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Immigration and Naturalization Service

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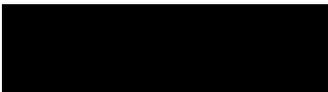


File: EAC-02-127-52263

Office: Vermont Service Center

Date: 16 SEP 2002

IN RE: Petitioner:
Beneficiary:



Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(O)(i) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(15)(O)(i)

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 nonimmigrant visa petition was denied by the Director, Vermont Service Center, and is now before the Associate Commissioner for Examinations on appeal. The record will be remanded.

The petitioner is an individual. The beneficiary is a professional chef. The petitioner seeks classification of the beneficiary under section 101(a)(15)(O)(i) of the Immigration and Nationality Act (the "Act"), as an alien with extraordinary ability in the culinary arts. The petitioner seeks to employ the beneficiary as a "household Chef de Cuisine" for a period of three years with a salary, housing, and benefit package valued at \$85,000 per year. The valuation was later revised to be equivalent to \$110,000.

The director denied the petition finding that the petitioner failed to establish that the beneficiary satisfies the regulatory standards as an alien of extraordinary ability in the culinary arts.

On appeal, counsel for the petitioner argued, in pertinent part, that the director may have applied a higher standard than appropriate for an alien in the arts seeking O-1 classification and may not have considered all of the evidence in consideration of the unique nature of the position of a private chef.

Section 101(a)(15)(O)(i) of the Immigration and Nationality Act (the "Act"), provides classification to a qualified alien who has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim, whose achievements have been recognized in the field through extensive documentation, and who seeks to enter the United States to continue work in the area of extraordinary ability. Section 101(a)(46) of the Act further states that the term "extraordinary ability" means, for purposes of section 101(a)(15)(O)(i), in the case of the arts, distinction.

At issue in this matter is whether the petitioner has established that the beneficiary is an alien of extraordinary ability in the arts within the meaning of this provision.

8 C.F.R. 214.2(o)(1)(i) provides that O-1 classification is provided for aliens of extraordinary ability or achievement as follows:

Under section 101(a)(15)(O) of the Act, a qualified alien may be authorized to come to the United States to perform services relating to an event or events if petitioned for by an employer. Under this nonimmigrant category, the alien may be classified under section 101(a)(15)(O)(i) of the Act as an alien who has extraordinary ability in the sciences, arts, education, business, or athletics, or who

has a demonstrated record of extraordinary achievement in the motion picture or television industry.

8 C.F.R. 214.2(o)(3)(ii) defines, in pertinent part:

Arts includes any field of creative activity or endeavor such as, but not limited to, fine arts, visual arts, culinary arts, and performing arts.

Extraordinary ability in the field of arts means distinction. Distinction means a high level of achievement in the 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.

8 C.F.R. 214.2(o)(3)(iv) states that in order to qualify as an alien of extraordinary ability in the arts, the alien must be recognized as being prominent in his or her field of endeavor as demonstrated by the following:

(A) Evidence that the alien has been nominated for, or has been the recipient of, significant national or international awards or prizes in the particular field such as an Academy Award, an Emmy, a Grammy, or a Director's Guild Award; or

(B) At least three of the following forms of documentation:

(1) Evidence that the alien has performed and will perform services as a lead or starring participant in productions or events which have a distinguished reputation as evidenced by critical reviews, advertisements, publicity releases, publications, contracts, or endorsements;

(2) Evidence that the alien has achieved national or international recognition for achievements evidenced by critical reviews or other published materials by or about the individual in major newspapers, trade journals, magazines, or other publications;

(3) Evidence that the alien has performed in a lead, starring, or critical role for organizations and establishments that have a distinguished reputation evidenced by articles in newspapers, trade journals, publications, or testimonials;

(4) Evidence that the alien has a record of major commercial or critically acclaimed successes as evidenced

by such indicators as title, rating, standing in the field, box office receipts, motion picture or television ratings, and other occupational achievements reported in trade journals, major newspapers, or other publications;

(5) Evidence that the alien has received significant recognition for achievements from organizations, critics, governmental agencies, or other recognized experts in the field in which the alien is engaged. Such testimonials must be in a form which clearly indicates the author's authority, expertise, and knowledge of the alien's achievements; or

(6) Evidence that the alien has either commanded a high salary or will command a high salary or other substantial remuneration for services in relation to others in the field, as evidenced by contracts or other reliable evidence; or

(C) If the criteria in paragraph (o)(3)(iv) of this section do not readily apply to the beneficiary's occupation, the petitioner may submit comparable evidence in order to establish the beneficiary's eligibility.

