U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted] **Public Copy**

File: [redacted] Office: Nebraska Service Center Date: APR 27 2001

IN RE: Petitioner: [redacted]
Beneficiary:

Petition: Immigrant Petition for Alien Worker as an Alien of Extraordinary Ability Pursuant to Section 203(b)(1)(A) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(1)(A)

IN BEHALF OF PETITIONER:

[redacted]

identification data deleted to prevent clearly unwarranted invasion of personal privacy.

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

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Acting Director
Administrative Appeals Office

 [redacted]

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center. The center director treated an untimely appeal as a motion, and reopened and again denied the petition. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a Chinese restaurant. It seeks to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(1)(A), as an alien of extraordinary ability in the arts. The director determined the petitioner had not established that the beneficiary has earned the sustained national or international acclaim necessary to qualify for classification as an alien of extraordinary ability.

Section 203(b) of the Act states, in pertinent part, that:

> (1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):
>
> > (A) Aliens with Extraordinary Ability. -- An alien is described in this subparagraph if --
> >
> > > (i) the alien has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation,
> > >
> > > (ii) the alien seeks to enter the United States to continue work in the area of extraordinary ability, and
> > >
> > > (iii) the alien's entry to the United States will substantially benefit prospectively the United States.

As used in this section, the term "extraordinary ability" means a level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor. 8 C.F.R. 204.5(h)(2). The specific requirements for supporting documents to establish that an alien has sustained national or international acclaim and recognition in his or her field of expertise are set forth in the Service regulation at 8 C.F.R. 204.5(h)(3). The relevant criteria will be addressed below. It should be reiterated, however, that the petitioner must show that the beneficiary has sustained national or international acclaim at the very top level.

This petition seeks to classify the beneficiary as an alien with extraordinary ability as a chef. [redacted] proprietor of

the petitioning restaurant, states that the beneficiary "is one of the top cooks in China."

The regulation at 8 C.F.R. 204.5(h)(3) indicates that an alien can establish sustained national or international acclaim through evidence of a one-time achievement (that is, a major, international recognized award). Barring the alien's receipt of such an award, the regulation outlines ten criteria, at least three of which must be satisfied for an alien to establish the sustained acclaim necessary to qualify as an alien of extraordinary ability. The petitioner has submitted evidence which, counsel claims, meets the following criteria.

Evidence of the alien's participation, either individually or on a panel, as a judge of the work of others in the same or an allied field of specification for which classification is sought.

A 1991 certificate identifies the beneficiary as "a member of the Chef Assessment Committee belonging to the Office of Workers' Skills Assessment of the Bureau of Labor Administration of Kaiping County." According to a certificate from the Guangdong Province Bureau of Labor Administration, in 1994 the beneficiary "reached the requirement for the Beginning Level Examiner for Chinese Cuisine Chefs." Counsel indicates that these certificates establish the beneficiary's service as a judge of the work of other chefs. It remains that this work was at the county and provincial levels, rather than national or international. It appears from the evidence that every county and province has examiners' boards of this kind, for the routine issuance of employment credentials to qualified chefs. The petitioner has not shown that national or international acclaim attaches to positions in the particular county or province where the beneficiary served.

Evidence that the alien has commanded a high salary or other significantly high remuneration for services, in relation to others in the field.

Ms. Liang asserts that the beneficiary's "current monthly salary of 3,500 Yuan is an indication of his level of expertise in a country where a cook's salary is 857 Yuan." The petitioner submits documentation from the International Labour Office to establish that male cooks in China earned an average of 856.9 Yuan per month in 1996, and that the Tan Jiang Restaurant paid the petitioner 3,500 Yuan per month. The International Labour Office documentation provides only a mean wage figure, rather than a maximum and minimum range which would more clearly indicate the petitioner's standing throughout the field rather than simply in relation to a single average.

The petitioner was not only a chef, but a supervisor at the aforementioned restaurant. The petitioner also held positions with various local and provincial oversight organizations and committees, which could also affect his level of compensation. The evidence submitted is not sufficient to establish that the petitioner is among China's highest-paid chefs.

Beyond the above two criteria, the petitioner has listed various positions which the beneficiary has held, but there is no objective evidence to show that these positions are among the most prestigious in China or that they otherwise establish the extraordinary ability or sustained acclaim of the chef holding those positions. Similarly, the petitioner has failed to establish the significance of government certificates which show the beneficiary's "technical rank." These documents appear to represent little more than licenses or comparable employment credentials from China's Ministry of Labor.

On October 2, 1998, the director informed the petitioner that the documentation submitted with the petition was not sufficient to establish the beneficiary as an alien of extraordinary ability. The director clearly set forth the criteria outlined in section 203(b)(1)(A) of the Act, and specified that the Service has defined "extraordinary ability" as "a level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor."

In response to this letter, the petitioner has submitted a certificate showing that the beneficiary has worked as a cook at China's embassies in Guinea and North Yemen. Counsel asserts that, along with the previously submitted evidence, the fact that the beneficiary "has been . . . sent to work as a cook in foreign countries" serves to "establish that [the beneficiary] is one of the few individuals who have risen to the very top as far as expertise in Chinese cuisine goes." This assertion relies upon the entirely unproven assumption that only China's top chefs are posted to embassies.

