

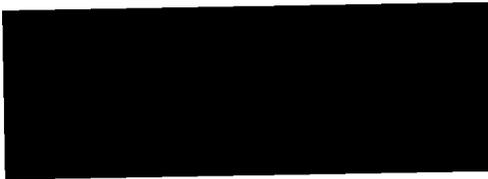
Identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

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**



dg

DATE: DEC 12 2011 Office: CALIFORNIA SERVICE CENTER FILE:

IN RE: Petitioner:   
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:



**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 and certified her decision to the Administrative Appeals Office (AAO) for review pursuant to 8 C.F.R. § 103.4(a)(1). The AAO will affirm the director's decision to deny the petition.

The petitioner, a public elementary school, 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 artist or entertainer coming to the United States to perform under a culturally unique program. The petitioner has employed the beneficiary in P-3 status since 2008 and seeks to extend his status for one additional year so that he may continue to serve in the position of Language and Culture Specialist.

On October 18, 2010, the director denied the petition, concluding that the named petitioner is neither the beneficiary's United States employer nor a qualifying United States agent. The director certified the decision to the AAO for review. *See* 8 C.F.R. § 103.4(a)(5). The director notified the petitioner that it had 30 days in which to submit a brief or other written statement for consideration by the AAO. The petitioner has submitted nothing further and the record will be considered 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)(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.

Pursuant to 8 C.F.R. § 214.2(p)(2)(i), a P-3 petition for an artist or entertainer in a culturally unique program shall be filed by the sponsoring organization or a United States employer.

In the context of employment-based immigration law, the right to file a nonimmigrant visa petition is limited to the actual "importing employer" of the alien worker. *See* sec. 214(c)(1) of the Act; *but see* sec. 214(c)(5)(B) of the Act (discussing the joint liability of the "petitioner" and "employer" with respect to the O or P nonimmigrant alien's return transportation). While the statute requires that O and P petitions be filed by an importing employer, the legacy Immigration and Naturalization Service (INS) interpreted the statute to include agents as importing employers under specific circumstances. 59 Fed. Reg. 41818, 41829 (August 15, 1994).

The regulations at 8 C.F.R. § 214.2(p)(2)(iv)(E) provides:

*Agents as petitioners.* A United States agent may file a petition in cases involving workers who are traditionally self-employed or workers who use agents to arrange short-term employment on their behalf with numerous employers, and in cases where a foreign employer authorizes the agent to act on its behalf. A United States agent may be: the actual employer of the beneficiary' the representative of both the employer and the beneficiary' or, a person or entity authorized by the employer to act for, or in place of, the employer as its agent. . . .

## II. Discussion

The sole issue addressed by the director is whether the petitioner in this matter qualifies as an appropriate P-3 petitioner under 8 C.F.R. § 214.2(p)(1)(i). The director determined that the named petitioner is neither the beneficiary's United States employer nor a qualifying United States agent.

The named petitioner, Lincoln Elementary School, filed the Form I-129, Petition for a Nonimmigrant Worker, on December 7, 2009. The petitioner is self-described as a public elementary school with 35 employees. The petitioner stated on the Form I-129 that the beneficiary will work at the school as a language and culture specialist and will receive wages of \$150.00 per week, as well as housing, meals and transportation.

The petition was accompanied by a letter dated November 20, 2009 from the petitioner's school principal, which is printed on Olympia School District letterhead. The principal explained that the beneficiary teaches Mexican culture and Spanish language through storytelling, music, dance and folk arts as part of the "Lincoln Options for Learning Program," which incorporates concepts of culture, language and diversity into all aspects of the school curriculum.

The director issued a request for evidence ("RFE") on January 15, 2010, in which she requested additional explanation of the beneficiary's events or activities, additional evidence to establish that the beneficiary's performances or presentations will be at cultural events, and, evidence that the beneficiary either has a teacher's license or is exempt from licensing requirements.

The petitioner's response to the RFE included a letter dated February 8, 2010 from [REDACTED] [REDACTED] dated:

This is to inform you that [the beneficiary] is currently providing instructional services at Lincoln Elementary School in the Olympia School District. [The beneficiary] is teaching Spanish as an enrichment activity for students and is being minimally compensated for his efforts by the parent community at Lincoln.

[The beneficiary] is not a hired employee of our school district. Since he is supervised in the classrooms at Lincoln by certificated employees at all times, he does not need Washington State teacher certification.

On April 5, 2010, the director issued a notice of intent to deny the petition. The director advised the petitioner that, based on [REDACTED] statement that the beneficiary is not a hired employee of the school district, it appears that the petitioner is neither the beneficiary's employer nor a United States agent pursuant to 8 C.F.R. § 214.2(p)(2)(iv)(E). As such, the director questioned the petitioner's eligibility to file the petition on the beneficiary's behalf. The director provided the petitioner 30 days to submit additional information, evidence or arguments in support of the petition, and further requested that the petitioner submit evidence that the beneficiary is maintaining his previously accorded status, including copies of the beneficiary's pay checks/stubs, IRS Form W-2, or personal income tax returns.

In a response dated April 26, 2010, counsel for the petitioner stated:

The Options Program at Lincoln Elementary School is the United States employer of the beneficiary. Lincoln Elementary is within the Olympia School District, however it is an independent 501C3 non-profit entity, with its own elected board members, by-laws, fundraising, and budgetary mechanisms. Payment to the beneficiary as an employee of Lincoln Elementary is recorded in their financial records.

