



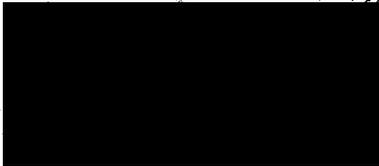
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U.S. Department of Justice

Immigration and Naturalization Service

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



File: EAC 00 016 50268

Office: Vermont Service Center

Date: 03 MAY 2002

IN RE: Petitioner:  
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:



Public Copy

INSTRUCTIONS:

This is the decision 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.

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 that 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 that 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, Director  
Administrative Appeals Office

**DISCUSSION:** The employment-based immigrant visa petition was denied by the Director, Vermont Service Center. The director rejected the petitioner's appeal as untimely,<sup>1</sup> but accepted it as a motion. The director reopened the petition and again denied it. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner 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 petitioner is a three-star restaurant, which indicated on the Form I-140 petition that it seeks to employ the beneficiary as a "sous chef (chef de cuisine)." The director determined the petitioner had not established 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.

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<sup>1</sup> Counsel maintains that the appeal was timely filed, as the director received it on the 33<sup>rd</sup> day as permitted by regulation. The appeal form, however, was not properly signed, and therefore the appeal had not been properly filed. The petitioner subsequently resubmitted the appeal form, now properly signed, but by that time the filing period had expired.

Counsel, in the initial submission, states that the petitioner seeks to classify the beneficiary as “a person of extraordinary ability whose services will serve the national interest.” The initial submission also refers repeatedly to a waiver of the job offer requirement. There is clearly some confusion, as counsel has combined elements of two distinct and non-overlapping classifications: extraordinary ability (relating to section 203(b)(1)(A) of the Act) and exceptional ability with a national interest waiver of the job offer requirement (relating to section 203(b)(2) of the Act). On balance, it is clear that the petitioner seeks to classify the beneficiary as extraordinary rather than exceptional, and we will therefore disregard extraneous references to the other classification, as the director has done.

The regulation at 8 C.F.R. 204.5(h)(3) states:

Initial evidence: A petition for an alien of extraordinary ability must be accompanied by evidence that the alien has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise. Such evidence shall include evidence of a one-time achievement (that is, a major, international recognized award), or at least three of the following:

- (i) Documentation of the alien's receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor;
- (ii) Documentation of the alien's membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields;
- (iii) 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. Such evidence shall include the title, date, and author of the material, and any necessary translation;
- (iv) 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;
- (v) Evidence of the alien's original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field;
- (vi) Evidence of the alien's authorship of scholarly articles in the field, in professional or major trade publications or other major media;
- (vii) Evidence of the display of the alien's work in the field at artistic exhibitions or showcases;

- (viii) Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation;
- (ix) Evidence that the alien has commanded a high salary or other significantly high remuneration for services, in relation to others in the field; or
- (x) Evidence of commercial successes in the performing arts, as shown by box office receipts or record, cassette, compact disk, or video sales.

Neither the petitioner nor counsel has offered any systematic explanation as to which of the above ten criteria the petitioner has satisfied. The initial submission consists primarily of a list of restaurants where the beneficiary has worked, supporting documentation from and about those restaurants, and documentation of the beneficiary's vocational training. These documents establish that the beneficiary is a fully trained and experienced chef, but they do not establish that the petitioner has earned sustained national or international acclaim as a top chef. Background evidence that establishes the reputation of a given restaurant does not in any way imply that the beneficiary shares the fame of a given restaurant simply by virtue of having worked there.

Also submitted with the initial petition were several witness letters. [REDACTED] co-proprietor of the petitioning restaurant, discusses the beneficiary's education and previous employment. Ms. Jammet asserts that the beneficiary has worked at many prestigious restaurants in Paris and New York, and that the beneficiary's "blend of superb managerial and technical skills have made him indispensable to our executive chef." Ms. Jammet asserts that the beneficiary is "nationally know[n] in France" but cites no evidence to support that claim.

[REDACTED] executive chef at the petitioning restaurant, states that the beneficiary's "creative talents are on a par with the great chefs" and that the beneficiary has "create[d] several outstanding dishes that have enhanced the reputation and prestige" of the petitioning restaurant. [REDACTED] states that the beneficiary "manag[es] the entire kitchen staff of 16 in my absence," which somewhat contradicts other assertions in the record that the management of the staff is among the beneficiary's routine duties, rather than something to be done in the absence of the executive chef. While [REDACTED] surely sincere in his personal assessment of the beneficiary as being "on a par with the great chefs," the statute demands "extensive documentation" to establish "sustained national or international acclaim." The high opinions of his superiors do not establish that the beneficiary has earned such acclaim outside of the restaurants where he has worked.

