

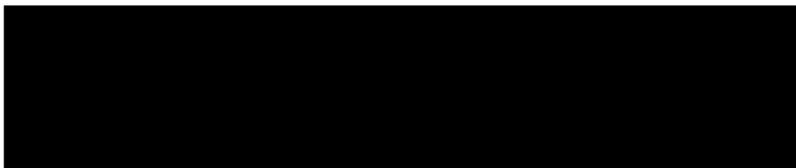
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U.S. Department of Homeland Security
U.S. Citizenship & Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**

D10



FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: DEC 27 2010

IN RE: Petitioner: [REDACTED]
Beneficiaries: [REDACTED]

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: SELF-REPRESENTED

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, initially approved the nonimmigrant visa petition. The director subsequently revoked the approval of the petition on notice pursuant to 8 C.F.R. § 214.2(q)(9)(iii)(D). 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 is self-described as a "cultural exchange and training" company and claims to operate a cultural exchange program called "Passport to Culture". It seeks to employ the 105 beneficiaries temporarily in the United States in the position of "Cultural Representative/Guest Service" for a period of approximately five months. The beneficiaries are citizens of Paraguay, New Zealand, Australia, United Kingdom, Colombia, Serbia, Slovakia, Romania, Hungary, Argentina, Brazil, Denmark, Germany, Indonesia, South Africa, Slovenia, Philippines, Czech Republic, Chile, France, Russia, Cameroon, Canada, and Bulgaria. The beneficiaries will be assigned to work in resorts located in Colorado and Vermont as ski instructors, ski services staff, food and beverage staff, and activities/guest services positions.

The director approved the nonimmigrant petition on October 14, 2008. On December 19, 2008, the director issued a Notice of Intent to Revoke, after the petition was returned for review by the U.S. Department of State due to questions raised regarding the beneficiaries' eligibility during the visa interview process. The director advised the petitioner that it had come to the attention of U.S. Citizenship and Immigration Services (USCIS) that the approval of the petition was contrary to the requirements of the Q-1 regulations. The director expressed a concern that the purpose of the petitioner's Q-1 international cultural exchange program is to provide workers, normally granted H-2B status, to the hospitality and hotel sector in order to fill a labor shortage. The director advised that ten petitions filed between August 15, 2007 and September 15, 2008, involving 755 workers, were under review. The petitioner was granted thirty-three (33) days in which to submit additional evidence in rebuttal to the proposed grounds for revocation, and submitted a timely response.

On March 9, 2009, after reviewing the petitioner's response to the notice of intent to revoke, the director revoked approval of the petition based on the petitioner's failure to demonstrate: (1) that it is a qualified employer pursuant to 8 C.F.R. § 214.2(q)(4)(i); and (2) that its program is eligible for designation by 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 program has a cultural component that is an essential and integral part of the international cultural exchange visitor's employment, or that the international exchange visitors' employment in the United States will serve as a vehicle to achieve the objectives of the cultural component. The director further found that the petitioner: (1) did not designate a qualified employee to administer the petitioner's programs at the receiving host properties; (2) did not establish that it will offer the beneficiaries wages and working conditions comparable to those accorded to local domestic workers similarly employed in Colorado, Utah and Vermont; and (3) did not establish who will actually employ the beneficiaries and pay their wages.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO. On appeal, the petitioner asserts that it has relied upon a settlement agreement made between USCIS and the petitioning company on May 24, 2007 in the United States District Court of South Carolina, and alleges that all defects found by the director in the instant matter were previously resolved in the settlement (*National Collegiate Recreation Services d/b/a American Hospitality Academy v. Chertoff, et al*, Civil No. 9:05-CV-3011-PMD). The petitioner asserts that it is a qualified employer operating a program which satisfies all Q-1 regulatory requirements, and alleges that USCIS "intend[s] to hold [the petitioner] to a higher standard for adjudicating its Q visa petitions than any other companies who applies [*sic*] for Q visa status and the previous settlement agreement concerning the identical issues."

