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

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DATE: **OCT 17 2011** Office: CALIFORNIA SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the nonimmigrant visa petition. The petitioner subsequently filed an appeal with the Administrative Appeals Office (AAO). The AAO withdrew the director's decision and remanded the matter to the service center director for entry of a new decision. The director denied the petition on February 16, 2011 and certified her decision to the AAO pursuant to 8 C.F.R. § 103.4(a)(1). The AAO will affirm the director's decision to deny the petition.

The petitioner filed the 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 entertainer coming to the United States to perform under a culturally unique program. The petitioner operates a musical instruments store and music school. It seeks to employ the beneficiary as a classical Brazilian music instructor for a period of three years.¹

The director initially denied the petition on April 13, 2009, concluding that the petitioner failed to establish that all of the beneficiary's performances would be culturally unique events. Specifically, the director observed that the beneficiary would spend the majority of his time teaching music classes as part of the petitioner's regular instructional schedule, and that such activities do not qualify as culturally unique events.

On appeal, the AAO determined that the director's reasoning was incorrect. Specifically, the AAO determined that as long as the petitioner establishes through submission of the required evidence that the beneficiary's musical performances and presentations are culturally unique, the fact that his presentations would take place as part of the petitioner's regularly scheduled instructional program is irrelevant. However, the AAO found that the evidence submitted failed to establish that the beneficiary's art form is culturally unique pursuant to the requirements at 8 C.F.R. § 214.2(p)(6)(ii)(A) or (B). Accordingly, the AAO withdrew the director's decision on September 30, 2010 and remanded the matter to the service center. The AAO instructed the director to request any additional evidence deemed warranted, issue a new decision, and to certify the decision to the AAO if the decision was adverse to the petitioner.

The record of proceeding contains a request for evidence dated November 2, 2010 addressed to the petitioner at its address of record. USCIS electronic records for this petition also indicate that the RFE was issued on that date. The record does not contain a response from the petitioner. The director issued a decision denying the petition on February 16, 2011, and certified the decision to the AAO. The director determined that the petitioner's evidence fails to satisfy the regulatory requirements at either 8 C.F.R. § 214.2(p)(6)(ii)(A) or (B) and therefore fails to establish that the beneficiary's art form is culturally unique.

The director issued the decision on Form I-290C, Notice of Certification, and advised the petitioner and counsel that the decision has been certified to the AAO for review. In accordance with 8 C.F.R. § 103.2(a)(2), the director also advised the petitioner that it had 30 days to submit a brief or other written statement for consideration by the AAO and that such brief or statement should be sent directly to the AAO. The AAO notes that the director's

¹ Pursuant to the regulation at 8 C.F.R. § 214.2(p)(8)(3)(C), an approved petition for an artist or entertainer under section 101(a)(P)(iii) of the Act shall be valid for a period of time determined by the Director to be necessary to complete the event, activity, or performance for which the P-3 alien is admitted, not to exceed 1 year.

decision included a second decision cover sheet, also dated February 16, 2011, which indicates that the petition was denied, and includes instructions for filing an appeal or motion to reopen on Form I-290B, Notice of Appeal or Motion.

On March 2, 2011, counsel for the petitioner submitted by fax a copy of the AAO's decision and a copy of the director's February 16, 2011 decision, including both the notice of certification and the notice of decision cover sheets. Counsel contends that the director did not issue a request for evidence prior to denying the petition. Counsel also emphasizes that the director simultaneously advised the petitioner that the decision was certified and that the petition was denied. As of this date, counsel has submitted no other brief or additional evidence in support of the petition or in rebuttal to the adverse decision.

As a preliminary matter, the AAO will address the contentions made by counsel in his correspondence dated March 2, 2011. Counsel asserts that the director did not comply with the AAO's instructions to issue a request for additional evidence when the petition was remanded. As discussed above, the record of proceeding contains a request for evidence dated November 2, 2010 which is addressed to the petitioner at its address of record and USCIS electronic records indicate that the RFE was in fact issued on this date. *See* 8 C.F.R. § 103.5a. The petitioner was given 30 days to submit additional evidence to satisfy the requirements of the regulation at 8 C.F.R. § 214.2(p)(6)(ii)(A) or (B). It is noted that the request for evidence was not returned to USCIS as undeliverable mail. In light of the evidence in the record, counsel has not established that no RFE was sent.

Even if the AAO were to find that the RFE in the record of proceeding was never issued, the director's error would be harmless. Because the director did not request the evidence prior to her decision, the petitioners had the opportunity to submit additional evidence to the AAO in this proceeding. *Cf. Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). The petitioner did not avail itself of this opportunity.

Finally, while the director made a procedural error by issuing two separate decision coversheets with the February 16, 2011 decision, there was nothing prohibiting the petitioner from submitting a brief to the AAO along with a copy of the Notice of Certification, within 30 days of the director's decision. Accordingly, the AAO will consider the record complete.

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.

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

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

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

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

The regulation at 8 C.F.R. § 214.2(p)(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.

Finally, 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.

II. Discussion

The sole issue addressed by the director is whether the petitioner has met the evidentiary requirements for this visa classification as set forth at 8 C.F.R. § 214.2(p)(6)(ii)(A) or (B).

A. *Affidavits, testimonial or letters from recognized experts*

The petitioner submitted a total of three letters in support of the petition which will be considered pursuant to 8 C.F.R. § 214.2(p)(6)(ii)(A).

