

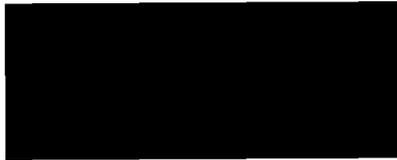
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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave. N.W., MS 2090
Washington, DC 20529-2090



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

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

IN RE: Petitioner:
Beneficiary:

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

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 matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed a Form I-129, Petition for a Nonimmigrant Worker, seeking to extend the beneficiary's P-1S classification as essential support personnel pursuant to section 101(a)(15)(P)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(P)(i)(b). The petitioner is a non-profit organization engaged in Chinese martial arts teaching and performing. It seeks to continue to employ the beneficiary as a chef for a period of one year. The petitioner has employed the beneficiary in this position since January 2008 and seeks to extend his status from November 13, 2010 until November 12, 2011.

The director denied the petition based on two independent and alternative grounds, concluding that the petitioner: (1) failed to submit a consultation from a labor organization with expertise in the area of the beneficiary's skill; and (2) failed to establish that the principal P-1 aliens have been granted an extension of status beyond January 5, 2011.

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, the petitioner submits a new consultation letter from the American Guild of Variety Artists (AGVA), along with evidence that the petitioner has appealed the denial of an extension petition filed on behalf of the principal P-1 aliens.

I. The Law

Under section 101(a)(15)(P)(i) of the Act, an alien having a foreign residence which he or she has no intention of abandoning may be authorized to come to the United States temporarily to perform services for an employer or sponsor. Section 214(c)(4)(B)(i) of the Act, 8 U.S.C. § 1184(c)(4)(B)(i), provides that section 101(a)(15)(P)(i)(b) of the Act applies to an alien who:

- (I) performs with or is an integral and essential part of the performance of an entertainment group that has, except as provided in clause (ii), been recognized internationally as being outstanding in the discipline for a sustained and substantial period of time,
- (II) in the case of a performer or entertainer, except as provided in clause (iii), has had a sustained and substantial relationship with that group (ordinarily for at least one year) and provides functions integral to the performance of the group, and
- (III) seeks to enter the United States temporarily and solely for the purpose of performing as such a performer or entertainer or as an integral and essential part of a performance.

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

Essential support alien means a highly skilled, essential person determined by the Director to be an integral part of the performance of a P-1, P-2, or P-3 alien because he or she performs support services which cannot be readily performed by a United States worker and which are essential to the successful performance of services by the P-1, P-2, [or P-3] alien. Such alien must have appropriate qualifications to perform the services critical knowledge of the specific services to be performed, and experience in providing such support to the P-1, P-2, or P-3 alien.

Accordingly, the petitioner must establish that the support alien will provide support to a P alien and is essential to the success of the P alien. The petitioner must also establish that beneficiary is qualified to perform the services and the services cannot be readily performed by United States workers.

The regulation at 8 C.F.R. § 214.2(p)(4)(iv) states:

- (A) *General.* An essential support alien as defined [above] may be granted P-1 classification based on a support relationship with an individual P-1 athlete, P-1 athletic team, or a P-1 entertainment group.
- (B) Evidentiary criteria for a P-1 essential support petition. A petition for P-1 essential support personnel must be accompanied by:
 - (1) A consultation from a labor organization with expertise in the area of the alien's skill;
 - (2) A statement describing the alien(s) prior essentiality, critical skills, and experience with the principal alien(s); and
 - (3) A copy of the written contract or a summary of the terms of the oral agreement between the alien(s) and the employer.

II. The Issues on Appeal

A. Consultation

The first issue to be addressed is whether the petitioner submitted a consultation from a labor organization with expertise in the area of the alien's skill, pursuant to 8 C.F.R. § 214.2(p)(4)(iv)(B)(1). The regulation at 8 C.F.R. § 214.2(p)(7)(ii)(6) provides that a written consultation on a petition for an essential support alien must be made with a labor organization with expertise in the skill area involved. A favorable consultation must evaluate the alien's essentiality to and working relationship with the artist or entertainer, and state whether United States workers are available who can perform the support services. Alternatively, a labor organization may submit a letter of no objection if it has no objection to the approval of the petition. *Id.*

The petitioner seeks classification of the beneficiary as an essential support chef specializing in East Asian Buddhist vegetarian cuisine.

