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U.S. Citizenship & Immigration Services
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U.S. Citizenship and Immigration Services

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FILE: EAC 08 123 50740 Office: VERMONT SERVICE CENTER Date: JUN 23 2009

IN RE: Petitioner: [redacted]
Beneficiaries:

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

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, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

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

The petitioner seeks designation of its program as an international cultural exchange program and classification of the beneficiaries as international cultural exchange visitors pursuant to the provisions of section 101(a)(15)(Q)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(Q)(i). The petitioner operates a casino and resort located in Marksville, Louisiana. It seeks to employ the 15 beneficiaries temporarily in the United States as beverage and food servers for a period of 15 months.

The director denied the petition, concluding that the petitioner's program is ineligible for designation by United States Citizenship and Immigration Services (USCIS) as an international cultural exchange program under section 101(a)(15)(Q)(i) of the Act. Specifically, the director determined that the petitioner failed to establish that its cultural exchange program has a cultural component that is an essential and integral part of the international cultural exchange visitor's employment, or that such employment will serve as a vehicle to achieve the objectives of the cultural component, as required by the regulations at 8 C.F.R. § 214.2(q)(3)(iii)(B) and (C).

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, counsel for the petitioner suggests that the director's decision imposes undue restrictions on the types of employment permitted under the Q-1 classification. Specifically, counsel asserts that the regulatory language does not appear to require that Q-1 beneficiaries exclusively engage in cultural duties. Counsel asserts that the work component in the petitioner's program "is entirely dependent on the cultural components of the program and vice versa." Counsel submits a brief and documentary evidence in support of the appeal.

Section 101(a)(15)(Q)(i) of the Act defines a nonimmigrant in this classification as:

> an alien having a residence in a foreign country which he has no intention of abandoning who is coming temporarily (for a period not to exceed 15 months) to the United States as a participant in an international cultural exchange program approved by the Attorney General for the purpose of providing practical training, employment, and the sharing of the history, culture, and traditions of the country of the alien's nationality and who will be employed under the same wages and working conditions as domestic workers.

The regulation at 8 C.F.R. § 214.2(q)(3) provides:

> *International cultural exchange program.* -- (i) *General.* A United States employer shall petition the Attorney General on Form I-129, Petition for a Nonimmigrant Worker, for approval of an international cultural exchange program which is designed to provide an opportunity for the American public to learn about foreign cultures. The United States employer must simultaneously petition on the same Form I-129 for the authorization for one or more individually identified nonimmigrant aliens to be admitted in Q-1 status. These aliens are to be admitted to engage in employment or training of which the essential element is the sharing with

the American public, or a segment of the public sharing a common cultural interest, of the culture of the alien's country of nationality. The international cultural exchange visitor's eligibility for admission will be considered only if the international cultural exchange program is approved.

* * *

(iii) *Requirements for program approval.* An international cultural exchange program must meet all of the following requirements:

(A) *Accessibility to the public.* The international cultural exchange program must take place in a school, museum, business or other establishment where the American public, or a segment of the public sharing a common cultural interest, is exposed to aspects of a foreign culture as part of a structured program. Activities that take place in a private home or an isolated business setting to which the American public, or a segment of the public sharing a common cultural interest, does not have direct access do not qualify.

(B) *Cultural component.* The international cultural exchange program must have a cultural component which is an essential and integral part of the international cultural exchange visitor's employment or training. The cultural component must be designed, on the whole, to exhibit or explain the attitude, customs, history, heritage, philosophy, or traditions of the international cultural exchange visitor's country of nationality. A cultural component may include structured instructional activities such as seminars, courses, lecture series, or language camps.

(C) *Work component.* The international cultural exchange visitor's employment or training in the United States may not be independent of the cultural component of the international cultural exchange program. The work component must serve as the vehicle to achieve the objectives of the cultural component. The sharing of the culture of the international cultural exchange visitor's country of nationality must result from his or her employment or training with the qualified employer in the United States.

The issue to be addressed in this proceeding is whether the petitioner established that its proposed program is eligible for designation by USCIS, under section 101(a)(15)(Q)(i) of the Act, as an international cultural exchange program. Specifically, the director determined that the petitioner's program does not satisfy the regulatory requirements pertaining to the cultural and work components. The director concluded that the cultural component of the program would be independent of the beneficiaries' employment as food and beverage servers, and that the beneficiaries' work will not serve as a vehicle to achieve the objectives of the cultural component.

Upon review, and for the reasons discussed herein, the AAO concurs with the director's determination.

