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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

D9



DATE: NOV 17 2011 Office: CALIFORNIA SERVICE CENTER FILE: [REDACTED]
IN RE: Petitioner: [REDACTED]
Beneficiaries: [REDACTED]

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

The petitioner filed the nonimmigrant petition seeking to employ 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 artists or entertainers coming to the United States to perform under a culturally unique program. The petitioner states that it operates a Chinese martial arts teaching and performance company. The petitioner seeks to employ the beneficiaries as Martial Arts Instructors/Performers for a period of one year.

The director denied the petition, concluding 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 asserts that there is no appropriate labor organization in the field of Chinese martial arts in the United States. Nevertheless, counsel submits a written consultation from the American Guild of Variety Artists (AGVA) in support of the appeal, while maintaining that this organization is not a labor organization in the beneficiaries' field.

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.

Congress did not define the term "culturally unique," leaving that determination to the expertise of the agency charged with the enforcement of the nation's immigration laws. By regulation, the Immigration and Naturalization Service (now U.S. Citizenship and Immigration Services (USCIS)), defined the term at 8 C.F.R. § 214.2(p)(3):

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 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. *Consultation with a Labor Organization*

The sole issue addressed by the director is whether the petitioner submitted a written consultation from a labor organization, as required by 8 C.F.R. § 214.2(p)(2)(ii)(D).

Pursuant to 8 C.F.R. § 214.2(p)(7)(i)(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. 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. 8 C.F.R. § 214.2(p)(7)(i)(E).

The petitioner has offered the beneficiaries positions as martial arts instructors/performers in the field of Chinese martial arts. The petitioner indicates that they will serve as coaches for martial arts tournaments and performances; as martial arts instructors in kung fu and other self-defense techniques; and as martial arts choreographers and instructors at various exhibitions and competitions.

The petitioner indicated on the Form I-129 that it had obtained the required written consultation. It submitted an "advisory opinion" from [REDACTED] which is described as "a professional organization for martial art masters in the United States." The letter states that the organization has no objection to the approval of a P-3 visa petition on behalf of the beneficiaries.

In response to the RFE, the petitioner submitted an "expert opinion" from [REDACTED] of the USA O-Mei Kung Fu Academy and [REDACTED], which he describes as "a professional organization for martial arts masters in North America."

The director denied the petition on December 9, 2010, concluding that the petitioner failed to submit a written consultation from an appropriate labor organization. The director acknowledged the letter from [REDACTED] but emphasized that there is no provision in the regulations governing the P-3 classification that allows for the substitution of an individual or group "peer review" attestation in lieu of a labor consultation. The director further found that the petitioner failed to meet its burden to establish that an appropriate labor organization does not exist, pursuant to 8 C.F.R. § 214.2(p)(7)(F).

On appeal, counsel for the petitioner states: "As we stated clearly in our initial petition, there is NO appropriate labor organization in the field of Chinese martial arts in the United States." Nevertheless, the petitioner submits a favorable consultation from the American Guild of Variety Artists (AGVA) in support of the appeal.

Upon review, the petitioner has not overcome the grounds for denial. Contrary to counsel's assertions, the petitioner made no attempt to establish that there is no appropriate labor organization exists, either at the time of filing or in response to the RFE. The director provided the petitioner 30 days to obtain a consultation and the petitioner did not attempt to obtain the consultation until after the denial of the petition. Further, the petitioner's response to the RFE included no arguments or evidence pertaining to the lack of an appropriate labor organization. Therefore, the petitioner did not submit evidence to meet the labor consultation requirement, or evidence to qualify for an exemption from the requirement.

The petitioner now submits a consultation from the AGVA in support of the appeal. 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

Based on the limited evidence submitted with the petition, it appears that the beneficiaries may be performing a combination of athletic-oriented coaching and competitive duties, as well as performances for entertainment purposes, such that they have been considered by the AVGA to be "sports-people appearing in noncompetitive entertainment shows."

Regardless, the regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The 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).

Where, as here, 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); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal. Consequently, the appeal will be dismissed.

B. Culturally Unique Performance

Beyond the decision of the director, a remaining issue is whether the petitioner established that the beneficiary possesses culturally unique skills by submitting the evidence required under 8 C.F.R. § 214.2(p)(6)(ii). Specifically, the regulation at 8 C.F.R. § 214.2(p)(6)(ii) requires that the petitioner establish that the beneficiary's performance or art form is culturally unique through submission of affidavits, testimonials and letters, or through published reviews of the beneficiaries' work or other published materials.