Upon initial review of the record, the AAO issued a request for additional evidence pursuant to 8 C.F.R. § 103.2(b)(8), on October 19, 2009. The AAO's request for evidence was limited to the issue of whether the petitioner is a qualified employer pursuant to 8 C.F.R. § 214.2(q)(4)(i). The petitioner submitted a timely response to the AAO's request on November 18, 2009.

Upon review, the AAO concludes that the director properly revoked the approval of the petition pursuant to the regulation at 8 C.F.R. § 214.2(q)(9)(iii)(D).

I. The Law

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 regulation at 8 C.F.R. § 214.2(q)(1)(iii) provides:

Qualified employer means a United States or foreign firm, corporation, non-profit organization or other legal entity (including its U.S. branches, subsidiaries, affiliates, and franchises) which administers an international cultural exchange program designated by the Attorney General in accordance with the provisions of section 101(a)(15)(Q)(i) of the Act.

The regulation at 8 C.F.R. § 214.2(q)(4)(i) further states:

Documentation by the employer. To establish eligibility as a qualified employer, the petitioner must submit with the completed Form I-129 appropriate evidence that the employer:

- (A) Maintains an established international cultural exchange program in accordance with the requirements set forth in paragraph (q)(3) of this section;

- (B) Has designated a qualified employee as a representative who will be responsible for administering the international exchange program and who will serve as a liaison with the Immigration and Naturalization Service;
- (C) Is actively doing business in the United States;
- (D) Will offer the alien(s) wages and working conditions comparable to those accorded local domestic workers similarly employed; and
- (E) Has the financial ability to remunerate the participant(s).

Finally, the regulation at 8 C.F.R. § 214.2(q)(9)(iii) provides in pertinent part that the service center director shall send the petitioner a notice of intent to revoke an approved Q-1 classification petition if he or she finds that:

- (A) The international cultural exchange visitor is no longer employed by the petitioner in the capacity specified in the petition; or if the international cultural exchange visitor is no longer receiving training as specified in the petition;
- (B) The statement of facts contained in the petition was not true and correct;
- (C) The petitioner violated the terms and conditions of the approved petition; or
- (D) The Service approved the petition in error.

II. Prior Approvals and Settlement Agreement

On appeal, the petitioner seeks to rely on its prior Q-1 petition approvals and a settlement agreement made between USCIS and the petitioner in May 2007. Specifically, the petitioner states:

The UCIS [*sic*] agreed in United States District Court of South Carolina on May 24th, 2007 (Civil No. 9:05-CV-3011-PMD) that [the petitioner's] program satisfied all regulatory requirements governing the Q visa regulatory requirements of 8 C.F.R. 214.2(q)(3)(iii). . . .

USCIS Notices of Intent to Revoke the approved visa petitions alleged the same grounds which were resolved by settlement in Civil No. 9:05-3011-PMD that [the petitioner] failed to establish that it has an international cultural exchange program which satisfies the components prescribed by the Q visa regulations.

Under the terms of the negotiated settlement agreement, the petitioner agreed to dismiss a lawsuit it filed on October 21, 2005. USCIS acknowledged that it approved three Form I-129, Q classification petitions filed by the petitioner while the law suit was pending, and that "based on the evidence submitted in support of those petitions, that the petitions satisfied all the regulatory requirements governing Q visa status pursuant to 8 C.F.R.

214.2(q)(3)(iii)." The approved petitions acknowledged in the settlement agreement were [REDACTED] approved on March 12, 2007; [REDACTED], approved on November 6, 2006; and [REDACTED] approved on June 16, 2006.

Paragraph six of the settlement agreement states:

Plaintiff acknowledges that the subsequent approval of the petitions listed above is not binding on USCIS with respect to any subsequent petitions filed by the Plaintiff or any unadjudicated petitions pending with USCIS. Nor does this agreement relieve the Plaintiff of its burden of establishing a cultural exchange program with respect to future petitions as provided by the relevant regulations.

