Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

D9

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: NOV 23 2010

IN RE: Petitioner: [redacted]
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:

[redacted]

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 an artist or entertainer in a culturally unique program. The petitioner states that it is engaged in the promotion and preservation of Greek language and culture through theatrical productions, musical events and charity functions. It seeks to employ the beneficiary in the position of "Marketing/Public Relations/Advertising/Budget Analyst" for a period of one year. The beneficiary was previously granted P-3 status for employment with a different petitioner and the petitioner now seeks to extend his status.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary will be performing as an artist or entertainer in the United States or that he will be performing, teaching or coaching under a commercial or non-commercial program that is culturally unique. The director further found that the petitioner failed to establish that the beneficiary was maintaining his previously granted P-3 status as of the date the instant petition was filed.

The petitioner subsequently filed an appeal. The director determined that the appeal was untimely and considered whether the appeal meets the requirements of a motion to reopen or reconsider, in accordance with the regulation at 8 C.F.R. § 103.3(a)(2)(v)(B)(*2*). On February 12, 2010, the director concluded that the appeal did not meet the requirements of a motion pursuant to 8 C.F.R. § 103.5(a)(2) or (3). The petitioner has since provided evidence that the director's decision dated December 4, 2009 was mailed on December 7, 2009, and thus the appeal was not untimely. The director's decision dated February 12, 2010 is withdrawn and the appeal will be adjudicated as a timely appeal.

On appeal, counsel objects to the director's conclusion that the type of work performed by the beneficiary does not fall within the scope of P-3 classification. Counsel emphasizes that the beneficiary was previously granted P-3 classification to perform the same duties with a different Greek cultural organization. Counsel asserts that "the public must rely on prior decisions and precedent," and contends that "a careful reading of all the material presented does establish that the beneficiary's work is both essential and necessary to the success of the cultural sponsored events, which include artists and entertainers."

Upon review, the AAO concurs with the director that the beneficiary is neither an artist nor an entertainer, but a marketing, public relations and budget specialist. As such, his proposed activities do not fall within the plain language of the statute at section 101(a)(15)(P)(iii)(I) of the Act, or within the applicable regulatory definition of "arts."

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)(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.

Finally, the regulation at 8 C.F.R. § 214.2(p)(3) defines "arts" as follows:

> *Arts* includes fields of creative activity or endeavor such as, but not limited to, fine arts, visual arts, and performing arts.

II. Discussion

The primary issue to be addressed is whether the beneficiary qualifies as an artist or entertainer for the purposes of this visa classification. Section 101(a)(15)(P)(iii)(I) of the Act provides P-3 classification to aliens who perform as *artists or entertainers*, individually or as part of a group, or as an integral part of the performance of such a group.

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on August 11, 2009. The petitioner stated that the beneficiary will be employed in the position of "Marketing/Public Relations/Advertising/Budget Analyst." In a letter dated August 6, 2009, the petitioner described the beneficiary's proposed duties as follows:

> We seek the services of [the beneficiary] as a person who will handle Marketing / Public Relations /Advertising Solicitation and be our Budget Analyst. He will prepare, as he did with his former sponsor, contributor agreements, solicitation advertising packages and formulate budget analysis for our cultural organization.

The petitioner provided evidence of similar work the beneficiary performed with his prior P-3 employer. The petitioner stated that the beneficiary will assist the organization "in our endeavors to bring all aspects of Greek cultural, Greek language, Greek theatre, Greek music and Greek charitable events to the entire Greek and Greek-American community throughout the tri-state area.

The director issued a request for additional evidence ("RFE") on October 5, 2009. The director requested, *inter alia*, the following: (1) affidavits, testimonials or letters from recognized experts attesting to the authenticity of the alien's skills in performing or presenting the unique or traditional art form; (2) evidence to establish that the beneficiary is coming to the United States to participate in an entertainment event or engagement; and (3) evidence that all of the performances or presentations by the alien will be culturally unique events.

In a response dated November 2, 2009, counsel stated that the beneficiary "will continue P-3 classification work, as he did before with the [prior P-3 petitioner], with his new employer." Counsel emphasized that the beneficiary's contribution "will allow this organization to fulfill its mission of presentation of Greek language theater, musical events and various charitable functions." The petitioner submitted additional evidence to establish that the beneficiary performed similar duties with his prior P-3 employer.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary will be performing as an artist or entertainer or that he will be performing, teaching or coaching under a commercial or non-commercial program that is culturally unique. The director acknowledged the beneficiary's prior P-3 approval and noted that, based on the evidence in the current record, the beneficiary was not performing duties for the prior petitioner that fall within "the definition of P-3 classification." Citing to *Matter of Church Scientology International,* 19 I&N Dec. 593, 597 (Comm. 1998), the director emphasized that USCIS is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals which may have been erroneous.

