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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: APR 26 2004

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)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, California Service Center. The petition is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks classification 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 culinary arts. 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 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 he has sustained national or international acclaim at the very top level.

This petition, filed on April 7, 2003, seeks to classify the petitioner as an alien with extraordinary ability as an executive pastry chef instructor. 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.

In his request for evidence (RFE) dated July 10, 2003, the director requested that the petitioner submit advisory opinions from "recognized organizations and/or recognized major academic or media organizations or institutions attesting" to the petitioner's qualifications and reputation of extraordinary ability. Counsel

noted in his response to the RFE that no advisory opinions had been offered with the petition because they were not required by the regulation to establish eligibility as an alien of extraordinary ability. Counsel is correct. While opinions from recognized national or international experts in the field would certainly help the petitioner's case, the regulation does not require that the petitioner submit certain forms of evidence in order to prove his case. The regulation does not require that the petitioner submit an advisory opinion as is required for the O nonimmigrant alien of extraordinary ability in the arts at 8 C.F.R. § 214.2(o)(5)(ii).

In his decision, the director's statement that the "submission of documentation to satisfy three or more of the criteria . . . does not in and of itself establish eligibility as an alien of extraordinary ability," is unclear and may be misleading. Clearly, if the petitioner submits evidence that satisfies three of the regulatory criteria, he will qualify for the visa classification. However, the petitioner must do more than submit evidence addressing at least three of the criteria. The evidence in support of each criterion must qualitatively satisfy the criterion.

The director also indicated that the petitioner must establish eligibility for visa classification preference by clear and convincing evidence. However, neither the statute nor the regulation establishes a clear and convincing standard as the burden of proof in these proceedings. The burden on the petitioner is to establish the alien's extraordinary ability with extensive documentation of sustained national or international acclaim.

Additionally, the director noted that the petitioner's field of endeavor is "worldwide," erroneously implying that the petitioner needs to establish sustained international acclaim. Notwithstanding this statement, however, the director correctly analyzed the petitioner's evidence as it relates to sustained national *or* international acclaim. We concur with the director's determination that the petitioner did not establish national or international acclaim in that he failed to establish that he meets at least three of the criteria enumerated in the regulation.

In his decision, the director questioned the petitioner's failure to supply an offer of employment from a United States employer and questioned the petitioner's failure to establish the reputation of potential U.S. employers. The statute requires that the alien prove he will continue working in his area of expertise in the United States. As the statute does not require an offer of employment to establish eligibility as an alien of extraordinary ability, the issue of the reputation of potential U.S. employers is irrelevant, and we withdraw the director's comments as they pertain to such employers.

While we note the deficiencies in the director's decision, we concur with his final analysis. CIS maintains the authority to affirm decisions that, although based on incorrect grounds, are deemed correct decisions on other grounds within the power of CIS to formulate. *See Helvering v. Gowran*, 302 U.S. 238 (1937); *Securities Comm'n v. Chenery Corp.*, 318 U.S. 80, 88 (1943); and *Chae-Sik Lee v. Kennedy*, 294 F.2d 231 (D.C. Cir 1961), *cert. denied*, 368 U.S. 926 (1961).

The petitioner, through counsel, has submitted evidence that, he claims, meets the following criteria.

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

The petitioner claims to meet this criterion based on his receipt of two awards at the 1991 National Restaurant Association's American Culinary Classic. As evidence, he submits photocopies of photographs of himself with medals around his neck and captioned with the statements that they are of him with the medals he won at the competition. Other photographs depict him at various stages of the competition. The record also contains a translation of a 1995 article from the *Wu Lu Mu Qi* newspaper entitled "Interview with China's top Western Pastry Style Chef." The translation provided does not contain an interview, but indicates that the petitioner won "medals" for two of his pastry creations at the 1991 National Restaurant Association's National Culinary championship. The article indicates that the competition consisted of 600 contestants. Photocopies of several pictures that are annotated "Video Capture from Chengdu Television Station" are apparently of an interview with the petitioner. The annotations accompanying the pictures indicate that the petitioner won two medals in a world culinary contest in 1991. No evidence establishes the authenticity of the "video capture." Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Although the newspaper article provides some evidence of the awards, the petitioner provides no primary evidence that he won the awards from the National Restaurant Association, and provides no evidence that the awards are nationally or internationally recognized awards for excellence.

The petitioner also submitted evidence that he had won a 1997 gold medal in the Yu Lan Cup special technology pastry contest and a 1998 first place award in the Wu Lon Cup pastry contest. The Sichuan Food Industry Baking Association presented both awards. These appear to be local or provincial awards, and not nationally or internationally recognized awards for excellence.