The petitioner filed the nonimmigrant petition on March 26, 2008 on behalf of 15 beneficiaries, all citizens of Brazil. The petitioner stated on Form I-129, Petition for a Nonimmigrant Worker, that the beneficiaries will all serve as beverage and food servers responsible for "providing high quality food and beverage service to guests and casino patrons."

In a letter dated March 18, 2008, described its proposed Q-1 cultural exchange program as follows:

> The Program itself will consist of several specific one-time events over a season, weekly and daily events, as well as ongoing opportunities for cross-cultural conversations, interactions and education led by the Q-1 visa holder participants. The participants will also wear their national/local attire/costumes, speak their native language when appropriate, perform/demonstrate their special skills and talents, as well as generally engage [the petitioner's] guests on various cultural subjects. Decorations and other cultural indicia where the participants engage in their employment activities (work stations and elsewhere at) [the petitioner] will also provide guests with opportunities for questions and explanations related to Brazil and other showcased countries approved in the future.

The petitioner indicated that all participants will be required to: wear nametags identifying their city, region and country of nationality; actively engage guests in conversations referencing Brazilian themes, facts, customers, heritage or languages; and have one or more skills/talents, along with prior experience performing or demonstrating such skills as soccer, soccer coaching, samba dancing, Brazilian style singing and/or guitar playing, story telling, capoeira martial arts, tour guide experience, hospitality experience or general teaching experience.

The petitioner indicated that Brazilian cultural events scheduled for 2008 will include daily themed parades/dance performances; Carnival days; Brazilian martial arts performances and workshops; a Brazilian Independence Day celebration; weekly Brazilian guitar recitals; weekly soccer demonstrations; story telling; display of Brazilian flags; and brochures and fliers to be handed out when appropriate. The petitioner stated that the participants will also participate in local community events, such as attending and giving cultural presentations at chamber of commerce and rotary club meetings; providing cultural presentations at local schools and tourism offices; mentoring local soccer teams; and teaching Portuguese at the petitioner's training department.

The petitioner stated that the program participants will "support themselves financially and obtain valuable work training, while simultaneously providing an appropriate vehicle for conveying their cultural knowledge, skills and talents," by working as full-time beverage and food servers. The petitioner attached a position description for this position, as follows:

- Maintain the highest quality guest experience through consistent, positive interaction.
- Greet every guest with a pleasant attitude and smile. Ensure the proper flow of guests through their location.

- Maintain "show" environment. Be conscious of costume, appearance and actions while "On Stage."
- Work as a team with fellow associates, assisting them with common duties and responsibilities to ensure the efficient operation of the area.
- Achieve daily sales and/or other objectives;
- Maintain a clean, safe and orderly work location.
- Observe and follow all policies & procedures.
- Other miscellaneous duties as assigned.

The petitioner indicated that the position's "end results/goals" are "increased guest experiences to maximize sales and providing memorable cultural exchange moments to the maximum number of guests possible." According to the position description "actual hours of work, duties and responsibilities may vary."

In its letter, the petitioner emphasized that the position of beverage and food server involves "nearly continuous face-to-face contact" with resort and casino guests, and noted that the duty shifts would be structured to facilitate the sharing of customs, history, heritage, philosophy and traditions "both during the actual work shift and when the participants are scheduled to be involved in other cultural events not directly related to the employment duties."

The petitioner also discussed the benefit that it would enjoy from operating the proposed Q-1 cultural exchange program, as follows:

> [The petitioner] experiences a recurring, seasonal shortage of applicants for its various job positions which we have historically not been able to fill from the local and/or US markets. For many years [the petitioner] has participated in the international J-1 and H-2B programs, but even these programs have not provided full relief from the shortfall. Therefore, the Q-1 participants will provide some additional relief in this regard without replacing U.S. workers.

The petitioner also provided a copy of its six-page Q-1 Cultural Exchange Visa Program Description and Agreement, which further describes the proposed cultural exchange program and provides housing, position and wage information. According to the description, participants will wear name tags noting their country of origin, wear Brazilian national colored shirts, and "actively engage park visitors in conversations referencing Brazilian themes." The AAO notes that the program description contains other references to "park visitors" although the petitioner does not operate a park. The agreements that were signed by the 15 beneficiaries also contain references to "EIS Kodak's Cultural Exchange Program."

