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



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



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FILE:



Office: CALIFORNIA SERVICE CENTER

Date:

**NOV 18 2010**

IN RE:

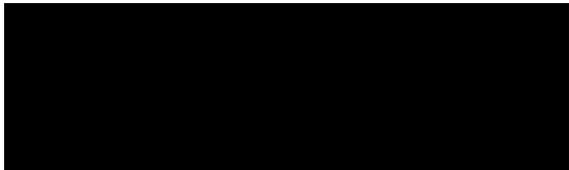
Petitioner:

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:

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.

Thank you,

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, California Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will sustain the appeal and approve the petition.

The petitioner filed the nonimmigrant petition seeking to extend the beneficiaries' classification 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 who perform under a culturally unique program. The petitioner operates a bowling alley and entertainment center, and also serves as the beneficiaries' producer. The petitioner has offered the beneficiaries continued employment in P-3 classification as "cultural artists" who perform plays, dances, and music native to the Philippines.

The director denied the petition on multiple grounds determining that the petitioner failed to establish: (1) that the beneficiaries are a culturally unique entertainment group; and (2) that all of the proposed performances or presentations will be culturally unique events. The director further found that the petitioner failed to submit a written consultation from an appropriate labor organization.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that all of the beneficiaries included in the petition are performers with the [REDACTED]. Counsel further contends that the director's view of a "cultural event" reveals a "limited perspective of the regulations" and "does not take into consideration the essence or the spirit behind the P-3 classification whatsoever." Finally, counsel asserts that the petitioner received a waiver of the labor consultation requirement when it filed previous petitions on behalf of the beneficiaries, and believed that such waiver would be granted again in this proceeding. The petitioner submits a favorable consultation letter from the American Federation of Musicians in support of the appeal.

Upon review of the totality of the record, the petitioner and beneficiaries meet all eligibility requirements for P-3 classification. Accordingly, the director's decision will be withdrawn and the petition will be approved.

## **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)(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.

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

### A. Culturally Unique Performers or Entertainers

The first issue addressed by the director is whether the six beneficiaries are members of a culturally unique entertainment group. Specifically, the director focused on whether the beneficiaries are all performers in an "entertainment group."

The definitions at 8 C.F.R. § 214.2(p)(3) provide that "group" means "two or more persons established as one entity or unit to perform or to provide a service." A "member of a group" is "a person who is actually performing the entertainment services."

The petitioner indicates that all six beneficiaries are members of the group [REDACTED]. [REDACTED] The petitioner identified the beneficiaries' job titles as "Executive/Artistic/Musical Director," "Props Manager," "Technical Manager," "Costume Manager," "Theater Arts Director," and "Dance Director." The petitioner also submitted a two-page resume and biographical information sheet for each beneficiary, which describes in detail each individual's history with the group and their roles in [REDACTED] programs and activities. This documentation indicates that each beneficiary has an "organizational role," that coincides with the job titles provided, as well as several artistic roles, which involve directly teaching or performing in indigenous Filipino musical, dance or theatrical productions.

In denying the petition, the director determined that the beneficiaries are not performers, but rather serve as support personnel for performers. The director further found that the evidence submitted, specifically photographs of performances by the group, is inconsistent with respect to the number of performers in the group. The director noted that some photographs depict up to 14 or 16 members.

Upon review, the director's determination is not supported by the evidence of record and it will be withdrawn. There is ample documentary evidence in the record to support a conclusion that the six named beneficiaries are members of the recognized group known as [REDACTED] and that they perform Filipino theatre, music and dance together as a group. The director appears to have relied solely on the beneficiaries' job titles in determining that they are support personnel rather than performers. The petitioner has established that the beneficiaries are dancers, musicians, choreographers, actors and directors, as well as instructors of the culturally unique art forms that the group represents. Further, it is noted that the director did not find that the performances of the group are not culturally unique. Rather, he simply questioned the composition of the group and the roles of the beneficiaries within it.