At the time of filing the petition on November 12, 2010, the petitioner submitted a consultation from the American Guild of Variety Artists (AGVA) dated November 10, 2007. The consultation is for three unnamed P-1S essential support personnel and indicates that the AGVA believes that the unnamed persons meet the regulatory requirements for the stated classification.

The director issued a request for additional evidence ("RFE") on November 24, 2010, in which she advised the petitioner as follows:

Essential Support – Consultation: Provide a consultation from a labor organization in the area of the alien's skill.

The petitioner has submitted a consultation dated November 10, 2007 from The American Guild of Variety Artists. This consultation is too old to qualify. Also the guild has jurisdiction over "variety performers." The support personnel in the instant petition is a chef. A more appropriate labor organization may be UNITE HERE or other culinary workers union.

The petitioner was granted four weeks to submit a response to the RFE.

In a response dated December 21, 2010, the petitioner stated:

We have requested a new consultation from a labor organization with expertise in the area of the alien's skill. Please see attached cover letter regarding such request. Since the circumstance of the petitioner and beneficiary has not changed since last P1S filing, we expect the labor organization will issue a favorable consultation without any problem.

The petitioner attached evidence that it submitted a request for a new consultation from the AGVA on December 21, 2010.

The director denied the petition on January 3, 2011, concluding that the petitioner failed to submit a consultation from a labor organization with expertise in the area of the alien's skill, pursuant to 8 C.F.R. § 214.2(p)(4)(iv)(B)(1).

In denying the petition, the director acknowledged that the petitioner provided evidence of its efforts to obtain a new consultation; however, the director once again emphasized that the AGVA is not a labor organization with expertise in the area of the beneficiary's skill, which is the culinary field.

On appeal, counsel submits a copy of the consultation it requested from the AGVA. The consultation is dated January 17, 2011 and indicates that the beneficiary meets the current regulations in the P-1S category. Counsel does not acknowledge the director's finding that the AGVA is not a labor organization with expertise in the area of the beneficiary's skill.

Upon review, the petitioner has not satisfied its evidentiary burden to submit an appropriate labor consultation. The AGVA maintains the following statement on its public web site: " AGVA's jurisdiction covers musical

and variety performers in live performances in non-book revues, comedians, skaters, circus acts, certain lecture and speaking artists, certain cabaret and night club performers, and sports-people appearing in noncompetitive entertainment shows."¹

The beneficiary in this matter is a chef who is not directly involved in the live performance of the principal P aliens. Accordingly, the director properly determined that the AGVA is not a labor organization with expertise in the beneficiary's skill area. Moreover, the petitioner fails to acknowledge the director's determination that the AGVA is not the appropriate labor organization to be consulted in this matter, and simply submits a new AGVA consultation in support of the appeal. Accordingly, the appeal will be dismissed.

The AAO acknowledges that the petitioner appears to have provided an AGVA consultation in support of a previously approved petition 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'r. 1988). In this matter, the director gave notice to the petitioner that an AGVA consultation will not satisfy the consultation requirement given that the beneficiary's area of expertise is in the culinary field, and gave the petitioner an opportunity to correct the deficiency. The petitioner opted to submit a new AGVA consultation rather than to follow the guidance provided by the director.

USCIS 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'r. 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).

B. Status of P-1 Aliens

The remaining issue addressed by the director is whether the petitioner established that the beneficiary is eligible for the requested one year extension of his P-1S status through November 12, 2011.

