U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

D9

[redacted]

FILE: EAC 04 118 50432 Office: VERMONT SERVICE CENTER Date: DEC 2 2 2005

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: This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Mari Johnson

Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner is an artistic painting and design company. The petitioner filed a Form I-129 (Petition for a Nonimmigrant Worker) 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 a culturally unique artist.

The director denied the petition, finding that the petitioner failed to establish that the beneficiary was coming to the United States to perform, coach or teach in a culturally unique program. The director denied the petition, in part, finding that the petitioner failed to establish that the beneficiary is an alien having a foreign residence, which he has no intention of abandoning, and that the beneficiary seeks to enter the United States temporarily.

On appeal, counsel for the petitioner submits a statement.

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)(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 first issue to be addressed in this proceeding is whether the petitioner established that the beneficiary was coming to the United States solely to perform, teach, or coach as a culturally unique artist. According to the evidence on the record, the beneficiary is a decorative artist. The petitioner indicated on the Form I-129 petition that the beneficiary would plan, design and prepare decorative art work for residential and organizational customers, using watercolors, oils, acrylics, tempera and other paint and design media. The director found that the beneficiary was not coming to "perform, teach or coach;" therefore, he is ineligible for P-3 classification. Counsel for the petitioner asserts that the beneficiary performs his services as an artist. While the evidence indicates that the beneficiary has painted and restored Byzantine icons and murals in the past, it does not establish that the beneficiary would be coming to the United States to continue to perform in those media. The petitioner submitted three expert letters[1] with identical language.[2] These boilerplate letters were submitted as evidence that the beneficiary's recent work in the United States has been culturally unique. The three letters are virtually identical. They each state:

> [The beneficiary] is employed by [the petitioning organization], a professional corporation located in Media, PA. The company specializes in culturally unique interior design. [The beneficiary's] projects involve Ukrainian style culturally unique projects for private residences and public institutions, involving wall painting design, ceiling painting design, ornament design, molding design. [The beneficiary's] designa [sic] are truly culturally unique, as they involve authentic Ukrainian heritage style designs, techniques and materials and obviously require his extensive expertise in this field.

While the references attested to the contents of the letters by signing them, the use of identical boilerplate language diminishes the evidentiary value of these letters. The evidence does not establish that the beneficiary has and would limit himself to a specific culturally unique art form.

The second issue to be addressed in this proceeding is whether the petitioner established that all of the beneficiary's performances would be culturally unique. The director determined, and the AAO concurs, that the petitioner failed to establish that the beneficiary's performances would be culturally unique. The petitioner failed to submit evidence of an employment contract outlining the exact nature of the beneficiary's job duties. The petitioner failed to submit an itinerary by which Citizenship and Immigration Services (CIS) might evaluate the nature of the proposed events or performances.

The evidence contains a statement of the beneficiary, indicating that from 1985 until 1991, he was employed as the decorative artist/designer at the scientific and research department of the Lviv Academy of Arts, performing decorative work at designated cultural or historic sites in the Ukraine. He further indicated that between 1992 and 1998 he worked on the design and painting of icons and ornaments for several churches in the Ukraine. He stated that for his United States employer (the petitioner), he has been involved in

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[1] The letters were written by [redacted], [redacted], and [redacted]

[2] Two of the three letters contain the same typographical errors.

Ukraininan style projects for private residences and public institutions, involving the design of ornaments and molding as well as wall and ceiling painting. The petitioner submitted several letters from artists stating that the beneficiary's work for the petitioner involved Ukrainian style culturally unique projects. The letters are insufficiently specific; hence, they carry little evidentiary weight. As evidence of his recent work, he attached photographs of the interior of churches, residences and a school dining hall. There is no independent corroboration establishing that the work depicted was performed by the beneficiary. The petitioner has not established that the beneficiary's performances would be solely culturally unique, rather than work that is primarily related to the field of interior decoration in general.

The next issue to be addressed in this proceeding is whether the petitioner established that the beneficiary is an alien having a foreign residence, which he has no intention of abandoning and that the beneficiary seeks to enter the U.S. temporarily. The director noted that the beneficiary has been in the United States for more than six years in H1-B status, which had expired. Counsel for the petitioner asserts that the beneficiary's prior status does not preclude him from obtaining P-3 classification. While the regulations do not prohibit aliens from obtaining H-1B and P-3 status sequentially, the fact that the beneficiary has been in the U.S. for so long suggests that he does not seek to enter the U.S. on a temporary basis. As evidence that the beneficiary has a foreign residence, the petitioner submitted a partial copy of the beneficiary's passport, "confirming the permanent residence registration at the address indicated," and a copy of his residence certificate. The petitioner failed to submit sufficient evidence of the alien's ties to his native country. It is unknown whether the beneficiary has significant familial or professional ties to his country or whether he owns property there. It is known that he has resided in the United States since 1998 and that he seeks to remain for an additional three years. The evidence is insufficient to establish that the beneficiary has a foreign residence, which he has no intention of abandoning, and that the beneficiary seeks to enter the U.S. temporarily.

Beyond the decision of the director, the petitioner failed to submit a consultation with an appropriate labor organization regarding the nature of the work to be done and the alien's qualifications as is required by the regulation at 8 C.F.R. § 214.2(p)(7). Therefore, the petition may not be approved on this basis as well.

Another issue in this proceeding, also not raised by the director, is that the petitioner failed to submit a copy of any written contract between the petitioner and the alien, or a summary of the terms of the oral agreement between them, as required by 8 C.F.R. § 214.2(p)(2)(ii)(B). Similarly, the petitioner failed to submit 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, as required by 8 C.F.R. § 214.2(p)(2)(ii)(C). For these additional reasons, the petition may not be approved.

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); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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. § 1362. Here, that burden has not been met.

ORDER: The appeal is dismissed.