Although the director questioned the composition of [REDACTED] in terms of numbers, a careful review of the evidence submitted, including group programs and brochures, reveals that the group does in fact have several

established members who are not included in the petition. The evidence of record also establishes that the group regularly recruits and trains members of the local Filipino-American community to participate as performers in its culturally unique dance and theatrical productions. Both of these facts would reasonably cause a variation in the number of performers at any given event. The AAO therefore concludes that the six beneficiaries included in this petition are culturally unique performers and members of the group known as [REDACTED]

**B. Culturally Unique Events**

The second issue addressed by the director is whether the petitioner submitted evidence that all of the beneficiaries' performances or presentations will be culturally unique events. 8 C.F.R. § 214.2(p)(6)(ii).

In this regard, the director noted that the itinerary provided by the petitioner consists of 24 events over 12 months, with only 1,475 minutes of performances scheduled over a one year period. The director further observed:

Nine of the events take place in a bowling alley. Two events do not have a venue secured. Two events celebrate anniversaries of specific churches. One event is a Peace Corps reunion. One event is a wedding in a hotel in Newport Beach, California. The month of January and the month of March each have only 50 minutes of scheduled work to be performed at a bowling alley. None of the events in December have confirmed venues.

The plain language of the regulations is clear in this matter. In order to qualify for P-3 classification, an entertainment group . . . classified as culturally unique may only engage in performances and presentations that satisfy the definition of a culturally unique event. All activities of the beneficiary must be shown to be culturally unique. 8 C.F.R. § 214.2(p)(6)(ii)(C). Many of the events on the submitted itinerary are not culturally unique events.

The fact that the P-3 group's individual performance may be culturally unique, does not demonstrate that the commercial or noncommercial program is culturally unique within the meaning of section 101(a)(15)(P)(iii)(II) of the Act. The entire itinerary must be comprised of events that are culturally unique. Venues such as bowling alleys and events such as weddings and Peace Corps reunions are not cultural events to further the understanding of the beneficiary's art form and therefore are not culturally unique events.

On appeal, counsel asserts that "it appears that the determination of whether or not the Beneficiary's performances are culturally unique events primarily depends on the venue of the said cultural presentations and not on the nature and rationale for the event." Counsel contends that this "limited perspective" ignores the spirit of the P-3 regulations. Counsel states that "whether the performances or presentations are culturally unique events will hinge on whether or not they will further the understanding or development of the Beneficiary's art form."

Counsel emphasizes that the events at the petitioner's premises are not merely "at a bowling alley," noting that the petitioner is part of a complex facility that includes a restaurant, hotel and entertainment hall that serves as a "local convention center." Counsel asserts that the beneficiaries hold their performances, seminars and

workshops to present and teach their unique art form for the enjoyment and understanding of Americans and American-born Filipino-Americans who wish to learn about their cultural heritage. Counsel notes that while two of the proposed events are at churches and one is at a wedding, the programs are still performed for the purpose of highlighting the unique, indigenous theatre art form of the beneficiaries.

Finally, with respect to the director's observation that the beneficiaries' performances are sparsely scheduled, counsel asserts that each performances requires a "countless number of hours spent training, practicing, teaching, innovating and developing the myriad of ways that Philippine traditional ethnic, folk, cultural, musical, theatrical art and heritage can be performed/presented." Counsel suggests that "the Service has lost sight of the fact that the Beneficiary group performs, interprets, innovates and presents a total of eleven (11) different plays with a wide variety of 32 dances, rituals, songs and games to choose from."

Upon review of the record, the AAO agrees with counsel's assertions. The petitioner has provided a detailed itinerary which describes the nature and purpose of each of the beneficiaries' proposed performances and presentations and provided ample evidence, including certificates of appreciation from Filipino and Filipino-American cultural organizations, to establish that all of the beneficiaries' performances and presentations have been and will be culturally unique events designed to further the understanding of the group's Filipino theatrical, musical and dance art forms. Furthermore, while the petitioner may operate a bowling alley as part of its business operations, the evidence supports a finding that the beneficiaries' performances are scheduled and advertised as cultural events. The petitioner has established that it can reasonably accommodate such events on its premises. Some of these events will take place at the petitioner's premises; however, others will take place in local performing arts venues, cultural venues and community centers, with several occurring as part of larger Filipino cultural festivals and celebrations.