The director issued a request for additional evidence (RFE) on April 2, 2008. The director stated, in part, the following:

> You provided a schedule of events demonstrating cultural activities, but you state in order for the beneficiaries to support themselves the beneficiaries will perform duties in the positions of Beverage and Food Server. These positions appear to be independent of the cultural

> component. Immigration regulations require the work component to accomplish the cultural component.
>
> It appears your program is intended to provide beneficial employment for the beneficiaries and a labor shortage for your organization, which could be obtained by requesting the issuance of a different type of nonimmigrant visa.

The director referred to the supplementary information to the current regulations at 8 C.F.R. § 214.2(q), published at 57 Fed. Reg. 55056, 55058 (November 24, 1992), which states, in pertinent part: "Where training or employment is the primary reason for an alien's visit to the country, the alien should seek a visa classification that is appropriate for temporary workers, such as H-1B, H-2B or H-3." The director requested persuasive evidence to establish that the petitioner has instituted a cultural exchange program in compliance with the requirements at 8 C.F.R. **§ 214.2(q)(3)(iii).**

In response to the RFE, the petitioner submitted a letter dated April 4, 2008, in which it asserted that while it will benefit from the employment of the Q-1 beneficiaries, it "hires other workers and exchange students (e.g. from the H-2B and J-1 programs) to satisfy any seasonal labor shortage [the petitioner] experiences." The petitioner indicated that the beneficiaries' sharing of Brazilian culture will be paramount, "both while they are serving in the designated employment positions and during the organized/scheduled events when they are separately performing their particular talents/skills."

With respect to the requirement that the petitioner's program be accessible to the public, the petitioner stated that its casino, hotel atrium and entertaining areas, museum and performance areas are open to and accessible to the American Public, some for 24 hours a day. The petitioner noted that other events are scheduled to take place at "various Marksville community venues." The petitioner emphasized that individual cultural exchanges and organized, scheduled events and presentations will take place in areas open and accessible to the public.

The petitioner explained that its program incorporates a "two-part cultural component" consisting of organized and pre-scheduled events, demonstrations, performances and educational presentations, as well as cultural exchange carried out by the beneficiaries during the course of their employment duty shifts. The petitioner emphasized that beverage and food servers, more than any other position in the resort, have the most direct and continuous contact with guests, and the requisite "high public visibility" for the Q-1 program. The petitioner further described the individual cultural exchange interactions as follows:

> The Servers will wear nametags, pins, and/or badges indicating their Brazilian nationality while serving and engaging guests. They will provide interested guests with brochures, Brazilian fact cards and Q-1 events/presentations schedules and other information. At appropriate times, they will wear Brazilian national attire. . . . The Servers will use Portuguese, and possibility other native Brazilian terms when talking with guests. Regular announcements, flyer notifications and postings throughout the [petitioner's] facilities will apprise guests about the presence of the cultural exchange participants, as well as the upcoming daily, weekly and special cultural events/presentations. The Servers will

> themselves apprise interested guests of the events presentations in which they and their cohorts will participate while not on their duty shifts. In this matter, [the petitioner] will intertwine the direct beneficiary/guest interactions into the overall cultural interchange of the Q-1 Program experience by guests.
>
> Thus, the servers – as the major focus of their job duties – contribute significantly to the exhibiting of the attitudes, customs, history, heritage, philosophy and traditions of Brazil. Therefore, the Server positions occupied by the Q-1 beneficiaries further a major cultural objective of the [petitioner's] Program, and the cultural elements are an essential, dependent and integral part of the employment positions.

The petitioner asserted that the positions offered are similar to those offered by Q-1 qualified employers such as Disney, noting that, while some standard job duties are appropriately performed, "the position overall provides a vehicle for the Q-1 beneficiaries to engage in direct, one-on-one cultural interchange."

The director denied the petition on April 15, 2008, concluding that the petitioner's proposed program does not qualify for designation as an international cultural exchange program pursuant to the provisions of 8 C.F.R. § 214.2(q)(3). The director determined that the beneficiaries would not be engaging in employment of which the essential element is the sharing of the culture of their country of nationality. The director further determined that the work component of the program would be independent of the cultural component.

Specifically, the director found that the beneficiaries would primarily be employed as beverage/food servers, which would be considered productive employment not related to the cultural component of the program. Furthermore the director found that the petitioner did not adequately address the work component, as it did not establish the amount of time the beneficiaries will spend accomplishing their duties and responsibilities and how much time they will devote to cultural activities unrelated to the work component.

On appeal, counsel for the petitioner asserts that the petitioner's Q-1 program was designed specifically to showcase Western Hemisphere cultures, and that the evidence submitted was sufficient to establish the program's eligibility under the regulations. Counsel contends that the proposed Q-1 program and the chosen employment position of beverage and food server, "entirely complies with the letter and spirit of the Q-1 enabling law and related Regulations."

