10, 2010, the director issued a request for additional evidence (“RFE”) in which he instructed the petitioner to provide, *inter alia*, the following: (1) evidence that the petitioning organization was or has been contracted to perform at all of the events listed in the itinerary, including letters from managers at each venue, along with promotional materials for the petitioner’s listed performances; (2) letters from the manager of each venue on official letterhead along with promotional material created by the venue indicating that beneficiary will be performing or instructing at events indicated on the itinerary; and, (3) a copy of the lease agreement for the petitioner’s office or center, along with photographs depicting the nature of the business, along with evidence that demonstrates that the petitioner can reasonably provide the type of employment required for the P-3 classification, the wages and benefits indicated on the petition and the organizational support to provide such

services. The director indicated that the evidence submitted indicates that the beneficiary is conducting business independently and that it is unclear if the petitioner intends to be the beneficiary's employer or agent. The director requested that the petitioner respond to this issue and submit evidence clarifying the employer/employee relationship. The director requested evidence of staffing, a municipal business license, state business registration, along with contracts between the petitioner and third parties who will be contracting for the beneficiary's services.

In a response dated December 17, 2010, the petitioner submitted the following:

- A contractual agreement between the petitioner and beneficiary which was signed by the beneficiary. The petitioner indicated that the beneficiary will work at the petitioner's [REDACTED], performing services of Peking Opera Performing Artist. The petitioner stated that the beneficiary will receive \$200 to \$300 for each performance. The petitioner requested a one-year petition validity commencing on November 1, 2010.
- A featured artist contract between the beneficiary and a third party, Chinese Theatre Works (CTW), for the 2010-2011 season. The contract states that the beneficiary will be a featured performer with CTW for the 2010-2011 season and that he will be a lead performer in their repertoire of programs and that he will be involved in training other members of the company in "wu shen" stage fighting techniques, participating in rehearsals and in the development of new productions and presenting martial arts and Peking Opera workshops in schools.
- A letter from New York Chinese Opera Society, Inc. (NYCOS) indicating payment from NYCOS to the petitioner to "cover the services of [the beneficiary] who performed for us on loan from [REDACTED] at the following events: [REDACTED]
[REDACTED]
[REDACTED] There is no evidence in the file that the petitioner is acting as an agent for the beneficiary.
- Copies of signed checks from CTW written to beneficiary.
- Copies of three signed checks from the petitioner to the beneficiary dated in October and August 2010. There is no evidence that these checks were actually deposited.
- A copy of the petitioner's 2009 Form 990-EZ indicating that the petitioner's operating budget for 2009 was \$44, 987 including \$26,639 in salaries to employees.
- A copy of the lease agreement for its place of business, which is also the petitioner's artistic director's residential apartment lease. The beneficiary would clearly not be teaching Peking Opera in an apartment in which commercial use is prohibited, nor is it

reasonable to believe that he would otherwise be working in the petitioner's artistic director's residential apartment.

The petitioner also submitted a copy of a theatre rental agreement between the petitioner and the Flushing Town Hall for a previous Chinese Music & Acrobatics performance held on September 19, 2010, along with invitation letters from Chinese Students & Scholars Association International Culture Exchange Corp., and Chinese Center on Long Island Inc. inviting the petitioner to perform on various dates in 2010. The director noted that these letters are merely invitations and are not sufficient evidence of contracted employment between the petitioner and the beneficiary.

The director denied the petition on February 23, 2011, concluding that the evidence provided in response to the RFE "is not sufficient to show to USCIS you have contracted employment for the proposed itinerary of events for the beneficiary . . . for the period of time requested on the petition." The director acknowledged that the petitioner provided invitation letters and one programming contract for events to be held during the first few months of 2011. However, the director noted that the petitioner failed to submit evidence demonstrating that the intended itinerary has been complied with in the past and that future commitments for qualifying engagements had been confirmed.

On appeal, the petitioner does not address the issue of the employer/employee relationship or whether the petitioner has established that it has contracted employment with the beneficiary for the proposed itinerary of events.