Although the statute and regulations refer to a "commercial or noncommercial program that is culturally unique," the term "program" is not defined and no specific requirements are set forth for the petitioner to establish that such a program exists. Rather, the petitioner is required to submit evidence that "all of the performances or presentations will be culturally unique events." The petitioner or employer does not have to be a cultural organization or operate an overtly non-entertaining cultural program dedicated solely to the culturally unique art form.

Based on the foregoing, the AAO will withdraw the director's determination that the beneficiaries' performances and presentations will not be culturally unique events.

### **C. Written Consultation from a Labor Organization**

The third and final issue addressed by the director is whether the petitioner was required to submit a written consultation from a labor organization. Title 8, Code of Federal Regulations § 214.2(p)(2)(ii)(D) provides that all P nonimmigrant petitions must be accompanied by a written consultation from a labor organization.

The regulation at 8 C.F.R. § 214.2(p)(7) details the requirements for the consultation:

- (i) *General*

- (A) Consultation with an appropriate labor organization regarding the nature of the work to be done and the alien's qualifications is mandatory before a petition for P-1, P-2, or P-3 classification can be approved.
- (B) . . . evidence of consultation shall be a written advisory opinion from an appropriate labor organization.
- (C) . . . the petitioner shall obtain a written advisory opinion from an appropriate labor organization. The advisory opinion shall be submitted along with the petition when the petition is filed. If the advisory opinion is not favorable to the petitioner, the advisory opinion must set forth a specific statement of facts which support the conclusion reached in the opinion. Advisory opinions must be submitted in writing and signed by an authorized official of the organization.
- (D) . . . written evidence of consultation shall be included in the record of every approved petition. Consultations are advisory and are not binding on the Service.

\* \* \*

- (F) In those cases where it is established by the petitioner that an appropriate labor organization does not exist, the Service shall render a decision on the evidence of record.

The petitioner did not address the consultation requirement at the time of filing the petition. The director issued a request for additional evidence ("RFE") on August 14, 2009, in which she requested that the petitioner "provide a consultation with an appropriate labor organization."

In response to the RFE, the petitioner requested exemption from this requirement. The petitioner indicated that it had contacted The Asia Society, the California Arts Council, the American Folklore Society, and the Kentucky Center for the Arts in order to obtain a consultation or advisory opinion and was informed that none of these organizations provide such consultations "for the unique cultural presentation or show."

The director denied the petition based on the petitioners' failure to submit a consultation, noting that "the appropriate labor organizations for singers and stage actors include the American Federation of Musicians and the Actors Equity Association."

On appeal, counsel for the petitioner asserts that prior P-3 petitions filed on behalf of the instant beneficiaries were "approved on our contention that an appropriate consulting entity did not exist." Counsel suggests that it was therefore reasonable for the petitioner to submit the instant petition without a consultation and to rely on its belief that it qualified for a waiver of the requirement. The petitioner has since sought and obtained a favorable consultation from the American Federation of Musicians and submits this evidence in support of the appeal.

The AAO notes that, generally, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). However, here, the petitioner clearly sought to establish that no appropriate labor organization exists and to seek a waiver of the consultation requirement, pursuant to 8 C.F.R. § 214.2(p)(7)(i)(F). As such, we conclude that the petitioner previously made a good faith effort to comply with the director's request for a written consultation. Accordingly, we will consider the consultation offered on appeal, and will withdraw this ground for denial of the petition.

The director cited no other grounds for denying the petition, and upon *de novo* review, the AAO sees no additional basis for denial. Accordingly, the AAO will withdraw the director's decision dated December 2, 2009 and approve the petition. As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Upon review, the petitioner has met its burden of proof.

**ORDER:** The appeal is sustained.