

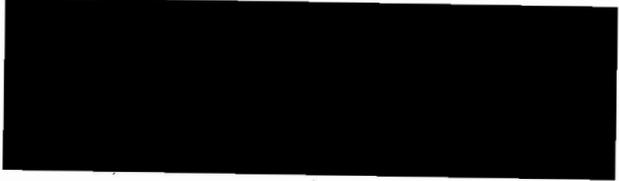
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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship and Immigration Services

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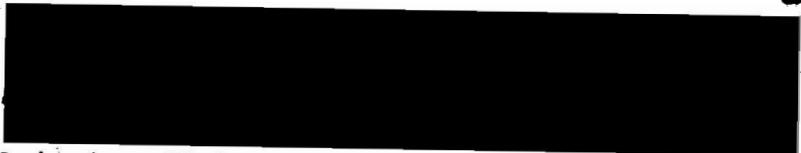
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FILE: WAC 04 010 50133

Office: CALIFORNIA SERVICE CENTER

Date: **JAN 10 2006**

IN RE: Petitioner:
Beneficiaries:



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: 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

Σ Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The California Service Center Director denied the nonimmigrant visa petition in a decision dated August 25, 2004. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Peruvian musical performing group. The petitioner filed a Form I-129 (Petition for a Nonimmigrant Worker) seeking an extension of classification of the beneficiaries 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 entertainers in a culturally unique program. The petitioner seeks to continue to employ the beneficiaries for an additional year.¹

The director denied the petition, finding that the petitioner failed to establish that the beneficiaries' performances would be culturally unique events as required by the regulation at 8 C.F.R. § 214.2(p)(6)(i)(B). The director denied the petition, in part, finding that the petitioner failed to submit a consultation as required by subparts (p)(2)(ii)(D) and (p)(7)(v) of 8 C.F.R. § 214.2.

On appeal, counsel for the petitioner submits a brief, and additional documentation, some of which had been previously submitted.

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:

¹ The petitioner has previously received four extensions of P-3 classification of the beneficiaries.

(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 beneficiaries' performances would be culturally unique events as defined by the pertinent regulations. Finding the evidence insufficient to establish that all the beneficiaries' performances would be culturally unique, on February 17, 2004, the director requested that the petitioner submit additional evidence (RFE). Counsel for the petitioner submitted some evidence and requested additional time to submit additional evidence in response to the RFE. All evidence submitted in response to a Service request must be submitted at one time. 8 C.F.R. § 103.2(b)(11). The petitioner submitted nothing further in response to the RFE. The director determined that the beneficiaries would be performing at "culturally eclectic" events; hence, they were ineligible for P-3 classification. The evidence in the record relating to whether the beneficiaries' performances would be culturally unique events is as follows:

- An undated letter from [REDACTED] and [REDACTED] of Six Rivers Brewing Company in Eureka, California, that states that the petitioner has played at one concert and is scheduled to play at two more concerts.
- A letter dated September 28, 2004, from [REDACTED] music teacher at the Fortuna Middle School, that states that the petitioner is "a unique musical performing group, whose music represents the ancestral music of the members' native land, Peru."
- An undated letter from [REDACTED] Spanish Professor at the College of the Redwoods, Eureka, California, confirming the petitioner and beneficiaries' performance at the College of the Redwoods Festival de Cultura Hispanica en Celebracion del Cinco de Mayo.
- A letter dated October 8, 2004, written by Lic. [REDACTED] Spanish teacher, Woodside Priory School, Portola Valley, California, inviting the petitioner to participate in the school's upcoming Latino Indigenous Festival activities.
- A letter dated September 15, 2004, written by [REDACTED] General Manager, Eureka Theater, stating that the petitioner and beneficiaries would be performing Andes music at the theater at a concert free and open to the public.
- A letter dated April 2, 2004, from [REDACTED] of the Humboldt State University (HSU) Pow Wow Committee, confirming the petitioner's participation at the 15th Annual HSU Pow Wow.
- A letter confirming the appearance of the petitioner at the 11th Annual Juan de Fuca Festival of the Arts in Port Angeles, Washington in May 2004.