Counsel also indicates that the petitioner won a 1999 gold medal at the National Pastry Competition held by the Sichuan Food Industry Pastry Association and a 2002 ACBA Pastry and Restaurant Management Award. However, counsel submits no evidence of these awards. As noted above, going on record without supporting documentation is insufficient to meet the burden in this proceeding. *Matter of Treasure Craft of California, supra.*

The evidence does not establish that the petitioner meets this criterion.

> *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.*

To demonstrate that membership in an association meets this criterion, the petitioner must show that the association requires outstanding achievement as an essential condition for admission to membership. Membership requirements based on employment or activity in a given field, minimum education or work experience, standardized test scores, grade point average, recommendations by colleagues or current members, or payment of dues do not satisfy this criterion as such requirements do not constitute outstanding achievements. The overall prestige of a given association is not determinative. The issue is membership requirements rather than the association's overall reputation.

The petitioner submits evidence that he is a "distinguished" member of the All-China Bakery Association (ACBA). Although counsel states that the ACBA is the "most prestigious pastry and bakery association in

China, whose membership is limited to the top professionals," he submits no evidence of the criteria for selection to membership in the ACBA. The assertions of counsel are not evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The petitioner also claims to be an honorary member of the National Restaurant Association, an association whose purpose is to promote the interest of the restaurant industry through lobbying and publicity. The record does not reflect that membership in the National Restaurant Association requires outstanding achievement. A review of the association's website does not indicate any achievement requirements. Furthermore, the site does not indicate that the association has an "honorary" membership category.[1]

> *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.*

In order to meet this criterion, published materials must be primarily about the petitioner and be printed in professional or major trade publications or other major media. To qualify as major media, the publication should have significant national distribution and be published in a predominant language. Some newspapers, such as the *New York Times*, nominally serve a particular locality but would qualify as major media because of a significant national distribution.

As evidence of this criterion, the petitioner submitted a 1996 article from the *Market Window* newspaper, which features a photograph identifying the petitioner. The brief article indicated that the petitioner's bakery created the "award winning Fruit Cake during the Chinese new year." A 1995 article in the *Business Market* newspaper reports that the petitioner's new bakery will provide competition in the city of Wu Lu Mu Qi. The *Wu Lu Mu Qi* article discussed above indicates that the petitioner is considered the leading Western pastry chef in China. The petitioner submits no evidence that these articles appeared in major media, or major trade or professional media as required by this criterion.

As indicated above, the petitioner submits photocopies of photographs that are identified as "video captured" scenes from an interview done on the Chengdu television station. Neither the date of the interview nor the subject matter of the interview is identified. The evidence also includes scenes from a "video capture" that is identified as a television special, apparently about the petitioner and his restaurant. The date of the video is not identified and the authenticity of the photographs is not established. Nothing in the record establishes that the petitioner meets this criterion.

> *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.*

Counsel asserts that the petitioner has judged many culinary competitions during his career. He states that the petitioner judged the Zhi Jin Cup Special Pastry Technology contest for the Sichuan Food Industry Baking Association in 1998. The record contains a document accompanied by what appears to be a summarized translation. The translation does not identify the date of the document and states only that the petitioner was

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[1] *See* www.restaurant.org.

"offered" a position as judge of the contest. No evidence that the petitioner actually participated as a judge in the contest is in the record.

Counsel also asserts that while at the Sichuan Culinary Arts College and the ChongQing University, the petitioner judged competitions at the Guangzhou Li Du Hotel, the Ning Yuan Restaurant, the Liu Hua Hotel, and the Dong Fan Hotel. As evidence, counsel submits a "certification" from the Guangzhou Li Du Hotel stating that the petitioner was an advanced culinary instructor at the Guangzhou Li Du Hotel through 1992 and "judged many contests." The statement does not identify a starting date for the petitioner's tenure at the hotel and does not specify the types or numbers of contests he "judged." Further, as an instructor, his job duties would have entailed viewing and judging the works of his students. Fulfillment of one's duties does not, without more, indicate eligibility under this criterion. There is no evidence in the record showing that the petitioner was the judge of contests at the other establishments named by counsel.

A statement labeled "Sichuan Vegetable Service Company" appears to be a synopsis of the itinerary of the members of the Chinese delegation that participated in the cooking contest in 1991. The statement indicates that the petitioner was chosen to be one of the "leaders" of a culinary contest. The identity of the author of this statement is unknown, and the statement does not establish that the petitioner participated as a judge in a culinary contest.

The evidence does not establish that the petitioner meets this criterion.

Evidence of the alien's original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field.

