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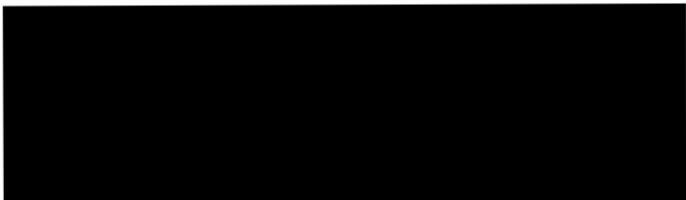
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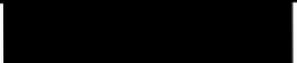
U.S. Citizenship
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Services

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FILE:



Office: VERMONT SERVICE CENTER

Date: AUG 03 2007

EAC 04 115 51684

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)

ON BEHALF OF PETITIONER:



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.

MaunDeadnick
to Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary as an “alien of extraordinary ability” in the arts, pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(A). The director determined the petitioner had not established that the beneficiary enjoys the sustained national or international acclaim necessary to qualify for classification as an alien of extraordinary ability.

On appeal, counsel asserted that the director failed to follow an April 23, 2004 memorandum that, according to counsel, requires the director to defer to a previous determination made on a nonimmigrant visa petition in behalf of the beneficiary. Counsel fails to acknowledge that, in the arts, the regulatory criteria for the similarly named nonimmigrant visa classification differ from those for the immigrant classification sought, as will be elaborated below. In addition, counsel asserted that the director failed to consider certain evidence. Counsel also indicated that he would submit a brief and/or evidence to this office within 30 days. Counsel dated the appeal December 15, 2005 but submitted nothing further. Thus, on June 7, 2007, this office contacted counsel by facsimile, advising that we had received no additional materials, inquiring as to whether anything had been submitted and requesting a copy of any additional materials submitted. The facsimile requested a response within five days. As of this date, this office has received no response. Thus, we will adjudicate the appeal based on the evidence of record, including counsel’s brief statements on appeal. For the reasons discussed below, the petitioner has not established that the beneficiary qualifies for the exclusive classification sought. Our evaluation of each criterion separately is consistent with a review of the evidence in the aggregate.

Previously Approved Nonimmigrant Visa

Counsel previously submitted a copy of an interoffice memorandum entitled: “The Significance of a Prior CIS Approval of a Nonimmigrant Petition in the Context of a Subsequent Determination Regarding Eligibility for Extension of Petition Validity,” HQPRD 72/11.3, William Yates, Associate Director for Operations, Citizenship and Immigration Services, April 23, 2004. The memorandum, while acknowledging that an adjudicator is not bound by prior determinations, sets forth a policy for diverging from previous determinations. The examples provided, however, all involve subsequent nonimmigrant petitions. The memorandum does not suggest that the director was bound to approve an immigrant visa petition in behalf of an alien who was the beneficiary of a previously approved nonimmigrant visa in a similar classification. The memorandum concludes that it is “not intended to be, and may not be relied upon, to create any right or benefit, substantive or procedural, enforceable at law by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.”

We do not find that an approval of a nonimmigrant visa mandates the approval of a similar immigrant visa. As stated in the memorandum on which counsel relies, each case must be decided on a case-by-case basis on the evidence of record. 8 C.F.R. § 103.8(d). It must be noted that many I-140 immigrant petitions are denied after CIS approves prior nonimmigrant petitions. *See e.g. Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989). Because CIS spends less time reviewing I-129 nonimmigrant petitions than I-140 immigrant petitions, some nonimmigrant petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30; *see also Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004) (finding that prior approvals do not preclude CIS from denying an extension of the original visa based on a reassessment of petitioner's qualifications).

The AAO 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. 1988). It would be absurd to suggest that CIS 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).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

More significantly in this matter, the regulation at 8 C.F.R. § 214.2(o)(3)(ii) defines extraordinary ability in the arts (including the performing arts) as simply "distinction," which is further defined as follows:

Distinction means a high level of achievement in the field of arts evidenced by a degree of skill and recognition substantially above that ordinarily encountered to the extent that a person described as prominent is renowned, leading, or well-known in the field of arts.