Pursuant to 8 C.F.R. § 214.2(p)(4)(iv)(C), an essential support alien may be granted P-1 classification based on a support relationship with an individual P-1 athlete, P-1 athletic team, or a P-1 entertainment group. The regulation at 8 C.F.R. 214.2(p)(8)(iii)(E) provides that petitions for essential support personnel to P-1, P-2 and P-3 aliens shall be valid for a period of time to be necessary to complete the event, activity or performance for which the P-1, P-2, or P-3 alien is admitted, not to exceed 1 year. Therefore, status of the P-1S essential support personnel is contingent upon approval of the principal's P-1 status for the purposes of accompanying the principal to assist in the performance.

¹ See website of American Guild of Variety Artists, "Immigration Performer Visas: Visa Union Consultations for Artists Coming to the U.S.A. to Perform" <<http://www.agvausa.com/immigrationform.html>> (accessed on November 10, 2011, copy incorporated into record of proceeding).

The regulation at 8 C.F.R. § 214.2(p)(14)(i) states the following, in pertinent part, with respect to requests for extensions of stay:

Extension procedures. The petitioner shall request extension of the alien's stay to continue or complete the same event or activity by filing Form I-129 The petitioner must also request a petition extension. The extension dates shall be the same for the petition and the beneficiary's stay Even though the requests to extend the petition and the alien's stay are combined on the petition, the Director shall make a separate determination on each.

There is no appeal from the denial of an application for extension of stay filed on Form I-129. 8 C.F.R. § 214.1(c)(5).

At the time of filing the petition, the petitioner requested that the beneficiary be granted a one-year extension of his P-1S status from November 13, 2010 until November 12, 2011. The petitioner provided copies of approval notices for four principal P-1 aliens, indicating that their status would expire on January 5, 2011. The petitioner indicated that the principal aliens are in the process of extending their status and provided the receipt number for a pending Form I-129 Petition.

In the request for evidence issued on November 24, 2010, the director requested that the petitioner provide evidence that the primary P-1 aliens have a valid P-1 status to cover the entire period of requested P-1S validity.

In response, the petitioner indicated that the petition filed on behalf of the P-1 aliens was denied, and that an appeal of the matter was pending. The petitioner requested that USCIS withhold a decision on this matter until a decision is reached on the appeal filed on behalf of the principal aliens.

The director noted that "no evidence has been presented which indicates that the principal alien performing group has been granted an extension of stay," and denied the petition on this additional ground.

On appeal, the petitioner submits evidence to establish that the petitioner filed a timely appeal in response to the denial of the Form I-129 petition filed to request an extension of status on behalf of the principal P-1 aliens.

Upon review, the AAO notes that, if the instant petition were otherwise approvable, the appropriate action would be to grant the beneficiary an extension of stay from November 13, 2010 through January 5, 2011. Because the director makes a separate determination with respect to the petition and the extension of stay, the director should not have denied the underlying petition based on a failure to establish that the principal aliens had been granted an extension of status for the entire requested validity period of the instant petition.

Nevertheless, as the director denied the petition on a separate ground, the petition was not approvable. As such, no extension of the petition can be granted, and it would serve no useful purpose to await the outcome of the principal aliens' appeal of the denial of the P-1 petition extension request.

C. The Beneficiary's Qualifications as Essential Support Personnel

Beyond the decision of the director, a remaining issue to be addressed is whether the petitioner established: (1) that the beneficiary's services are an integral part of the performance of the petitioner's P-1 performers and essential to their successful performance; and (2) that the beneficiary's support services could not readily be performed by a United States worker.

In a letter dated November 11, 2010, the petitioner described its organization and its activities, noting that it is the first North American branch of the Shaolin Temple of China, and was designed to carry on the temple's 1,500-year old traditions and training disciplines in the martial arts of Kung Fu, Tai Chi and Chi Kung. The petitioner stated that the beneficiary, as [REDACTED] "is an integral part of the team and is irreplaceable in their contribution to fulfill all our contractual obligations."