The director denied the petition on February 8, 1999. The petitioner submitted an appeal which, owing to procedural omissions, was not properly filed until March 18, 1999. Because this appeal was not timely filed, the director treated it as a motion pursuant to 8 C.F.R. 103.3(a)(2)(v)(B)(*2*). In support of this initial appeal, the petitioner submits a certificate which, according to counsel, "states that [the beneficiary] won several culinary awards for Chinese cooking." The reference to awards suggests that the evidence is intended to satisfy an additional regulatory criterion:

Documentation of the alien's receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor.

A certificate from Kaiping City Tanjiang Mansions states that, between 1986 and 1989, the beneficiary "won culinary awards for Chinese Cooking on several occasions." This extremely vague assertion cannot satisfy the plain wording of this criterion. The certificate does not even identify the "culinary awards," let alone establish that the awards are national or international in character. The certificate indicates that the beneficiary "was one of the finest cooks at Tanjiang Mansions and the city of Kaiping" but offers no indication of the beneficiary's acclaim or recognition beyond that one city.

The director determined that the petitioner had not overcome the grounds of denial, and again denied the petition on May 25, 1999. On appeal, counsel requests 45 additional days to submit further evidence, because the petitioner is "still experiencing difficulties obtaining from China the necessary evidence and documentation in support of the appeal." Counsel does not identify or explain the nature of the evidence which the petitioner seeks to obtain from China. In the nearly two years since the petitioner requested additional time, the only new submissions in the record are change of address notices from counsel and a brief which includes no new evidence.

In the brief, counsel argues that the petition must be approved because the beneficiary "earns a significantly high salary in relation to other cooks in China, has received national awards in cooking, and has been teaching and judging the work of other cooks in China." As noted, the beneficiary is not only a cook, but also a supervisor, teacher, and member of evaluation committees, all of which could be expected to increase the beneficiary's wage. The petitioner has not shown that the beneficiary earns more than other chefs with comparable duties.

Counsel protests that the director has compared the beneficiary's salary to that of cooks in the United States, rather than in China. The director's remarks, however, were directed not towards the beneficiary's salary in China, but the salary which the petitioner has stated it intends to pay the beneficiary. The petitioner, a restaurant which employs four people including the proprietor, has repeatedly stated its intent to pay the beneficiary $18,000 per year, whereas according to figures cited by the director, executive chefs earn a median wage between $37,000 and $43,000, depending on the size of the employing establishment. If the beneficiary is indeed one of the most acclaimed and highly paid chefs in China, it is not unreasonable to question why his prospective employer, which purports to require a chef of extraordinary ability, intends to pay

the beneficiary a wage less than half of the median salary for executive chefs.

As discussed above, the beneficiary's work as a judge has never risen to the national level, and the petitioner has not shown that county or provincial organizations require a national reputation for evaluators, or that county or provincial positions of this kind lead to national acclaim or recognition. The beneficiary's posts appear to be routine evaluator positions, ensuring that only properly qualified chefs receive employment certification.

Counsel states that the regulation does not require that the beneficiary act as a judge at any particular level; it only requires that he has acted as a judge. The stated intent of the regulatory criteria, however, is to establish sustained national or international acclaim. Clearly, the beneficiary's activities must be at a level concomitant with or conducive to such acclaim.

To illustrate the fallacy in counsel's logic, we refer to another of the regulatory criteria:

> *Published materials about the alien in professional or major trade publications or other major media, relating to the alien's work in the field for which classification is sought.*

If a restaurant reviewer from a major publication wrote a review of a meal which a given chef had prepared, and deemed the meal to be the worst, most badly-prepared meal ever served to her, the resulting review, however scathing, would still be published material about the chef in major media. Plainly, however, such an article would not establish that the chef in question is nationally acclaimed as one of the very top chefs.

With regard to the beneficiary, he has not been invited to serve as a judge for major competitions, nor has he served on the admissions boards of top cooking schools; he has taken examinations to serve on local evaluation committees. By counsel's logic, every member of every such committee meets the criterion regarding acting as a judge. Furthermore, every cooking teacher meets the criterion as well because every teacher judges the work of his or her students. The purpose of the regulation is to distinguish the very best in the field from the vast majority of their peers; defining the criteria so broadly as to include whole classes or specialties weakens the criterion beyond any useful application.

Counsel maintains that the beneficiary "satisfies the INS's own requirements by providing evidence indicating that he has received a nationally recognized award." The single document which refers to "awards" never states or implies that the awards are national in character. The assertions of counsel do not constitute evidence. Matter of Laureano, 19 I&N Dec. 1, 3 (BIA 1983); Matter of

Obaigbena, 19 I&N Dec. 533, 534 (BIA 1988); Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 506 (BIA 1980).

The record establishes that the beneficiary is a successful chef with a long and varied career behind him. We cannot, however, conclude from the available evidence that the beneficiary enjoys sustained national acclaim as one of the best-known chefs throughout China.

The documentation submitted in support of a claim of extraordinary ability must clearly demonstrate that the alien has achieved sustained national or international acclaim, is one of the small percentage who has risen to the very top of the field of endeavor, and that the alien's entry into the United States will substantially benefit prospectively the United States.

Review of the record, however, does not establish that the beneficiary has distinguished himself as a chef to such an extent that he may be said to have achieved sustained national or international acclaim or to be within the small percentage at the very top of his field. The evidence indicates that the beneficiary shows talent as a chef, but is not persuasive that the beneficiary's achievements set him significantly above almost all others in his field. Therefore, the petitioner has not established eligibility pursuant to section 203(b)(1)(A) of the Act and the petition may not be approved.

The burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. Here, the petitioner has not sustained that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.