Counsel asserts that the petitioner satisfies the requirements of this criterion based on his awards at the 1991 National Restaurant Association's National Culinary world championships. During this competition, counsel states that the petitioner won awards for his two "original masterpieces." As discussed above, the evidence is not sufficient to establish the petitioner's receipt of the awards he claims. Nevertheless, counsel submits no other evidence of the pastries for which the petitioner purportedly won awards. Counsel also presents no evidence of how those pastries have been a contribution of major significance to the culinary arts, nor does he present evidence of any other contribution of major significance made by the petitioner.

Evidence of the display of the alien's work in the field at artistic exhibitions or showcases.

Counsel claims that the petitioner meets this criterion based on the "display" of his work in the 1991 National Restaurant Association's National Culinary championship and at his restaurant. This claim is without merit. The petitioner owns his restaurant and it is the norm for pastry shops to display their goods to be sold. Further, to be judged, virtually every thing entered in competition must be displayed. The petitioner has not demonstrated how the display of his work at his restaurant or in a competition is beyond the norm, or is indicative of national or international acclaim. The wording of this criterion strongly suggests it is for visual artists such as sculptors and painters. The petitioner has not submitted any evidence that indicates that he meets criterion.

Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation.

To meet this criterion, the petitioner must show that he performed a leading or critical role for the organization or establishment and that the organization or establishment enjoys a distinguished reputation.

Counsel states that the petitioner meets this criterion based on his work as a pastry instructor and culinary competition judge at the Li Du Hotel, the Ning Yuan Restaurant and the Dong Fan Hotel. Counsel submitted no evidence of the petitioner's employment at the Ning Yuan Restaurant or the Dong Fan Hotel. The restaurant at the Guangzhou Li Du Hotel states simply that the petitioner was a culinary instructor at the restaurant, that he gave "high presentations, received awards, and judged contests." A statement from the Sichuan Food Training Association certifies that the petitioner was a professor of Sichuan food advanced training from 1984 to 1985. The Guangzhou Success Baking School invited the petitioner to become a "Specialist Pastry Technology Adviser" at the school. The petitioner also submits a copy of an undated invitation from the Shanghai Ke Ma Expert Company, offering the petitioner the position of manager of desserts. The record does not reflect that the petitioner accepted the positions offered by the Guangzhou Success Baking School or the Shanghai Ke Ma Expert Company. None of these letters or certifications submitted as evidence establishes that the petitioner performed a leading or critical role for the organizations.

The petitioner owns his own business and serves as its general manager. He thus plays a leading role for the company. However, no evidence is submitted to establish that the Chengdu Xililai Western Style Food Co. Ltd. has a distinguished reputation. The record reflects that the petitioner's company has achieved a measure of success; however the petitioner submitted no evidence of the company's standing in the field of culinary arts, particularly in regards to pastry, or any evidence of its standing in the business world. No evidence establishes that the petitioner meets this criterion.

Evidence of commercial successes in the performing arts, as shown by box office receipts or record, cassette, compact disk, or video sales.

Counsel states that the success of the petitioner's restaurant is evidence of this criterion. He states that the petitioner's restaurant has been featured on television news specials and that he has maintained his restaurant certifications through extensive examinations. As discussed above, the evidence regarding the appearance of the petitioner on television is insufficient as it consists only of photocopied frames of videos. No details regarding the interviews or the specials were presented. The newspaper articles attest to a measure of success for the petitioner's restaurant; however this criterion is intended for those in the performing arts. The petitioner has not submitted evidence to indicate that his success in the restaurant business is indicative of sustained national or international acclaim under this criterion.

Other comparable evidence.

The regulation at 8 C.F.R. § 204.5(h)(4) states: "*If the above standards do not readily apply to the beneficiary's occupation*, the petitioner may submit comparable evidence to establish the beneficiary's eligibility." [emphasis added]. The regulatory language precludes the consideration of comparable evidence in this case, as there is no indication that eligibility for visa preference in the petitioner's occupation cannot be

established by the 10 criteria specified by the regulation. However, we will briefly address other evidence presented by the petitioner under this provision.

On appeal, counsel submits letters of support from others in the field of culinary arts. The authors attest to the petitioner's culinary skills and talent as a pastry "artist." He is described as a chef with "considerable accomplishments." [redacted] Executive Head Chef of the Jasmine Restaurant in Monterey Park, California, states that the petitioner is the "only Chinese chef that I have ever met who won a medal in the American Culinary Classic in the pastry division." While the authors of the letters are complimentary of the petitioner's skills, they do not attest that he is among the rare pastry chefs who are at the top of the field.

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 his field of endeavor.

Review of the record, however, does not establish that the petitioner has distinguished himself as a pastry 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 petitioner is a talented pastry chef, but is not persuasive that the petitioner'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.