The instant petition is a new Q-1 petition filed on October 1, 2008, and is not one of the three petitions covered by the settlement agreement. Pursuant to paragraph six of the agreement, the agreement was not binding on USCIS in the adjudication of the instant petition. The director did not violate the terms of the settlement agreement when he revoked the approval of the instant petition.

The AAO acknowledges that USCIS previously approved many Q-1 nonimmigrant petitions filed by the petitioner. The prior approvals do not preclude USCIS from denying an extension of the original visa based on reassessment of the petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). The mere fact that USCIS, by mistake or oversight, approved a visa petition on one occasion does not create an automatic entitlement to the approval of a subsequent petition for renewal of that visa. *Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 148 (1st Cir 2007); see also *Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 597 (Comm. 1988). For example, if USCIS determines that there was a material error, changed circumstances, or new material information that adversely impacts eligibility, USCIS may question the prior approval and decline to give the decision any deference.

Each nonimmigrant petition filing is a separate proceeding with a separate record of proceeding and a separate burden of proof. See 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, USCIS is limited to the information contained in that individual record of proceeding. See 8 C.F.R. § 103.2(b)(16)(ii). Despite any number of previously approved petitions, USCIS does not have any authority to confer an immigration benefit when the petitioner fails to meet its burden of proof in a subsequent petition. See section 291 of the Act.

As will be discussed, the petitioner's initial filing in this matter was missing key relevant information needed to determine whether all the elements of eligibility for Q-1 classification were established. Accordingly, it follows that the approval of this petition based on the evidence submitted was in error. The petitioner indicates that its previous petitions have nevertheless been approved based on the same evidence. USCIS records confirm that most or all of the petitioner's prior Q petitions were favorably adjudicated with no requests for additional evidence. If the petitioner routinely submits the same initial evidence in support of its Q petitions, then it is likely that many prior petitions were also approved without sufficient evidence of eligibility in the record. Such approvals would constitute material and gross error on the part of the director. Neither the director nor the AAO is 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).

III. Issues on Appeal

The two issues before the AAO on appeal are: (1) whether the petitioner is a "qualified employer" pursuant to the eligibility requirements set forth at 8 C.F.R. § 214.2(q)(4)(i); and (2) whether the petitioner's proposed program is eligible for designation, under section 101(a)(15)(Q)(i) of the Act, as an international cultural exchange program, pursuant to the requirements set forth at 8 C.F.R. § 214.2(q)(3)(iii).

A. Qualified Employer

The first issue to be addressed is whether the petitioner is a qualified employer pursuant to 8 C.F.R. § 214.2(q)(4)(i). Specifically, the director found that the petitioner: (1) did not designate a qualified employee to administer the petitioner's programs at the receiving host properties; (2) did not submit appropriate evidence that it will offer the beneficiaries wages and working conditions comparable to those accorded to local domestic workers similarly employed in Colorado and Vermont; and (3) did not establish who will actually employ the beneficiaries and pay their wages.

Procedural History

The petitioner stated on the Form I-129, Petition for a Nonimmigrant Worker, that the beneficiaries will serve in the position of "Cultural Representative/Guest Service," and receive wages of \$350.00 per week. Where asked to indicate on Form I-129 the address where the beneficiaries would work, the petitioner stated: "see attached." The only attachment provided was a list of 26 "Participating Resorts and Host Properties" located in South Carolina, Florida, Colorado and Vermont. The petitioner did not indicate which specific property or properties would be receiving the 105 beneficiaries included in the petition. The petitioner also did not state what type of work the beneficiaries would be doing beyond performing "guest service and/or instructor assignments." The petitioner stated in its undated letter submitted with the petition that the beneficiaries "will receive compensation as similarly employed individuals."

The petitioner indicated on Form I-129 that it has 20 employees, and reported its gross and net annual income as \$4,200,000 and \$135,000, respectively.

