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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

PUBLIC COPY

D9

[redacted]

DATE: JUL 11 2011 Office: CALIFORNIA SERVICE CENTER FILE: [redacted]

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, California 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, a martial arts school, 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 beneficiary was previously granted P-3 classification for employment with the petitioner, and the petitioner now seeks to extend his status for one additional year.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary seeks to enter the United States solely to perform, teach or coach as a culturally unique artist or entertainer at a culturally unique event or events. In denying the petition, the director observed that several of the events in which the beneficiary would be participating are athletic competitions in which the beneficiary would participate as a competitor or judge, rather than events requiring the services of an artist or entertainer. The director further noted that it appeared that much of the beneficiary's time would be devoted to teaching and coaching students in preparation for athletic competitions.

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 asserts that the petitioner operates a school rooted in the ancient Chinese Shaolin Kung Fu tradition, and requires the beneficiary's services for a series of culturally unique events. Counsel emphasizes that "one of the main functions of Kung Fu . . . is its artistic effect."

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. The Issue on Appeal

The sole issue addressed by the director is whether the beneficiary performs as an artist or entertainer and whether he 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. See sections 101(a)(15)(P)(iii)(I) and (II) of the Act.

A. Facts and Procedural History

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on May 24, 2010. The petitioner operates a martial arts school and seeks to employ the beneficiary as a Martial Artist/Instructor. In a letter submitted in support of the petition, the petitioner described the beneficiary's proposed role as follows:

> [T]he beneficiary is assigned to perform Chinese Martial Arts and display his culturally unique expertise of Shaolin Kung Fu at a series of culturally unique events. . . . Between the intervals, the beneficiary is scheduled to teach Chinese martial arts and impart his expertise of Shaolin Kung Fu to the students at the petitioner's school and other assigned locations.

The petitioner attached an itinerary covering the period from May 27, 2010 to May 27, 2011 which included the following:

1. [redacted] – Teaching preparation, class arrangement and coaching students in [the petitioner's school][redacted]
2. [redacted] – Attend Tiger Claw's 2nd Kung Fu Magazine Championship, San Jose, CA
3. [redacted] – Attend CPAA International Martial Arts Festival, San Jose, CA
4. [redacted] – Perform Shaolin Kung Fu and Lion Dance at "Independents [sic] Day" Parade in Las Vegas
5. [redacted] – Perform Shaolin Kung Fu with students at "The Peace Day" in San Francisco
6. [redacted] – Present Chinese martial arts performance and judge in 2010 NCCCAF APTSJW Cup International Wushu and Dance Invitational, Union City, CA
7. [redacted] – Perform Shaolin Kung Fu for Sing Tao Expo 2010 in San Mateo, CA
8. [redacted] – Attend 2010 Tiger Claw Elite National Championship/Disney's Martial Arts Festival, Orlando, FL
9. [redacted] – Christmas celebration, Kung Fu performance, Alameda, CA
10. [redacted] – Perform Shaolin Kung Fu at Chinese New Year Celebration of Foothill Elementary School, Saratoga, CA
11. [redacted] – Perform Shaolin Kung Fu and Lion Dance at San Jose City Hall to celebrate Chinese New Year
12. [redacted] – Perform Shaolin Kung Fu at Art of Living Chinese New Year Celebration, Milpitas, CA
13. [redacted] – Perform Shaolin Kung Fu and Lion Dance at Chinese New Year Parade, San Francisco, CA

14. [redacted] – Perform Shaolin Kung Fu and Lion Dance for Chinese Culture Center, Belmont, CA
15. [redacted] – Perform Shaolin Kung Fu at 5th Anniversary Celebration of United States Shaolin Martial Art Academy, Walnut, CA
16. [redacted] – Perform Shaolin Kung Fu at Kung Fu 1500 Years – Performed by 18 Shaolin Warrior Monks, San Jose, CA

With respect to items #2, 3, and 8 above, the petitioner indicated that the beneficiary would be participating in the events as an athletic competitor, while he would serve as a judge of athletic competitors at #6 and #15. As evidence of the beneficiary's qualifications, the petitioner submitted a number of certificates awarded by the Chinese Wushu Association and other bodies for his performance in athletic competitions in China.