Counsel asserts that the documentation submitted establishes that the petitioner's Q-1 participants "would essentially be performers while they are engaged in their employment duties." Counsel further states:

> They will use their positions on the whole to exhibit and explain aspects of their culture as well as to inform [the petitioner's] guests of the various daily, weekly and special events and presentations in which they and their cohorts will participate. They will thus be provided employment, as required by Q-1 law, and be paid for that service, but their primary responsibility will be to impart information on their cultural history and traditions directly to [the petitioner's] guests.

Counsel asserts that scheduled cultural events "would constitute the more 'showy' and structured performance part of the program, however mere public announcements or flyer notices of these events would not achieve the same level of public interest in that part of the program."

Counsel reiterates that servers have a great deal of contact with resort and casino guests, and emphasizes that Q-1 regulations "do not require that the employment itself be exclusively a performance or acting position." Counsel asserts that the petitioner has established that its servers would achieve the major objective of the proposed Q-1 program through their work duties. Counsel asserts that the Q-1 server position could be called a "Cultural Ambassador/Host." He further explains as follows:

> . . .the work component is entirely dependent on the cultural components of the program and vice-versa: taking beverage orders and serving [the petitioner's] guests initiates the direct contact between participants and guests. Without this contact, based on one of the primary needs/desires of casino, restaurant and entertainment venue patrons, [the petitioner's] program would simply consist of scheduled performances which would be attended only by guests who had heard impersonal announcements or seen flyers announcing the events.

Counsel emphasizes that the language of the regulations does not mandate that participants, while in employment positions, exclusively share their country's culture. Counsel asserts that such an interpretation would limit the use of the Q-1 classification to full-time culture/history teachers, storytellers, dance instructors and similar occupations.

Counsel also addresses the amount of time the participants will spend in their employment positions versus the amount of time they will spend in structured cultural activities, noting that "this will vary depending on the type of talents/skills each possesses." Counsel noted that a participant who will dance or sing at a daily, weekly or special event would spend more time on such events relative to a participant who will "otherwise facilitate these events." Counsel estimated that the participants will spend 20 percent of their time involved in scheduled events and a total of 60 percent of their time involved in activities that directly related to the sharing of culture, history and traditions of Brazil, while the remaining 40 percent of their time would be allocated to taking and delivering food and beverage orders and performing other duties typically performed by the resort's servers.

Finally, counsel asserts that the petitioner's representatives have visited "longtime Q-1 program employers (e.g. Disney)" and noted that their Q-1 participants serve in "standard employment positions" such as merchandising and food and beverage. Counsel acknowledges that such employees "would be part of the overall public, cultural immersion" in place at the employer's facility, but contends that the petitioner's servers will actually perform considerably more duties related to cultural exchange.

After careful review of the record, the AAO concurs with the director's conclusion that the petitioner failed to establish that its program qualifies for designation as an international cultural exchange program pursuant to the provisions of 8 C.F.R. § 214.2(q)(3). Specifically, the petitioner failed to establish that the beneficiaries would be engaged in employment of which the *essential element* is the sharing with the American public, or a segment of the public sharing a common cultural interest, of the culture of the aliens' country of nationality. The AAO agrees

that the amount of cultural sharing among the participants and the public would be tangential to the beneficiaries' employment, and the majority of the proposed bona fide cultural activities would be independent of the work component of the program.

As a preliminary matter, however, the AAO notes that the petitioner initially stated that it experiences "a recurring, seasonal shortage of applicants for its various job positions" that it cannot fill from the local and/or U.S. markets and that even the J-1 and H-2B programs "have not provided full relief from this shortfall." The petitioner explicitly stated that the Q-1 participants would provide "some additional relief in this regard." After the director observed in the RFE that the petitioner appears to be utilizing the Q-1 program to ease a labor shortage, the petitioner contradicted its earlier statement, stating that it hires "other workers and exchange students (e.g. from the H-2B and J-1 programs) to satisfy any seasonal labor shortage [the petitioner] experiences."

The petitioner provided no explanation for this change in position, nor did it acknowledge its earlier statement that the organization experiences labor shortages that cannot be met through the hiring of foreign workers through J-1 and H-2B programs. 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). In light of this discrepancy, the petitioner has not established that it will not use the Q-1 program to overcome staffing challenges for its basic employment positions.