- Entertainer applications for the Summer Arts and Music Festival at Benbow Lake in June 2003 and 2004. The petitioner completed the form indicating that it would be performing “music of the Andes.”
- A letter dated April 1, 2003 from [REDACTED] Market Manager, confirming the petitioner’s band’s performance at the Arcata Farmers Market.
- Additional evidence of applications and confirmations of performances in 1998, 1999, and 2001.
- An article about the [REDACTED] Festival in the **Peninsula Daily News**, May 31, 2004, featuring a captioned photograph of [REDACTED] of the group Huayllipacha, playing a melody from the Peruvian Andes at the festival in Port Angeles, Washington.
- A captioned photograph published in the May 27, 2002 edition of the Grants Pass Daily Courier that reads “members of the Andes musical group Huayllipacha entertained at Riverside Park throughout the Boatnik weekend.
- Another captioned photograph of [REDACTED] in an undated and unnamed publication.
- A flyer for the Festival de Cultura Hispanica at the College of the Redwoods that states that the petitioner group would be performing Andean music.
- A calendar of events indicating that the petitioner group would be performing at the Arcata Farmers’ Market.
- A 2004 flyer advertising the 15th Annual HUS Pow Wow and featuring the petitioning group.
- A letter from [REDACTED], General Manager, Factory Stores, Lincoln City, Oregon, stating that the petitioner and beneficiaries had performed at their resort area outlet shopping center for more than five years – since 1998.
- A letter dated March 24, 2004 from [REDACTED] Executive Director, [REDACTED] Association, stated that for the past three holiday seasons, she had invited the petitioner group to perform Andean music in downtown Corvallis.
- A letter dated April 20, 2004 from [REDACTED] General Manager, Mariner Square, Newport, stating that whenever the petitioner group is in town, they are pleased to hire them to perform in their courtyard.
- Copies of CD covers, captioned “Huayllipacha, Singing to the Earth, Music of the Andes, Peru.”
- A consultation dated October 29, 1997 from the American Federation of Musicians, relating to [REDACTED] stating that the performance of “these Peruvian performers meet the revised standards of cultural uniqueness.”
- The petitioner groups’ tentative performing schedule for 2004.

- The petitioner groups' tentative performance schedule indicates that it intended to perform at the San Francisco Fisherman's Wharf, various farmers markets, malls, and festivals.

In review, the petitioner has established that all of its performances would be culturally unique events. Although not expressly stated, the director suggested that the beneficiaries would not be performing at culturally unique events, but instead, at "culturally eclectic" events. There is no statutory or regulatory requirement that P-3 entertainers present at venues that limit performances to only those that are culturally unique. The petitioner established that the beneficiaries had performed and intended to continue to perform as culturally unique entertainers under culturally unique programs. The evidence shows that their performance would further the understanding of their art form, Peruvian Andean music. There is no evidence that the beneficiaries would perform anything but their culturally unique music. This portion of the director's decision is withdrawn.

The second issue to be resolved in this matter is whether the petitioner submitted the required consultation. The record contains a favorable consultation dated 1997. It is noted that the consultation relates to only one of the three members of the petitioning group, [REDACTED]. The regulation at 8 C.F.R. § 214.2(p)(7)(v) states that the consultation should "evaluate the cultural uniqueness of the alien's skills, state whether the events are cultural in nature, and whether the event or activity is appropriate for P-3 classification." Here, the consultation only mentions one of the three members of the petitioner group (one of two beneficiaries). The 1997 consultation is inadequate in that it reviewed the artistic style of only one of the beneficiaries. Finding the evidence insufficient to establish eligibility, on February 17, 2004, the director requested that the petitioner submit additional evidence (RFE). The director specifically requested that the petitioner provide a consultation with an appropriate labor organization. Counsel for the petitioner submitted some evidence and requested additional time to submit additional evidence in response to the RFE. Counsel for the petitioner indicated that he "would like to request for additional time . . . since we still have not been able to locate a labor organization to authenticate the uniqueness of the group nor a music expert to also state such uniqueness." All evidence submitted in response to a Service request must be submitted at one time. 8 C.F.R. § 103.2(b)(11). The petitioner submitted nothing further in response to the RFE. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

The director, in his discretion, may request an updated consultation at the time of the request for an extension of P-3 classification. 8 C.F.R. § 214.2(p)(13). The petitioner failed to submit the requested consultation; therefore, the petition must be denied.

Beyond the director's decision, the petitioner has failed to establish that it seeks an extension to allow the beneficiaries to perform in an event(s) for which the beneficiary entered the United States has not been completed. The regulation at 8 C.F.R. § 214.2(3) defines an event as "an activity such a . . . tour . . . entertainment event, or engagement. An entertainment event could include an entire season of performances." The beneficiaries commenced P-3 nonimmigrant visa classification in 1998 to perform with the petitioner group. The beneficiary has been in P-3 status for how long. The petitioner indicates that it wishes to continue to employ the beneficiary in another one-year engagement. We interpret the regulation defining the term event as a finite period, rather than as employment of indefinite (permanent) duration.

The regulation at 8 C.F.R. § 214.2 (13) states:

Extension of visa petition validity. The petitioner shall file a request to extend the validity of the original petition under section 101(a)(P) of the Act on Form I-129 in order to continue or complete the same activity or event specified in the original petition.

Congress did not intend to allow entertainers to circumvent the labor certification process and remain in the U.S. indefinitely. When the petitioner initially filed a Form I-129 visa petition on the beneficiary's behalf, it submitted an itinerary. The petitioner may not extend the classification by merely submitting a request for an extension with a new itinerary. The AAO finds that the beneficiary has completed the event or engagement specified in the original petition and is ineligible for an extension of his visa petition validity.

Further, the petitioner failed to establish that the beneficiaries are aliens having a foreign residence, which they have no intention of abandoning and that the beneficiaries seek to enter the U.S. temporarily. For this additional reason, the petition may not be approved.

The petitioner mentioned that Citizenship and Immigration Services (CIS) approved other petitions that had been previously filed on behalf of the beneficiaries. 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 CIS 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 the nonimmigrant petitions 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 prior approvals do not preclude CIS 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 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.