One letter is purportedly from [REDACTED] the office manager of [REDACTED] an assisted living community for senior citizens. The letter has not been signed and as such, the statements made therein cannot be attributed to [REDACTED] and cannot be given any weight in this proceeding. Nevertheless, the AAO notes that the letter describes the beneficiary as a "unique talent" who recently performed for the community's residents. The letter states that the beneficiary's "guitar playing is superb," his audience interaction is frequent and his "style of music ranges from fast-paced and intricate to slow and soothing," with a repertoire that is "enjoyable for all ages." Finally the letter indicates that the beneficiary included a cultural aspect into an "outstanding concert" by incorporating "a short background before each piece."

The petitioner submitted a second letter from [REDACTED], activity director at [REDACTED] which is also apparently an assisted living community for seniors. [REDACTED] letter is dated June 27, 2008 and addressed to the beneficiary. [REDACTED] thanks the beneficiary for his recent performances on June 4 and 26 and states that the community's residents were "mesmerized by your guitar artistry." He further states that "[o]ur residents felt that your repertoire was fabulous and the way you were able to share your [REDACTED] was educational as well as unique."

Finally, the petitioner submitted a letter dated September 1, 2008 from [REDACTED] who indicates that he is an instructor at Musicians Institute, where the beneficiary matriculated in F-1 status.² [REDACTED] states:

[The beneficiary] began his studies at the Musicians Institute in 2006. He already had an impressive background in classical guitar performance, theory and composition. In the 18 months I had the pleasure of working with him, he displayed the rare qualities of dedication, discipline and hard work. This led to significant improvement in a very short period of time. As a performer he has performed in guitar workshops and recitals, which have demonstrated his musical artistry and technical command along with a warm communication with the audience.

After graduating from Musicians Institute, [the beneficiary] continued his studies with me privately concentrating on his roots as a classical guitarist as well as expanding into the world of jazz improvisation. It is rare to find a musician in this day and age that is as versatile and fluent in so many different styles of music. This makes him a very special musician, performer and composer.

Upon review, none of the submitted letters satisfy the evidentiary requirement at 8 C.F.R. § 214.2(p)(6)(ii)(A). As noted above, [REDACTED] letter is not signed and will not be given any weight in this proceeding. Even if it were signed the AAO cannot conclude that either [REDACTED] as management or administrative staff for senior assisted-living communities, are recognized experts in the field of [REDACTED] music. Although they suggested that there are cultural elements to the beneficiary's classical guitar performances, neither

² The AAO notes that [REDACTED] letter is not on his employer's letterhead and does not include any contact information.

individual can establish their credentials as recognized experts in this area, nor do they describe with any specificity the cultural or traditional elements of the beneficiary's performance.

as a college-level music instructor, is in a better position to provide an expert opinion with respect to the beneficiary's musical abilities; his letter, however, fails to mention any cultural aspect to the beneficiary's performance, much less attest to the cultural authenticity of his performance. It is not evident from the content of this letter how would be considered a recognized expert with respect to s he makes no reference to the field.

The regulation at 8 C.F.R. § 214.2(p)(6)(ii)(A) specifically requires the submission of "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." In the present case, the petitioner has not established the credentials of the purported experts or any specifics about the beneficiary's skill at performing a unique or traditional art form.

As a matter of discretion, USCIS may accept expert opinion testimony.³ However, USCIS will 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.'").

Here, the three letters 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).

B. Documentation that the beneficiary's performances are culturally unique

³ 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).

The record does not contain sufficient 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.

The petitioner has submitted a review of the beneficiary's EP, "The Sound of Hope," which was published in the August 2008 issue of [REDACTED] magazine. The [REDACTED] is also distributed in [REDACTED] and appears to include content focused on all types of contemporary guitar music. The review states:

This guitar player from [REDACTED] currently lives in [REDACTED] where he has been perfecting his craft at the Musicians Institute and making various recordings as well as live shows. In this five-song EP he registered his "classical guitar" side, displaying an already latent and versatile musicality.

Here are some of the mandatory pieces for the improvement and study to every classical guitarist in the world, as the "Study #1 in E minor" (Heitor Villa-Lobos), the classic "Sons de Carrilhoes" (by the genius João Pernambuco) and "Recuerdos de la Alhambra" (by Francisco Tarrega). In these pieces, [the beneficiary] shows a flowing and clear technique with an expressive touch, exploring excellent tones and sounds with his guitar.

There are two little surprises: "Viagem (by Paulo Cesar Pinheiro & João de Aquino) and "Ballet" (Manuel Ponce) counting even more points to the musician[s] versatility and interpretation.

He is certainly a new name in the [REDACTED] scene to stand out in the next few years.

This review does not adequately address the culturally unique nature of the beneficiary's art form. Although the review confirms that the beneficiary has recorded five songs which appear to be composed by [REDACTED] composers, the review states that three of the pieces are "mandatory pieces. . . for every classical guitarist in the world." The review does not adequately establish how "Brazilian classical guitar," or the beneficiary as a musician, represents a traditional or unique art form. As noted above, the regulation at 8 C.F.R. § 214.2(p)(3) defines "culturally unique" as 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. If the beneficiary is performing music that is considered part of the standard repertoire for classical guitarists worldwide, it is reasonable to determine that such music is not considered culturally unique to Brazil.

While the AAO does not discount the possibility that the beneficiary's art form is culturally unique, the AAO cannot find that a single review confirming that the beneficiary plays classical music composed by [REDACTED] is sufficient to meet this evidentiary requirement. 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).

The petition is denied 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, *aff'd*. 345 F.3d 683 (9th Cir. 2003).

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 director's decision dated February 16, 2011 is affirmed. The petition is denied.