J.M. Bergognoux, chef-owner of the New York restaurant L'Absinthe (where the beneficiary worked from 1995 to 1997), states that the beneficiary "has already been recognized by his peers as an individual of extraordinary achievement, as evidenced by the last reviews of the restaurants he worked for." The record contains several very positive reviews of the petitioning restaurants, but the beneficiary's name does not appear in any of these reviews. Instead, the reviewers have credited Cyril Renaud. Thus, the reviews do not recognize the beneficiary in any way. Also, the

petitioner's "peers" are, presumably, other chefs rather than restaurant reviewers, and therefore a restaurant review would not show that the beneficiary has "been recognized by his peers."

██████████ who had been an executive chef and later a co-owner of the petitioning restaurant, states that the beneficiary has "become one of the most promising chefs of his generation in the United States. . . . [H]e is bound to play an important role in the training of American chefs in the culinary traditions of France." ██████████ subjective opinions regarding what we can expect from the beneficiary in the future does not demonstrate that the beneficiary has already earned sustained acclaim as one of the very top chefs in the nation. The assertion that the beneficiary is "one of the most promising chefs of his generation" suggests expectation for the future rather than demonstrable past achievement. The qualifier "of his generation" excludes from consideration older, more established chefs. To qualify for this highly restrictive visa classification, the beneficiary must be one of the top chefs in the country, not merely among his generation or age group (the beneficiary was 31 years old at the time of filing).

The record contains letters from other restaurant owners and managers who had employed the beneficiary in the past, but these letters are essentially reference letters rather than documentation of sustained acclaim. Many of the letters date from several years before the preparation and filing of the petition.

The beneficiary asserts, in a sworn affidavit, that he wants to establish "an innovative school or institute where cooking, the science of cooking, and related fields, such as nutrition, could be jointly explored." There is no evidence that the beneficiary has made any concrete progress toward this goal. Unrealized plans and goals do not demonstrate acclaim.

We note that a "sous chef" (the title repeatedly used in the record to refer to the beneficiary) is an assistant chef rather than a head chef; the record as originally constituted shows that the beneficiary reported to an "executive chef." The petitioner has not explained why it is that a nationally acclaimed chef would occupy a subordinate position at the petitioning restaurant, or how the beneficiary can be considered at the top of his entire field if he is not even the top chef at that one restaurant.

The director instructed the petitioner to submit additional evidence, stating that the initial submission did not establish sustained acclaim or extraordinary ability. In response, the petitioner submits additional letters and documents ██████████ states that the petitioner is a "true artist" who "has improved upon the highest standards of the French culinary tradition." ██████████ lists his own accomplishments, including national awards from the French government, hosting several award-winning television cooking programs, and writing columns for the New York Times and Food & Wine. A line of cookware bears his name. Mr. Pepin's achievements certainly establish his expertise in the field, but at the same time they set a standard for the kind of heights that a chef can reach at the very top of the field. Mr. Pepin's record appears to dwarf the beneficiary's record, and we cannot find that the beneficiary has reached the same level of acclaim that Mr. Pepin has reached. In order to establish national acclaim, the

beneficiary must do more than obtain a letter from Jacques Pepin; he must show that his own reputation is comparable to Mr. Pepin's.

A new letter from [REDACTED] reveals that [REDACTED] too, has received "the French government's highest honor in the food and agricultural field" and "the highest civilian and/or military award France can bestow." [REDACTED] identifies himself as "a member of the Maitres-Cuisiniers of France (a prestigious association of the very top French chefs)," but there is no indication that the beneficiary, himself a French chef, has been admitted into this association. As with Jacques [REDACTED] offers the personal opinion that the beneficiary is a top chef, while showing through his own achievements that the top of the field appears to lie considerably above the level the beneficiary has reached.

Lutèce chef André Soltner offers a similar letter with similar results. [REDACTED] states that the beneficiary confirmed his national reputation at "the much-publicized and acclaimed 40<sup>th</sup> anniversary" of the petitioning restaurant, by which time the beneficiary was the petitioner's executive chef. The record contains some documentation regarding this celebration. The petitioner celebrated its 40<sup>th</sup> anniversary in the autumn of 2000, nearly a year after the petition was filed, and six weeks after the director instructed the petitioner to submit further evidence of national acclaim. Evidence pertaining to this celebration cannot retroactively show that the beneficiary was eligible as of the November 1999 filing date, nor can the petitioner's March 2000 promotion of the beneficiary to executive chef or October 2000 certificate from the James Beard Foundation. A petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to Service requirements. See Matter of Izumii, I.D. 3360 (Assoc. Comm., Examinations, July 13, 1998), and Matter of Katigbak, 14 I&N Dec. 45 (Reg. Comm. 1971), in which the Service held that beneficiaries seeking employment-based immigrant classification must possess the necessary qualifications as of the filing date of the visa petition. If the petitioner believes that the beneficiary's circumstances have improved significantly since the initial filing of the petition, the proper course of action is to submit a new petition that can take those developments into account. We note that the media attention surrounding the anniversary of the petitioning restaurant appears to have been largely local rather than national.