The petitioner also provided a class schedule for its Cupertino, California location where the beneficiary works as an instructor. The class schedule includes all levels of kung fu, Wushu team practices, Kung Fu Fitness, Power Yoga, Tai Chi and private lessons. The petitioner did not indicate which classes the beneficiary would teach.

The director issued a request for additional evidence ("RFE") on August 30, 2010. The director emphasized that the P-3 classification is intended for "an artist or entertainer," and noted that the beneficiary is scheduled to serve as a competitor or judge in several martial arts tournaments and competitions in which participants are athletes rather than artists or entertainers. The director requested that the petitioner provide an explanation and documentary evidence to address this issue.

The director further noted that the beneficiary would be providing instruction in the beneficiary's school as well as performing in various events and competing in tournaments and competitions. The director requested additional evidence to establish that the beneficiary, in his role as instructor, would be participating in cultural events that will further the understanding or development of his art form.

In a response dated September 23, 2010, counsel for the petitioner noted that, although the beneficiary participated as a competitor in the Tiger Claw's 2nd Kung Fu Magazine Championship, "the beneficiary also performed Chinese martial arts as an entertainer and artist during the opening ceremony and closing ceremony of the event," and received a certificate of appreciation from the event organizers for his performance. Counsel further stated that the event itself "has exceeded the level as a common athletic competition but achieved the significance as a cultural unique performing arts show."

With respect to the [redacted] Tiger Claw Elite National Championship event to be held on October 24, 2010, counsel asserted that the competitors "will give full-fledged martial arts performances including traditional Japanese and Chinese martial arts," and that the beneficiary will perform Shaolin Kung Fu "as a unique martial arts artist from China." Counsel further stated that this event is "not like a general sports competition," but rather a "special and cultural occasion that focuses on Asian martial arts that are unique to American audience."

The petitioner submitted a revised events itinerary listing a total of 11 events, only seven of which appeared on the original itinerary, as well as additional evidence relating to the beneficiary's past participation in Chinese cultural events.

The director denied the petition on October 20, 2010, concluding that the petitioner failed to establish that the beneficiary is an artist or entertainer or that he seeks to enter the United States solely to perform, teach or coach as a culturally unique artist or entertainer at a culturally unique event or events.

In denying the petition, the director emphasized that a third of the events listed on the petitioner's initial itinerary required the beneficiary's participation as a martial arts competitor or judge, rather than as an artist or entertainer. The director noted that the evidence of record clearly shows that martial arts tournaments are considered athletic competitions rather than artistic or entertainment events. The director further noted that the beneficiary "has been recognized for his skill through martial arts competition and championships."

With respect to the beneficiary's role as an instructor at the petitioner's martial arts school, the director observed that "the submitted documentation indicates that the beneficiary will be instructing the petitioner's students in Chinese martial arts in order for them to participate in competitions with other schools." The director concluded that the petitioner did not establish exactly what the beneficiary would be teaching at the petitioner's school, and thus "USCIS is unable to determine whether the beneficiar[y] will be instructing the petitioner's students as an artist or entertainer in a performance or as an athletic instructor preparing students for competition as athletes."

On appeal, counsel for the petitioner indirectly addresses the director's finding that the beneficiary will not be performing, teaching or coaching solely as an artist or entertainer in the United States, noting:

> Martial Arts tournaments routinely give awards for how well a practitioner performs a series of moves, thus grading this person on their performance of the martial art. In fact, one of the main functions of Kung Fu (also known as Wushu) is its artistic effect (Exhibit 4). Therefore, both experienced practitioners and untrained spectators can appreciate the artistry, beauty and physical abilities involved in performing Shaolin Kung Fu's difficult routines and movements.

The referenced Exhibit 4 consists of an article titled "Chinese martial arts- kung-fu (wushu)" published by the web site *Self Defender Net* (http://www.self-defender.net). The article refers to wushu as both sport and "artistic exercise." Counsel does not further address the director's finding that the beneficiary would not be performing solely as an artist or entertainer, but instead emphasizes the cultural uniqueness of the petitioner's martial arts program, and the cultural uniqueness of the events in which the beneficiary would participate as performer, competitor and judge.