The director initially approved the petition on October 14, 2008 without requesting additional evidence to establish that the petitioner is a qualified employer pursuant to the eligibility requirements at 8 C.F.R. § 214.2(q)(4)(i).

On December 19, 2008, the director issued a notice of intent to revoke, in which the director requested that the petitioner provide: the location of each beneficiaries' proposed employment; job titles and occupational duties for each beneficiary; copies of the petitioner's contracts with host properties; certification in the form of a statement that the beneficiaries will receive wages and working conditions comparable to those afforded domestic workers similarly employed in the geographical area of the beneficiaries' employment; and

documentation from the state labor office of the prevailing wage for each location where occupations represented on the Form I-129 petition will be performed.

The director further emphasized that, pursuant to 8 C.F.R. § 214.2(q)(11), the beneficiaries may only be employed by the "qualified employer" through which the alien attained Q-1 nonimmigrant status. Specifically, the director stated:

Although your business is the Q1 petitioner and sponsor for immigration purposes, the engaging employer is the employer that receives the beneficiary in order for the beneficiary to fill a labor shortage. It is unclear whether your organization or the host employer will pay the Q1 salaries. . . . The record of evidence does not establish the petitioner's day-to-day supervision, control, involvement or oversight as an employer. There are no provisions in the Q1 regulations allowing for the sponsoring employer to place the Q1 beneficiary with another employer to perform work for the other employer. The record does not establish that the Q1 beneficiaries in this petition will be employed only by you, the petitioner.

In a response dated January 14, 2009, the petitioner stated that it did in fact certify in its initial letter of support that "Q1 beneficiaries would receive the same compensation as those similarly employed." The petitioner further stated:

[The petitioner] certifies that the occupations covered by [the petitioner's] petition will be afforded wages and working conditions comparable to those accorded domestic workers similarly employed. [The petitioner] is able to certify this by comparing the wages and working conditions of workers at the same hotel or resort working in a similar position as [the petitioner's] participants. Full time hours are recognized as 30 or more hours per week. [The petitioner] requires each host property to provide such information and to abide by such requirements.

In response to the director's request for prevailing wage information pertaining to the beneficiaries' occupations and locations of employment, the petitioner indicated that it was not able to obtain prevailing wage information from State labor departments in Vermont and Colorado.

The petitioner stated that it will serve as the employer for all participants and that Q-1 participants are prohibited from holding a second job. The petitioner further indicated:

[The petitioner] maintains an employer/employee and/or trainer/trainee relationship. [The petitioner's] director of recruitment and/or [the petitioner's] designated host site coordinator recruits, interviews and/or selects participants. [The petitioner] provides training, maintains participant files, generates and issues program manuals and handbooks (rules and regulations) and assigns essential job descriptions and duties in order to achieve the objectives of the international cultural exchange program. . . .

The petitioner further stated that it is responsible for providing participants with an itinerary of cultural activities, ongoing professional development seminars, support, communication, coaching and counseling, as well as monitoring performance, and maintaining the right to terminate participants who fail to follow cultural exchange program requirements.

The petitioner indicated that the 105 beneficiaries included in the petition will hold the occupational titles of "ski instructor," "ski services," "food and beverage," "guest services," and "activities/guest services," at ski resorts located in Colorado and Vermont. The petitioner also provided copies of Host Property Agreements, which outline the petitioner's "Passport to Culture" program and stipulate that the petitioner is responsible for administering the program. Exhibit D of the agreements designates the petitioner's president as the person responsible for administering the Q-1 program and acting as liaison with USCIS. The same exhibit also identifies a "Designated On-Site Coordinator" who "provides on site daily supervision of the Cultural Ambassador and manages the implementation of the Passport to Culture Program" and who "provides monitoring reports and documents to [the petitioner's] program director."