We never claimed that the Options Program at Lincoln Elementary School is an agent petitioning for the beneficiary. However, we have maintained and continue to maintain that the Options Program at Lincoln Elementary School is the United States Employer. The Olympia

School District [OSC] is not the employer of the beneficiary as stated in their letter. This distinction is necessary as your denial is based on the fact the OSD indicated they are not the employer of the beneficiary. However, we have never claimed or stated that OSD was in fact the employer or petitioner. The Options Program at Lincoln Elementary School is the only petitioner involved in this case as it is and has always been the U.S. employer since the initial filing.

The petitioner's response also included a second letter from [redacted] who stated that "[w]hile [the beneficiary] is not an employee of the Olympia School District, he is employed by Lincoln/Options Elementary School as a Spanish Language and Cultural Specialist." He noted that "the Lincoln community occasionally hires people to teach enrichment classes and/or work with students and teachers at their schools, as in this case."

The petitioner also provided a letter dated April 22, 2010 signed by two officers of Options Community Council, who seek to clarify that "the employer is the Options Program at Lincoln Elementary School, and is NOT the Olympia School District." The letter further states:

The Options Program at Lincoln Elementary School is the employer of [the beneficiary]. While this program operates as an alternative elementary school program within the Olympia School District, it remains independent as a 501C3 non-profit entity, with its own elected board members, by-laws, fundraising, and budgetary mechanisms, including maintenance and discretion of its own bank accounts, and the independent ability to hire contract employees. As such, Options at Lincoln files its own tax returns, as is included for your review. As [the beneficiary's] 2009 Form 1099 demonstrates, we paid him as his employer \$13,769.27 for his services and performances.

The governing body, the Options Community Council (OCC), made up of primarily parents and some of the staff of Options at Lincoln, consented on a Spanish initiative to provide the students exposure to a foreign language and culture that was relevant to the priorities of the community.

The petitioner submitted a copy of the 2008 IRS Form 990-EZ, Short Form Return of Organization Exempt from Income Tax, for "Options Program," with a supplementary schedule indicating that the entity reported \$12,800 in expenses for "Spanish Language Program." The petitioner also provided a copy of the IRS Form 1099-MISC issued to the beneficiary by the Options Program in 2009, copies of the beneficiary's recent paychecks issued by "Options Alternative Classrooms Council Account," and reimbursement forms the beneficiary submitted to the Options Program for his services in 2010.

In a decision dated October 18, 2010, the director determined that the evidence submitted in response to the Notice of Intent to Deny confirmed that the named petitioner is not the beneficiary's U.S. employer or a qualifying United States agent, and therefore does not meet the requirements to file a petition on behalf of the beneficiary. The director recommended the denial of the petition and certified the matter for review by the AAO. Upon review, the AAO will affirm the director's decision and deny the petition.

The evidence of record shows that the beneficiary's United States employer is the 501(c)(3) tax-exempt non-profit entity known as "Options Program," with IRS Employer identification number "91-1488108." The named petitioner is "Lincoln Elementary School" with IRS Employer identification number "91-6001626." A search of publicly available information revealed that this is the employer identification number assigned to the Olympia School District.<sup>1</sup>

Counsel correctly states that the petitioner has consistently claimed that the beneficiary works as part of the Options Program at Lincoln Elementary School. The named petitioner on the Form I-129, however, is Lincoln Elementary School, which has not been shown to exist as a legal entity separate from Olympia School District. If the Form I-129 had identified the petitioner as "Options Program at Lincoln Elementary School" and indicated the employer identification number for Options Program, then there would be no question as to which entity is the employer.

As it stands, the named petitioner as identified on the petition is not the same entity which has been serving as the beneficiary's employer in the United States. The AAO recognizes that the "Options Program" exists solely for the benefit of the Lincoln Elementary School community. That does not change the fact that it exists as a legal entity separate and apart from the school and the school district. As the named petitioner is neither the beneficiary's United States employer nor a qualifying United States agent, the petition cannot be approved.

### **III. Prior Approvals and Conclusion**

The AAO acknowledges that USCIS previously approved two P-3 petitions filed on behalf of the beneficiary. In matters relating to an extension of nonimmigrant visa petition validity involving the same petitioner, beneficiary, and underlying facts, USCIS will generally give deference to a prior determination of eligibility. The mere fact, however, 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). 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 that individual record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii).

In the present matter, the director reviewed the record of proceeding and concluded that the petitioner was ineligible to file the petition on behalf of the beneficiary because it is neither the beneficiary's United States employer nor a qualifying United States agent. If the previous petitions were approved under the same circumstances, the approvals would constitute gross error on the part of the director. The prior approvals do not preclude USCIS from denying an extension of the original visa based on a reassessment of the petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). 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*

---

<sup>1</sup> *See* Washington State Auditor's Office, Financial Statements and Federal Single Audit Report, Olympia District No. 111, Thurston County, Report No. 74367, page 29 issued April 14, 2008; available at <<http://www.sao.wa.gov/auditreports/auditreportfiles/ar74367.pdf>> (accessed on November 23, 2011, copy incorporated into record of proceeding).

*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).

Although the denial of the petition is affirmed, the denial of this petition is without prejudice to the filing of a new petition by the beneficiary's U.S. employer accompanied by the appropriate supporting evidence and filing fees.

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, the petitioner has not sustained that burden.

**ORDER:** The director's decision dated October 18, 2010 is affirmed. The petition is denied.