8 C.F.R. 214.2(o)(5)(i)(A) requires, in pertinent part:

Consultation with an appropriate U.S. peer group (which could include a person or persons with expertise in the field), labor and/or management organization regarding the nature of the work to be done and the alien's qualifications is mandatory before a petition for O-1 or O-2 classification can be approved.

The petitioner did not establish that the beneficiary has received a significant national or international award pursuant to 8 C.F.R. 214.2(o)(3)(iv)(A). Therefore, in order to establish the requisite extraordinary ability, the petitioner must satisfy at least three of the criteria at 8 C.F.R. 214.2(o)(3)(iv)(B), or submit comparable evidence as provided for by 8 C.F.R. 214.2(o)(3)(iv)(C).

In a statement submitted in support of the petition dated March 1, 2002, the petitioner explained that the beneficiary has been employed by the family as its household chef in France since 1994. The petitioner was transferred from France to the United States branch of her company and seeks to continue to employ the beneficiary during the family's residence in the United States. The petitioner estimated a stay of approximately five years.

In support of the claim that the beneficiary is an alien with extraordinary ability in the culinary arts, the petitioner submitted, in pertinent part, ten letters from prominent chefs and

restaurateurs attesting to their knowledge of the beneficiary's extraordinary ability as a chef. Also submitted were several additional attestations from prominent persons in other professions who have dined at the petitioner's residence and who praise the beneficiary's skills as a chef.

Counsel argued on appeal that the evidence submitted satisfies at least three of the criteria at 8 C.F.R. 214.2(o)(3)(iv)(B). The argument is not persuasive. The attestations from recognized experts in the field of endeavor may be considered to address criterion number 5. The attestations from private individuals are considered, but do not relate to or satisfy any of the regulatory criteria.

The petitioner did not submit evidence that the alien has been the lead or starring participant in any productions or events which have a distinguished reputation. Likewise, he has not performed in a critical role for organizations and establishments which have a distinguished reputation. The petitioner failed to submit any critical reviews or published material about the beneficiary. The record also is silent on the beneficiary's income history and does not reflect any major commercial or critically acclaimed successes for the beneficiary. The proposed compensation package is not a sufficient basis to satisfy criteria number 6, which relies on past income history. Accordingly, the director's finding that the petitioner failed to satisfy this requirement is affirmed.

Counsel further argued that the position of household chef is a unique position and one that does not lend itself to the types of documentation set forth at 8 C.F.R. 214.2(o)(3)(iv)(B). Counsel argued that the Service should consider the sum of the evidence as comparable evidence pursuant to 8 C.F.R. 214.2(o)(3)(iv)(C) in consideration of the unique nature of the position of a private chef which does not lend itself to published critical reviews or other common indicia for chefs.

Counsel's argument regarding the nature of a private chef is reasonable. After careful consideration of the record, the statements of ten top experts in the field of the culinary arts may be considered to establish the requisite distinction defined as renown in the field of the culinary arts. The fact that a private chef is known to so many top commercial chefs demonstrates a degree of recognition substantially above that ordinarily encountered. The record will be remanded to reconsider the evidence in light of the provision at 8 C.F.R. 214.2(o)(3)(iv)(C).

It is further noted that the petitioner must submit a labor consultation from the appropriate labor organization. 8 C.F.R. 214.2(o)(5)(i)(A). Counsel asserted that there was no appropriate labor organization for private chefs. While there may be no labor organization for private chefs, the American Culinary Federation

("ACF") is the recognized labor organization registered with the Service to offer consultations for the culinary arts. This requirement may not be waived where an appropriate labor organization exists. 8 C.F.R. 214.2(o)(5)(i)(G).

The record is also remanded for the purpose of allowing the petitioner to obtain the mandatory consultation from the ACF.

While not discussed by the director in his decision, O-1 classification is only available for specific purposes. O-1 nonimmigrant visa classification is available to a qualified alien to come to the United States to perform services relating to an event or events if petitioned for by an employer. 8 C.F.R. 214.2(o)(1)(i). *Event* means an activity such as, but not limited to, a scientific project, conference, convention, lecture series, tour, exhibit, business project, academic year, or engagement. Such activity may include short vacations, promotional appearances, and stopovers which are incidental and/or related to the event. A group of related activities may also be considered to be an event. 8 C.F.R. 214.2(o)(3)(ii). An O-1 classification may not be granted to an alien to enter the United States to free lance in the open market. 59 Fed.Reg. 41818-41842 (Aug. 15, 1994).

In this case, the petitioner seeks to employ the beneficiary in the United States during a temporary stay related to the employers' business activities. While this is an unusual circumstance for an alien seeking O-1 classification in the arts, it is concluded that such a temporary stay satisfies the intent of a specific event found in the regulations.

ORDER: The record is remanded for review and issuance of a new decision consistent with the above.