The petitioner further explained that all martial monks of the Shaolin Temple of China practice Chan Buddhism. The petitioner noted the following dietary requirements:

East Asian "Buddhist" cuisine differs from Western vegetarian cuisine in one aspect, that is avoidance of killing plant life. Buddhist vinaya for monks and nuns prohibit harming of plant. Therefore, strictly speaking, no root vegetables . . . are to be used as this will result in death of vegetables. Instead, vegetables such as beans or fruits are used. However, this stricter version of diet is often practiced only on special occasion. Some Mahayan Buddhists in China and Vietnam specifically avoid eating strong-smelling plants such as onion, garlic, chives, shallot and leek, and refer to these as 'Five Acrid and Strong Smelling Vegetables' or 'Five Spices' as they tend to excite senses.

Because the vegetarian cuisine in USA often use onion and garlic, they are not suitable for the martial artists who are also Buddhists from Shaolin Temple of China. Therefore it is essential from a religious aspect to have the cooks directly from Shaolin Temple of China to prepare the East Asian Buddhist cuisine for the principal.

[The petitioner] was established as an official oversea affiliate of Shaolin Temple of China. Because monks of [the petitioner] are directly from Shaolin Temple in China, their religion and health require them to eat special Buddhist cuisine. This kind of diet is also important to their martial arts practice.

The petitioner submitted a letter from [REDACTED] who stated that the beneficiary worked at the temple as a chef from January 2005 until September 2007, where he cooked vegetarian food for the monks of the temple daily.

The petitioner also submitted a letter dated September 10, 2010 from [REDACTED], a Chinese martial artist, coach and judge. He states, in relevant part:

I also know that Buddhist cuisine in Shaolin Temple of China is rather strict. Not only animals cannot be killed, plants also cannot be killed. In another word, no root vegetables (such as potatoes, carrots or onion) are to be used as this will result in death of vegetables. Instead,

vegetables such as beans or fruit are used. This is rather unique but is essential for the monks to practice Shaolin Kung Fu and Chan.

concludes that "the supporting chef is essential" to the success of the principal Shaolin performers.

The petitioner submitted a second letter from [REDACTED], who states: "I could testify that Buddhists in Shaolin Temple of China specifically avoid eating strong-smelling plants such as onion, garlic, chives, shallot and leek because they tend to excite senses." [REDACTED] notes that the P-1 monks require "special East Asian Buddhist Cuisine."

The petitioner submitted several articles from *Wikipedia* and other Internet sources regarding Buddhist cuisine and dietary restrictions. The petitioner also submitted evidence that the beneficiary completed a four-month cooking school course in order to be certified as a Chinese Food Chef in 1999.

Finally, the petitioner's evidence included an article titled "Shaolin Temple USA" published in the February 2009 issue of *Kung Fu-Tai Chi* magazine. The article includes an interview with the petitioner's director and headmaster. The article indicates that the director and several monks reside at the petitioner's facilities, where, "under [the director and headmaster's] direction, the monks cook their own food and adhere to a strict vegetarian diet." Upon review, the AAO finds that the petitioner has failed to demonstrate that the beneficiary provides services that are an integral and essential part of the performance of the petitioner's P-1 martial arts performers, or that the beneficiary's services cannot be readily performed by a U.S. worker. *See* 8 C.F.R. § 214.2(p)(3).

The petitioner's evidence indicates that the petitioner's monks, the P-1 visa holders, "cook their own food," information which appears to be counter to the petitioner's request for the ongoing essential support services of a chef. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

While a vegetarian diet with certain food restrictions appears to be important to the monks from a religious standpoint, it is unclear why the food would need to be prepared by a Chinese chef, or exactly how the cuisine is integral to their martial arts performances. Any qualified chef would reasonably be able to account for dietary restrictions. Other than restrictions on root vegetables and five strong-smelling vegetables, the petitioner has not documented any peculiarities of "East Asian Buddhist Cuisine" that would place it beyond the expertise of a qualified U.S. worker trained in preparing vegetarian cuisine. For this additional reason, the petition cannot 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 Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis). 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.

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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 appeal is dismissed.