1. Affidavits, testimonials or letters from recognized experts

The regulation at 8 C.F.R. § 214.2(p)(6)(ii)(A) requires the petitioner to submit 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.

At the time of filing, the petitioner submitted an "advisory opinion" from [REDACTED], which is described as "a professional organization for martial arts masters in the United States." [REDACTED] states that he believes that the petitioner is engaged in a culturally unique martial

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).

arts program and that the beneficiaries are well-qualified as Martial Arts Instructors/Performers. He concludes by stating that he has "no objection" to the approval of the P-3 petition.

The only other letter in the record is the above-referenced letter from [REDACTED] who states:

After reviewing the references and documents presented, I can attest to the authenticity of [the beneficiaries'] skills in performing in a culturally unique program. It is my opinion that the petitioner is engaged in culturally-unique martial arts program. The beneficiaries are qualified Chinese martial arts instructors and performers. I have no objection to USCIS issuing P-3 visas to these Chinese martial arts masters.

Upon review, both of these letters are lacking in probative value and specificity with respect to the beneficiaries' culturally unique skills. Further, the AAO notes that the persons providing testimonial evidence have not fully established the basis of their knowledge of the beneficiaries' skill. [REDACTED] indicates that he reviewed "the references and documents presented," and [REDACTED] indicates that he reviewed "credentials and documentation." Therefore, the letters submitted at the time of filing and in response to the request for evidence fail to establish the manner in which the authors gained knowledge of the beneficiaries' skill and fail to reference any culturally unique aspects of the beneficiaries' Chinese martial arts performance.

USCIS may accept expert opinion testimony. USCIS is, however, ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought; the submission of expert opinion letters is not presumptive evidence of eligibility. The admissibility of and weight to be accorded expert testimony may vary depending on such factors as the extent of the expert's qualifications, the relevance of the testimony, the reliability of the testimony and the overall probative value to the specific facts at issue in the case. *See Matter of D-R-*, 25 I&N Dec. 445, 460 n.13 (BIA 2011)(citing Fed. R. Evid. 702).

Here, for the reasons discussed above, the expert opinion testimony is lacking in probative value, as the letters do not assist USCIS in determining whether the beneficiaries in this matter possess skills in performing, presenting, coaching, or teaching the unique or traditional art form

While the AAO acknowledges that kung fu or wushu is a Chinese martial art, simply establishing that the beneficiaries are skilled practitioners trained in China is not sufficient to demonstrate their eligibility for this classification. Here, the letters submitted in support of the petition cannot be deemed probative of the "culturally unique" nature of the beneficiary's performance, and therefore, the evidentiary criterion at 8 C.F.R. § 214.2(p)(6)(ii)(A) has not been met.

The petitioner has submitted no evidence which, in the alternative, meets the regulatory criterion at 8 C.F.R. § 214.2(p)(6)(ii)(B), which requires the petitioner to submit documentation that the performance of the alien or group is culturally unique, as evidenced by reviews in newspapers, journals, or other published materials.

The petitioner has submitted articles regarding Chinese martial arts from *Wikipedia* and an article titled "An Introduction to Chinese Martial Arts" by [REDACTED]. The regulation requires the petitioner to submit evidence that the *beneficiaries'* performance is culturally unique, as evidenced by reviews in newspapers, journals or other

published materials. The record contains no published materials that are specific to the individual beneficiaries and their performance of the claimed culturally unique art form.

The petitioner must establish that the instant beneficiaries' performance, and the specific artistic or entertainment events for which their services are sought, are culturally unique. The petitioner bears the burden of establishing through submission of evidence that the beneficiaries' performances across all events and activities is in fact unique to a particular country, nation, society, class, ethnicity, religion, tribe or identifiable group of persons with a distinct culture. 8 C.F.R. § 214.2(p)(3). Vague references to the "Chinese martial arts" tradition are insufficient to establish the beneficiary's eligibility. As the petitioner has not submitted evidence to satisfy the regulatory criterion at either 8 C.F.R. § 214.2(p)(6)(ii)(A) or (B), 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.