B. Analysis

Upon review, the AAO concurs with the director's conclusion that the beneficiary is not seeking solely to perform, teach, or coach as a culturally unique artist or entertainer under a commercial or noncommercial program that is culturally unique, pursuant to sections 101(a)(15)(P)(iii)(I) and (II) of the Act.

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 "fields of creative activity or endeavor" and includes, but is not limited to, fine arts, visual arts, and performing arts. *See* 8 C.F.R. § 214.2(p)(3).

Therefore, it is necessary to determine whether Chinese martial arts, referred to in the record as Kung Fu or Wushu, is a "creative activity or endeavor" such that its practitioners could be considered "artists" according to the regulatory definition of arts. The petitioner has emphasized that it teaches traditional Chinese martial arts and emphasizes that kung fu and wushu are recognized as having artistic aspects. The petitioner did not further elaborate as to how the petitioner's school is dedicated to the "arts" or how the beneficiary's services as a coach or instructor are artistic, rather than athletic, in nature, given the context of the terms and conditions of his employment.

The AAO does not doubt that the petitioner's school teaches authentic Chinese wushu and kung fu styles, but it has failed to explain or demonstrate why the beneficiary, who apparently will spend the majority of his time coaching and instructing the petitioner's students, should be deemed an "artist or entertainer" for purposes of this classification. According to the evidence submitted, Wushu is a sport with an international governing body (the International Wushu Federation). Wushu sporting events at the world, continental, and national levels are held all over the world, and the beneficiary has been successful as a competitive athlete in this field, as evidenced by his awards from the Chinese Wushu Association.

Therefore, while Wushu is a martial "art," it has not been shown to be strictly a "field of creative activity or endeavor." It is a sport whose practitioners are recognized as athletes. The beneficiary is coming to the United States, in part, to coach students and athletes in an athletic discipline and to compete in and judge an athletic discipline. While it appears that some of the events described in the itinerary will require the beneficiary's services as a performer or entertainer, it is evident that he will not be providing services *solely* as an artist, performer or entertainer, as required by the plain language of the statute and regulations. As such, the AAO finds that the beneficiary is not an alien who can be classified as a P-3 artist or entertainer, and the petition cannot be approved for this reason.

III. Additional Grounds for Denial

Even assuming, *arguendo*, that the petitioner had established that the beneficiary is coming to the United States solely to perform services as an artist or entertainer as required by the statute, the AAO concurs with the director that the petitioner did not meet the evidentiary requirements for a petition involving a culturally unique program, as set forth at 8 C.F.R. § 214.2(p)(6)(ii).

Specifically, the regulation at 8 C.F.R. § 214.2(p)(6)(ii) requires that the petitioner establish that the beneficiary's performance or art form is culturally unique through submission of affidavits, testimonials and letters, or through published reviews of the beneficiary's work or other published materials.

The regulation at 8 C.F.R. § 214.2(p)(6)(ii)(A) requires the petitioner to submit 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.

The petitioner submitted a single letter dated May 18, 2010 from [redacted] Fu, a Chinese martial arts school located in Belmont, California. [redacted] discusses his own background as a Chinese martial arts athlete, judge and referee, and notes his membership in the Chinese Wushu Association. [redacted] indicates that he wrote "to explain the cultural uniqueness of the events which [the beneficiary] will be performing in" and briefly addressed the beneficiary's anticipated role in 14 of the events included on the petitioner's initial itinerary submitted at the time of filing. He stated that "after reviewing the references and documents presented, I can attest to the authenticity of [the beneficiary's] skills in performing in a culturally unique program." [redacted] further opined that the beneficiary is a "unique Chinese martial arts expert," and stated that he based his opinion on "his skills in Chinese martial arts and the award certificates from Chinese national competitions presented."