The director revoked the approval of the petition on March 9, 2009, concluding that the petitioner had not established that it can be considered a qualified employer for purposes of this visa classification. This conclusion was based on: (1) the petitioner's failure to establish that it has designated a qualified employee to administer the petitioner's program at the host properties; (2) the petitioner's failure to submit corroborating evidence that it will offer the beneficiaries wages and working conditions comparable to those accorded to local domestic workers similarly employed in Colorado and Vermont; and (3) the petitioner's failure to establish who will actually employ the beneficiaries and pay their wages. The director concluded that the evidence of record failed to meet the evidentiary requirements for qualified employers set forth at 8 C.F.R. §§ 214.2(q)(4)(i)(B), (D) and (E).

On appeal, the petitioner states that it did in fact clearly identify designated representatives for each host property as requested. In addition, the petitioner asserts that the director only requested "a certification in a form of a statement addressing that the occupations will be afforded wages and working conditions comparable to those accorded domestic workers similarly employed." The petitioner asserts that it provided the requested certification in the form of a statement and emphasizes that no corroborating documentation was requested.

Upon review of the petitioner's statements on appeal and the record of proceeding in its entirety, the AAO found these issues to be unresolved. The AAO issued a request for additional evidence on October 19, 2009 in order to allow the petitioner to submit additional evidence and/or explanation to establish that it meets all regulatory requirements as a Q-1 qualified employer set forth at 8 C.F.R. § 214.2(q)(4)(i).

Specifically, the AAO noted that the host property agreements submitted do little more than describe the petitioner's "Passport to Culture" program and do not include terms relating to details such as the number of participants to be received at each property, their intended assignments, their wages and working conditions, or the compensation to be paid to the petitioner in exchange for organizing and operating the program at the properties, if applicable. The AAO further noted that portions of the agreements were signed months after the

community organizations contract [the petitioner] to design, implement and provide support the *Passport to Culture* program for their guests and employees.

The hospitality industry presents an ideal forum for international understanding as it breaks down social barriers by hosting different cultures together in an environment that promotes peace and friendships. The *Passport to Culture* program provides daily, weekly and monthly activities that emphasize and encourage cross cultural learning. . . .

* * *

[The petitioner's] structured cultural exchange program provides practical training, employment and the sharing of history, culture and traditions of the country of the alien's nationality, in accordance with 8 USC 1191(a)(15)(Q)[sic]. It is designed to exhibit and explain the attitude, customs, history, heritage, philosophy and traditions of the cultural representatives' country of nationality. Participating hotels and resorts serve as the vehicle to achieve the objectives of [the petitioner's] Cultural Exchange and program. Individuals from around the world have the opportunity to impart the awareness of their country's culture daily through their practical training.

Individuals are selected based on their dedication to share their culture, history and traditions and their desire to learn about the hospitality industry.

The petitioner explained that its program is accessible to the public as required by 8 C.F.R. § 214.2(q)(3)(A) because it will take place at "contracted hotels, resorts and within the local community." The petitioner stated that American and international tourists and the public have access to the hotels and resorts where its "Passport to Culture" program takes place.

The petitioner stated that the work component of its program "serves as the vehicle to achieve the cultural objective," and further described this component as follows:

Through the practical training in a guest service area of their host property, cultural exchange visitors will be imparting their culture, history and traditions. The work component is integral to implementing the *Passport to Culture* Program. Host properties of [the petitioner] adopt the *Passport to Culture* Program as their shared commitment to promoting diversity excellence and cultural understanding in the hospitality industry. This cultural exchange program was created to foster a spirit of tolerance, respect and understanding among all races and cultures. The best way to provide an exchange of knowledge and customs is to interact on a daily basis with the American and International tourists, and team members. This daily interaction is the main purpose of the work component. Daily interaction derives through the work as food and beverage attendant, retail attendant, activities attendant, and/or guest service attendant. Cultural Representatives identify and introduce themselves to the American and International Tourists as a representative of their country. During the guest service interaction, cultural representatives share information about their culture, history and