In support of the appeal, the petitioner submits the following:

- A photograph of the beneficiary at the Mayor's Awards for Arts & Culture, Manhattan, New York, November 8, 2010, along with a letter from [REDACTED] dated December 6, 2010 thanking the beneficiary for his participation in the event. There is no mention of the petitioner.
- A brochure from the Metropolitan Museum of Art indicating the beneficiary's participation in "Little Red Riding Hood: The Chinese Opera" on February 5, 2010. The petitioner also submits a brochure for a performance in Lititz, Pennsylvania dated January 8, 2011. Neither event is listed on the proposed itinerary.
- A letter from [REDACTED] of Symphony Space indicating that the beneficiary will make a valuable contribution to the organization. She does not indicate a specific event that the beneficiary is contracted to participate in, nor is there any mention of the petitioner.
- A playbill from Tong Xiao Ling Chinese Opera dated November 28, 2010 listing the beneficiary as a performer. This event is not on the itinerary nor is the petitioner mentioned.
- A program for the 2011 Spring Festival Performance, Council on East Asian Studies at Yale University, dated February 8, 2011. This event is not on the itinerary nor is the petitioner mentioned.

- A program for Asia Society, Selection of Traditional Chinese Performing Arts, January 29, 2011 in New York listing the beneficiary as a performer. This event is not on the itinerary nor is the petitioner mentioned.
- Various photographs depicting the beneficiary in traditional costume.

Upon review, and for the reasons discussed below, the AAO will uphold the director's decision and dismiss the appeal.

First, the AAO concurs with the director's conclusion that the petitioner's failure to document that it has confirmed any of the events listed in the itinerary provided at the time of filing raises questions regarding the petitioner's ability to offer the beneficiary the terms of employment outlined in the petition. Although requested by the director, the petitioner has failed to document that its organization has performed or will perform at a single event listed on the itinerary submitted at the time of filing, which extends from June 6, 2010 until December 2011. The director specifically requested evidence to corroborate the information provided in the itinerary. The documents submitted on appeal do not appear on the itinerary, nor do they support an employer/employee relationship between the petitioner and the beneficiary. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). The petitioner has not established that many of the events listed in its initial itinerary have occurred or will occur.

The petitioner claims to provide year-round instructional programs, including after-school and summer programs. According to the itinerary, summer programs are held at the petitioner's "center," and the petitioner has also stated that the beneficiary will "serve as an artistic director for our ongoing school programs and workshops." The petitioner's center-based and school-based instructional programs have simply not been documented. 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)).

As noted above, when asked to provide a lease agreement for its place of business, the petitioner submitted its artistic director's residential apartment lease. The beneficiary would clearly not be teaching Peking Opera in an apartment in which any commercial use is prohibited, nor is it reasonable to believe that he would otherwise be working in the petitioner's artistic director's residential apartment.

Finally, we note that the petitioner claims to employ only ten people, which raises further questions regarding its ability to provide the extensive cultural and arts programs described in the petition as noted above. While the petitioner has submitted some credible evidence of its involvement, or the involvement of its director, in Chinese cultural events in the past, the AAO concurs with the director's conclusion that the petitioner has not

established that the beneficiary would be providing the proposed performance or teaching services as described in the petition. Accordingly, the petition will be dismissed.

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). The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)."

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. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown 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.

The AAO acknowledges that USCIS has approved a prior petition granting the beneficiary P-3 classification as a culturally-unique artist or entertainer. Each nonimmigrant petition filing is a separate proceeding with a separate record 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 the individual record of proceeding. See 8 C.F.R. § 103.2(b)(16)(ii).

If the previous nonimmigrant petition was approved based on evidence similar to that contained in the current record, the approval would constitute material and gross error on the part of the director. Due to the lack of evidence of eligibility in the present record, the AAO finds that the director was justified in departing from the previous approval by denying the petitioner's request to extend the beneficiary's status.

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). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved a nonimmigrant petition on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

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.