The director denied the petition, acknowledging the beneficiary's "success as a chef" but finding that the beneficiary's overall achievements were not indicative of sustained national acclaim at the very top of the field. The initial appeal, which the director regarded as a motion because it was not properly filed until after the filing deadline, consisted of a brief from counsel, new letters, and copies of previously submitted exhibits. Counsel argues that the beneficiary has won "the favorable attention of three legendary chefs, actually icons, of classic French cuisine in America, [REDACTED] [sic], the three greatest names in classic French cuisine in America." As we have noted above, the beneficiary seeks a highly restrictive visa classification, more appropriate for the "icons" themselves than for lesser-known chefs whom those individuals happen personally to admire. The petitioner has not shown that he himself is among the "greatest names in classic French cuisine in America."

Counsel notes the "rare unanimity among experts" displayed by the three chefs' letters. We note that these three individuals do not represent the entire pantheon of French cuisine in the United States, and the petitioner could hardly be expected to submit letters which do not support the claim the petitioner intends to establish. Thus, the "unanimity" expressed in the three letters does not in any way prove or imply that every top French chef shares a similar opinion about the beneficiary.

Counsel cites the regulation at 8 C.F.R. 204.5(h)(4), which allows for the submission of "comparable evidence" beyond the ten criteria listed at 8 C.F.R. 204.5(h)(3). Counsel asserts that this regulation demonstrates an "allowance of flexibility for the petitioner's mode of evidence." Counsel contends that acclaim in the culinary arts is highly subjective and therefore not amenable to more empirical, objective means of measuring acclaim.

8 C.F.R. 204.5(h)(4), however, allows for the submission of "comparable evidence" only when the ten criteria of 8 C.F.R. 204.5(h)(3) "do not readily apply to the beneficiary's occupation." The record contains ample evidence that several of the criteria do, in fact, apply. To list a few examples, the record shows that the French government presents significant national awards to chefs; there exist exclusive associations for acclaimed chefs; and the most highly acclaimed chefs are the subject of substantial media coverage (including their own television series in some instances).

The bulk of counsel's appellate brief rests on the letters from the three famous chefs. Counsel appears to argue that these letters ought to take the place of the "extensive documentation" demanded by the statute and reflected in the regulations. Because many of the ten criteria do readily apply to the beneficiary's occupation, 8 C.F.R. 204.5(h)(4) does not apply here. The petitioner cannot invoke that regulation merely because the beneficiary, unlike the top figures in his field, is unable to meet at least three of the criteria as of the filing date.

André Jammet, co-proprietor of the petitioning restaurant, makes several arguments in a new letter. None of these arguments are persuasive. [REDACTED] observations about the reputation of his restaurant are beside the point; the restaurant was well established long before the beneficiary or Mr. Jammet were involved with it. The success of the restaurant's 40<sup>th</sup> anniversary gala cannot establish eligibility for a number of reasons, the primary reason being that it had not yet happened when the petition was filed. As noted above, a petitioner cannot file a petition in this classification before the beneficiary has earned acclaim, on the expectation that such acclaim is forthcoming at some future time. For the same reason, Mr. Jammet's assertion that the beneficiary is now the restaurant's highest-paid chef ever carries no weight. The beneficiary's salary was much lower at the time of filing. After the director requested evidence regarding that salary, the petitioner responded that the beneficiary had been promoted and his salary increased.

The statute and regulations do not allow for acclaim by association. The reputation of the beneficiary's employer and of three witnesses cannot, by osmosis, transfer a comparable reputation to the beneficiary or fully compensate for the beneficiary's failure to meet at least

three of the criteria set forth at 8 C.F.R. 204.5(h)(3). If it is the petitioner's contention that developments after the filing date have augmented the beneficiary's acclaim, then the proper course of action is to file a new petition because established case law, cited above, prevents those developments from retroactively qualifying the beneficiary for an earlier priority date.

The documentation submitted in support of a claim of extraordinary ability must clearly demonstrate that the alien has achieved sustained national or international acclaim and is one of the small percentage who has risen to the very top of the field of endeavor.

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 is a respected chef with a growing reputation, but is not persuasive that the beneficiary's achievements set him significantly above almost all others in his field at a national or international level at the time the petition was filed. 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.