The AAO finds this letter lacking in probative value and specificity with respect to the beneficiary's culturally unique skills, and thus insufficient to meet the regulatory requirement at 8 C.F.R. § 214.2(p)(6)(ii)(A). While we do not doubt the beneficiary's abilities as a martial arts athlete, coach and practitioner, we note that [redacted] letter does not attest with any specificity to the cultural or traditional elements of the beneficiary's coaching, instruction or athletic performance. [redacted] makes a blanket assertion that the beneficiary is a "unique Chinese martial arts expert" based on his awards in Chinese national competitions, and he does not otherwise explain what "references and documents" were presented for his review. Thus, he failed to fully establish the basis of his knowledge of the beneficiary's skill. His statement fails to explain what makes Chinese martial arts, and the specific forms practiced by the beneficiary, unique from the form of the sport that is practiced worldwide. The unique cultural elements of the beneficiary's skills have not been explained with any specificity. USCIS need not accept primarily conclusory assertions. *See, e.g., 1756, Inc. v. The Attorney General of the United States,* 745 F. Supp. 9, 18 (D.C. Dist. 1990). As a matter of discretion, USCIS may accept expert opinion testimony.[1]

[1] Letters may generally be divided into two types of testimonial evidence: expert opinion evidence and written testimonial evidence. Opinion testimony is based on one's well-qualified belief or idea, rather than direct knowledge of the facts at issue. Black's Law Dictionary 1515 (8th Ed. 2007) (defining "opinion testimony"). Written testimonial evidence, on the other hand, is testimony about facts, such as whether something occurred or did not occur, based on the witness' direct knowledge. *Id.* (defining "written testimony"); *see also id* at 1514 (defining "affirmative testimony").

Depending on the specificity, detail, and credibility of a letter, USCIS may give the document more or less persuasive weight in a proceeding. The Board of Immigration Appeals (the Board) has held that testimony should not be disregarded simply because it is "self-serving." *See, e.g., Matter of S-A-*, 22 I&N Dec. 1328, 1332 (BIA 2000) (citing cases). The Board also held, however: "We not only encourage, but require the introduction of corroborative testimonial and documentary evidence, where available." *Id.* If testimonial evidence lacks specificity, detail, or credibility, there is a greater need for the petitioner to submit corroborative evidence. *Matter of Y-B-*, 21 I&N Dec. 1136 (BIA 1998).

USCIS will, however, reject an expert opinion or give it less weight if it is not in accord with other information in the record or if it is in any way questionable. *Matter of Caron International, Inc.*, 19 I&N Dec. 791, 795 (Comm. 1988). USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought; the submission of expert opinion letters is not presumptive evidence of eligibility. *Id.*; *see also Matter of V-K-*, 24 I&N Dec. 500, n.2 (BIA 2008) ("[E]xpert opinion testimony, while undoubtedly a form of evidence, does not purport to be evidence as to 'fact' but rather is admissible only if 'it will assist the trier of fact to understand the evidence or to determine a fact in issue.'").

While the AAO acknowledges that Kung Fu is a Chinese martial art, simply establishing that the beneficiary is a skilled and well-qualified Kung Fu coach and athlete trained in China is not sufficient to demonstrate his eligibility for this classification. Here, the sole letter submitted cannot be deemed probative of the "culturally unique" nature of the beneficiary's performance. As the petitioner submitted no other affidavits, testimonials or letters from recognized experts, the petitioner has not satisfied the evidentiary requirement at 8 C.F.R. § 214.2(p)(6)(ii)(A).

The record does not contain any evidence that could, in the alternative, satisfy the requirement set forth at 8 C.F.R. § 214.2(p)(6)(ii)(B), which requires the petitioner to submit documentation that the beneficiary's performances are culturally unique, in the form of reviews in newspapers, journals, or other published materials.

Therefore, the petition may not be approved as the petitioner has not submitted evidence to satisfy the evidentiary requirements at 8 C.F.R. § 214.2(p)(6)(ii)(A) or (B).

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).

IV. Prior Approval and Conclusion

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 the beneficiary's form of artistic expression and 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) and 214.2(p)(6)(ii). 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 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).

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.

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.