On appeal, counsel relies on the beneficiary's prior approval for P-3 classification as evidence of his eligibility. Counsel asserts that the beneficiary's work is to be performed on behalf of a culturally unique organization and its productions and presentations, and states that the beneficiary's work is "both essential and necessary to the success of the cultural sponsored events, which include actors and actresses." Counsel contends that the petitioner cannot design or promote its events without the beneficiary's contribution.

Upon review, counsel's assertions are not persuasive. Section 101(a)(15)(P)(iii)(I) of the Act provides P-3 classification to aliens who perform as *artists or entertainers*, individually or as part of a group, or as an integral part of the performance of such a group. The term "arts" includes, but is not limited to, fine arts, visual arts, and performing arts. *See* 8 C.F.R. § 214.2(p)(3).

While the petitioner is undoubtedly a cultural organization that sponsors and promotes Greek culture through the arts, the beneficiary is coming to the United States as a business person responsible for marketing, advertising, public relations and financial tasks, not as an artist, performer or entertainer. The fact that the beneficiary would be employed by a cultural arts organization is irrelevant, as the P-3 classification is granted based on an assessment of the beneficiary's culturally unique skills as an individual performer or artist. As such, the AAO finds that the beneficiary is not an alien who can be classified as a P-3 artist or entertainer under the plain language of the statute. Where the language of a statute is clear on its face, there is no need to inquire into Congressional intent. *INS v. Phinpathya*, 464 U.S. 183 (1984). The P-3 classification is clearly limited to artists and entertainers.

The AAO notes that P-3S classification may be granted to individuals who are "integral to the performance" of a P-3 entertainer or entertainment group. However, the petitioner did not seek to classify the beneficiary as essential support personnel, nor did it submit evidence to satisfy the requirements for this visa classification, as set forth at 8 C.F.R. § 214.2(p)(6)(iii). Specifically, the petitioner did not submit evidence that the beneficiary has had a support relationship with a P-3 entertainer or entertainment group, or a

statement describing the beneficiary's prior essentiality, critical skills and experience with a principal P-3 alien or aliens. *Id.*

Furthermore, in order to establish a beneficiary's eligibility for P-3 classification, the petitioner must submit: (1) 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 (2) documentation that the performance of the alien or group is culturally unique, as evidenced by reviews in newspapers, journals, or other published materials. *See* 8 C.F.R. § 214.2(p)(6)(ii). The petitioner has submitted neither type of evidence with respect to the beneficiary, despite the director's specific request. The "group" to which these regulations refer is a foreign entertainment group and does not include the petitioning organization.

The AAO does not doubt that the marketing, financial and public relations tasks the beneficiary would perform would be essential to the success of the petitioning organization. Nothing in this decision should be taken to suggest that the AAO fails to recognize the skills the beneficiary possesses, or the petitioner's reasons for seeking to hire him. This denial does not preclude the petitioner from filing a new visa petition, supported by the required evidence, in an appropriate classification.

The remaining issue addressed by the director is whether the beneficiary was maintaining a valid nonimmigrant status at the time the instant petition was filed. The record shows that the beneficiary's previous P-1 petition expired on August 6, 2009. The instant petition was filed on August 11, 2009. A petition extension may be filed only if the validity of the original petition has not expired. 8 C.F.R. § 214.2(p)(13). Furthermore, the petitioner was unable to provide evidence that the beneficiary was employed by his former P-3 employer for the duration of the prior petition's approval. Regardless, as the extension petition was not timely filed, the director correctly concluded that the beneficiary is ineligible for an extension of stay in the United States.

III. Conclusion and Prior Approval

In summary, the statute requires that the beneficiary be an "artist or entertainer" and that he enter the United States solely to "perform, teach, or coach" under a program that is culturally unique. Section 101(a)(15)(P)(iii)(II) of the Act, 8 U.S.C. § 1101(a)(15)(P)(iii)(II). To obtain classification of the beneficiary under this section of the Act, the petitioner must submit evidence that all of the beneficiary's performances or presentations will be events that meet the regulatory definition of the term "culturally unique." 8 C.F.R. §§ 214.2(p)(3), 214.2(p)(6)(ii)(C). The petitioner failed to meet these evidentiary requirements. Accordingly, the appeal will be dismissed.

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 amend and 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.