Furthermore, the AAO concurs with the director's determination that the duties to be performed in the position of "Beverage and Food Server" are independent of the petitioner's proposed cultural component. The international cultural exchange program must have a cultural component which is an essential and integral part of the international cultural exchange visitor's employment or training. 8 C.F.R. § 214.2(q)(3)(ii)(B). The work component must serve as the vehicle to achieve the objectives of the cultural component. 8 C.F.R. § 214.2(q)(3)(ii)(C).

The petitioner's program is structured in such a way that the only *bona fide* cultural programs and activities would (1) account for a relatively small portion of the participants' time, estimated at 20 percent; and (2) occur in the form of cultural demonstrations separate from the responsibilities of serving food and beverages to casino, resort or entertainment venue guests. The AAO is not persuaded that such elements as wearing a name tag identifying a person's country of origin, announcing a cultural event, handing out flyers to guests who show interest, speaking in a foreign language, or offering a fact about Brazil will result in any meaningful exhibition or explanation of the attitude, customs, history, heritage, philosophy, or traditions of the international cultural exchange visitor's country of nationality.

While the petitioner insists that such personal interaction between the beneficiaries and resort/casino guests is necessary to encourage guest's attendance at scheduled cultural events, the AAO questions how much impact the daily interactions of 15 Brazilian food and beverage servers spread throughout the petitioner's casino, resort, hotel, and entertainment venues will realistically have on the cultural landscape of an organization that has 1,700 employees and over two million visitors per year. The petitioner has not established that the daily cultural

interactions of the participants would be part of a structured program truly designed to share the history, culture, and traditions of the country of the alien's nationality.

Moreover, while the petitioner indicates that the beneficiaries would spend half of their time while on duty as servers engaging in one-on-one cultural interactions, the record shows that the beneficiaries, like other servers employed by the petitioner, are responsible for achieving daily sales objectives and maximizing sales revenues, and rely on tips to earn a livable wage. These conditions would reasonably limit the amount of time they could spend interacting with individual guests. The AAO is not persuaded that the beneficiaries, in their roles as beverage and food servers, would realistically spend less than half of their time actually taking and delivering beverage and food orders.

In addition, the "job/training position details" submitted indicates that Q-1 participants' "actual hours of work, duties and responsibilities may vary" and that the petitioner only guarantees that participants will be paid as full-time employees. Notwithstanding the petitioner's repeated assertions that the server position is ideal for implementation of the cultural component of the petitioner's program, it appears possible that the prospective participants may in fact be assigned to other positions in which the amount of direct contact with guests may be substantially less than that experienced by a food and beverage server.

Furthermore, careful review of the documentation submitted, specifically the six-page program description and agreement, reveals that there are references in the petitioner's evidence to unrelated entities. As noted above, the agreements signed by the beneficiaries refer to "EIS Kodak's Cultural Exchange Program," and contain several references to "park guests." Such unexplained discrepancies suggest that the program descriptions were prepared by counsel based on an existing Q-1 program template, and may or may not reflect a bona fide Q-1 program designed by the petitioner. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

Accordingly, the AAO must conclude that the primary purpose of the petitioner's international exchange program is to sell food and beverages, rather than provide a structured cultural exchange program. The cultural component must be designed, on the whole, to exhibit or explain the attitude, customs, history, heritage, philosophy or traditions of the international cultural exchange visitor's country of nationality. 8 C.F.R. § 214.2(q)(3)(iii)(B). The presence of the foreign employees may contribute to some guests' overall experience at the casino/resort and the Q-1 employees may participate to a greater extent in cultural-based activities than, for example, J-1 or H-2B visa holders working at the resort. However, the fact remains that the participants will be spending the vast majority of their time on a daily basis performing the standard duties of a food and beverage server, during which periods their cultural interaction with resort and casino guests will be limited to informal and superficial cultural exchanges.

Based on the foregoing discussion, the petitioner has not established that its cultural exchange program satisfies the cultural and work components set forth at 8 C.F.R. §§ 214.2(q)(3)(ii)(B) and (C). According, the petition will be denied.

The AAO acknowledges the petitioner's claims that other qualified Q-1 employers, namely Disney, place their Q-1 participants in similar employment positions. It is worth emphasizing that that each petition filing is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, USCIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). The AAO does not have before it a Q-1 petition filed by Disney and cannot compare that organization's existing Q-1 program to the petitioner's proposed Q-1 program. Based on the lack of required evidence of eligibility in the current record, and in light of the petitioner's inconsistent statements as to whether it intends to utilize the Q-1 program to relieve a labor shortage, the AAO finds that the director was justified in denying the instant petition.

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.