The regulation relating to the immigrant classification, 8 C.F.R. § 204.5(h)(2), however, defines extraordinary ability in any field as "a level of expertise indicating that the individual is on of that small percentage who have risen to the very top of the field of endeavor." While the ten immigrant criteria set forth at 8 C.F.R. § 204.5(h)(3) appear in the nonimmigrant regulation, 8 C.F.R. § 214.2(o)(3)(iii), they relate only to aliens who seek extraordinary ability in the fields of science, education, business or athletics. Separate criteria for nonimmigrant aliens of extraordinary ability in the arts are set forth in the regulation at 8 C.F.R. § 214.2(o)(3)(iv). The distinction between these fields and the arts, which appears in 8 C.F.R. § 214(o), does not appear in 8 C.F.R. § 204.5(h). As such, the petitioner's approval for a non-immigrant visa under the lesser standard of "distinction" is not evidence of his eligibility for

the similarly titled immigrant visa. More specifically, the beneficiary could meet the nonimmigrant criteria and not the ones necessary for immigrant classification.

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.

Citizenship and Immigration Services (CIS) and legacy Immigration and Naturalization Service (INS) have consistently recognized that Congress intended to set a very high standard for individuals seeking immigrant visas as aliens of extraordinary ability. *See* 56 Fed. Reg. 60897, 60898-9 (November 29, 1991). 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 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 an executive sous chef. 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). Congress provided the Nobel Prize as an example of a one-time achievement. H.R. Rep. No. 101-723, 59 (September 19, 1990). Moreover, lesser internationally recognized awards can only be considered in combination with meeting two other regulatory criteria. 8 C.F.R. § 204.5(h)(3)(i). Thus, a major internationally recognized award must, like a Noble Prize, be more than

simply international in scope; it must also be one with a global pool of candidates and significant international notoriety.

Although counsel initially asserted that the beneficiary “is the recipient of nationally and internationally recognized prizes/award for excellence in the culinary arts,” counsel did not identify any specific awards and the initial submission included an academic “Service Award” from the International College of Hospitality Management for “Outstanding Performance as [a] Resident Assistant.” It is clear that this certificate is not for recognition in the beneficiary’s field of culinary arts.

In response to the director’s request for additional evidence, counsel references a letter from [REDACTED], President/Bailli of the Washington Chapter of Confrerie de la Chain des Rotisseurs, in which he affirms that the beneficiary is at the top of his field and is a chef of extraordinary ability. Mr. [REDACTED] continues: “This acknowledgement of extraordinary ability by the *Confrerie de la Chain des Rotisseurs* is considered one of the most significant national or international awards in the field of culinary arts equivalent to that of an Academy Award, a Grammy or a Director’s Guild Award.”

The petitioner submitted materials regarding the Confrerie de la Chain des Rotisseurs. These materials only reference two youth awards and do not address recognition from individual chapter baillies. It is not credible to assert that a reference letter, even if it had come from the head of an international organization rather than a local city chapter head, is remotely comparable to an Academy Award, which involves a strict nomination process resulting in major press coverage and a voting process by members of the Academy resulting in the presentation of awards during an internationally televised broadcast.

That said, the petitioner also submitted a 2003 Gastronomic Award of Excellence from Confrerie de la Chain des Rotisseurs signed by [REDACTED]. Once again, the certificate appears to be issued by a local city president; the record contains no evidence that the petitioner was selected for this certificate from a global pool of candidates. Unlike other major internationally recognized prizes, the record contains no evidence that the selection of “awardees” for this “award” receives any press coverage in the general or trade media. The record contains no evidence regarding regional or national preliminary competitions that select the final competitors for an international competition. The materials about the Confrerie de la Chain des Rotisseurs submitted by the petitioner mention two youth competitions sponsored by the group, but do not mention Gastronomic Awards of Excellence. It can be expected that if the Gastronomic Award of Excellence was a major internationally recognized award, the Bailli Delege des Etats-Unis of the Confrerie de la Chain des Rotisseurs would mention this award in his “Welcome” message, which boasts of the year’s achievements, including the winners of two youth competitions. His message, posted on the group’s website and submitted by the petitioner, does not mention the Gastronomic Award of Excellence.¹

¹ Our attempt to confirm the significance of this award on “Google” produced no results for the phrase “Gastronomic Award of Excellence.” While these results are not determinative, it remains that we were unable to confirm claims regarding the award’s international prestige.

Barring the alien's receipt of a major internationally recognized 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. On appeal, counsel asserts that the director ignored the beneficiary's "acceptance for training at the world's elite culinary academies" and reference letters. We note that training at a prestigious institution is not a regulatory criterion and reference letters are not identified as evidence that can, by themselves, meet any of the regulatory criteria.

The petitioner has submitted evidence alleged to meet the following criteria.²

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

The petitioner submitted the awards discussed above. The director concluded that the petitioner had not submitted evidence that the beneficiary had received any lesser nationally or internationally recognized prizes or awards for excellence as a chef. On appeal, counsel asserts that the director did not give proper weight to the beneficiary's awards.

As stated above, the beneficiary's recognition for serving as a resident assistant, albeit at a school in his field, does not appear to be an award for excellence *in the culinary arts*. Rather, resident assistants, or "RA's" typically are upperclassmen who oversee student life in dormitories. In addition, the petitioner has not demonstrated that the beneficiary's Gastronomic Award of Excellence is an award chefs nationwide aspire to win. Rather, as discussed above, it appears to be local citywide recognition from a local chapter president.

In light of the above, the petitioner has not demonstrated that the beneficiary meets this criterion.

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.

Counsel does not challenge the director's conclusion that the restaurant and hotel reviews submitted, which do not name the beneficiary, cannot be considered published material about him. We concur with the director.

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

While the beneficiary lists his position with the Ritz-Carlton as executive sous chef on his curriculum vitae, the letter from Tara Wolfe, Human Resource Coordinator at the Ritz Carlton, only confirms that the beneficiary worked there. Going on record without supporting documentary evidence is not

² The petitioner does not claim to meet or submit evidence relating to the criteria not discussed in this decision.

sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The published materials about the Ritz-Carlton all mention other chefs. The petitioner submitted the June 2001 offer of “Chef de Partie” extended to the beneficiary from The Ambassador’s Sky Chef in Mumbai. An October 17, 2001 letter from the Executive Chef at The Ambassador’s Sky Chef asserts that the beneficiary conducted “management training” at this hotel and was recently promoted to “Sous Chef.” The record contains no reviews of this hotel. The Executive Manager for the Mansingh Towers asserts that the petitioner undertook supervisor training there from October 1998 through February 1999. The record contains no evidence that this position involved chef duties, let alone leading or critical chef responsibilities.

The director concluded that simply being trained at, employed by or otherwise associated with establishments with a distinguished reputation cannot serve to meet this criterion. The director then stated: “The significance of the beneficiary’s own contributions must be established.”

On appeal, counsel asserts that the director failed to give sufficient weight to the beneficiary’s “performance in leading culinary roles at the world’s premiere restaurants” and “acceptance for training at the world’s elite culinary academies.”

The director appears to have confused this criterion with the criterion at 8 C.F.R. § 204.5(h)(3)(v), which requires evidence of contributions of major significance. At issue for this criterion are the nature of the position the alien was hired to fill and the reputation of the entity that hired him. That said, we are not persuaded that the petitioner has submitted sufficient evidence to demonstrate that the beneficiary meets this criterion.

We concur with the director’s implication that the role of “student” or “supervisor trainee” at an institution with a distinguished reputation is not playing a leading or critical role for that institution as a whole. Moreover, as the beneficiary seeks classification as an extraordinary chef, hotel management or supervisory training devoid of chef responsibilities is irrelevant. As stated above, the petitioner did not submit evidence of the distinguished reputation of the Ambassador Sky Chef and the record does not confirm that the beneficiary served as a sous chef for the Ritz Carlton. Moreover, the petitioner did not submit the organizational chart or kitchen hierarchy for the beneficiary’s employers. Thus, assuming that the beneficiary has served as a sous chef, the petitioner has not established that this position is a leading or critical role.

Even if we concluded that the beneficiary meets this criterion, and, as discussed above, we find that certain evidence that could establish this claim is absent, the beneficiary falls far short of meeting any other criterion for the reasons discussed above and below.

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

The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(ix) requires evidence that the beneficiary “has commanded” high remuneration in relation to others in the field. Initially, counsel asserted that the beneficiary “will” command a high salary “being paid an annual salary of \$50,000.” In its letter, the petitioner asserted that the beneficiary “has commanded and will continue to command a high salary in relation to others in his field, being paid an annual salary of \$50,000.” The petitioner submitted a letter from [REDACTED] of the Department of Employment Services, District of Columbia, asserting that the local prevailing wage for executive chefs is \$27,165 per year.

In the request for additional evidence, the director stated that the petitioner appeared to be comparing the beneficiary’s remuneration with others in the field who are not of extraordinary ability and requested evidence “to establish the beneficiary’s salary and that it is significantly higher than others employed in similar capacities within his field.” In response, counsel asserts that the previously submitted evidence is sufficient, establishing that the beneficiary earns “twice” the salary of other executive chefs.

The director concluded that the petitioner had not responded to the director’s request for “evidence to establish the beneficiary’s salary.” On appeal, counsel asserts that the director gave insufficient weight to a “prevailing wage determination evidencing Beneficiary is to be paid well in excess of the prevailing wage.”

We concur with the director that the record lacks Forms W-2 or pay stubs establishing that the beneficiary had been paid an annualized wage of \$50,000 prior to the filing of the petition. As stated above, the petitioner must establish that the beneficiary already received significantly high remuneration. 8 C.F.R. § 204.5(h)(3)(ix); see 8 C.F.R. § 103.2(b)(12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971). Moreover, it is insufficient to establish only that the alien has earned more than the average or prevailing wage locally. The petitioner must establish that the beneficiary earns a wage comparable with the top members of his field nationwide. The record lacks evidence regarding the remuneration earned by the top sous chefs nationwide.

In light of the above, the petitioner has not established that the beneficiary 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.

While the regulation at 8 C.F.R. § 214.2(o)(3)(ii) relates to nonimmigrant petitions, it is instructive that it defines the “arts” as including both “culinary arts” and “performing arts.” Thus, it would appear that culinary arts are not performing arts. Thus, this criterion does not relate to the beneficiary’s field. That said, counsel does not challenge the director’s conclusion that the record does not establish that the beneficiary is responsible for his employers’ commercial success. We concur with the director. The published materials and reviews of the beneficiary’s employers name other chefs. The record lacks evidence that the beneficiary’s employers promote or have promoted their restaurants and menus by invoking the beneficiary’s name.

Finally, the conclusion we reach by considering the evidence to meet each criterion separately is consistent with a review of the evidence in the aggregate. Even in the aggregate, the evidence does not distinguish the beneficiary as one of the small percentage who has risen to the very top of the field of endeavor. The beneficiary, a sous chef, has earned a local certificate and has received training and experience with restaurants that have been favorably reviewed in articles naming other chefs. These accomplishments do not appear comparable to the most renowned members of his field, as documented in the record. For example, one of the beneficiary's references, [REDACTED], lists an entire page of awards, is the main subject of an article in the "Food" section of *The Washington Post* and is featured in a short list of restaurants a food critic "can't get enough of" in *The Washington Post Magazine*. Another reference, [REDACTED], is featured in *The New York Times*. A third reference, [REDACTED] is featured in the *Washingtonian's* 100 Very Best Restaurants, *DC City Dining*, *The Washington Post Magazine* and, most notably, the national *Bon Appetit*. Thus, it appears that the highest level of the petitioner's field is far above the level he has attained.

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 petitioner has distinguished himself as an executive sous 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 shows talent as an executive sous 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.