

**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Room A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

D8



FILE: SRC 05 100 50633 Office: TEXAS SERVICE CENTER Date: NOV 10 2005

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: Petition for 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)

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.

Mari Johnson

2 Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Texas Service Center Acting Director and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a publishing company. The beneficiary is a chef. The petitioner seeks O-1 classification of the beneficiary as an alien with extraordinary ability in the arts under section 101(a)(15)(O)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(O)(i), in order to employ him as a chef for three years at an annual salary of \$30,000.

The director denied the petition, finding that the petitioner had failed to establish that the beneficiary satisfies the standards for classification as an alien with extraordinary ability in the arts.

On appeal, counsel for the petitioner submits a brief and additional evidence.

Section 101(a)(15)(O)(i) of 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.

The beneficiary is a 39-year old native and citizen of Germany. He completed his studies at the College of Nutrition, School of Social Studies, located in Solingen, Germany in June 1983. He was certified as a chef on July 15, 1986 in Düsseldorf, Germany. The beneficiary worked as an apprentice from August 1984 to July 1986 with the Stockheim Company in Düsseldorf. Over a twenty-year career, he has worked as a Chef Entremetier, Chef Saucier, Chef de Partie and Sous Chef at various hotels and restaurants in Switzerland, Germany, Cayman Islands, Austria and Aspen, Colorado. The beneficiary last entered the United States in H-1B classification to work at The Little Nell in Aspen, Colorado on December 7, 2001.

The issue to be addressed in this proceeding is whether the petitioner has established that the beneficiary qualifies as an alien with extraordinary ability in the arts as defined by the statute and the regulations.

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

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.

The regulation at 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, and will perform, 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.

For criterion number two, the petitioner submitted three items. The first item, published in the January 1, 2003 issue of the *American Way*, an in-flight publication of American Airlines, briefly reviews 4 restaurants, including The Colony, a restaurant, which "hired former Little Nell sous-chef [the beneficiary] to navigate the kitchen." The second item, published in the December 2002 issue of *Bon Appétit*,¹ includes a photograph of the beneficiary and a review of The Colony,¹ touting the beneficiary as its chef. These items indicate that the beneficiary has some received some publicity based upon his own and his employer's reputation. They do not mention the beneficiary's *achievements* however; hence, the beneficiary does not satisfy this criterion. A third item, titled "Chef Michael from the Colony Featured in *Bon Appétit*," fails to include the name or date of publication so it cannot be considered.

For criterion number three, the petitioner submitted several critical reviews and numerous letters² written by persons employed in the beneficiary's field of endeavor. The letters were all written by former or prospective employers, e.g., the petitioner.

██████████ Director of Human Resources, The Little Nell, wrote that the beneficiary was Executive Sous-Chef at The Little Nell from May of 1998 until May 2002. She wrote that the beneficiary has achieved national and international recognition for his achievements and worked in a critical role for establishments that have distinguished reputations. She failed to describe the beneficiary's achievements. She said that the beneficiary "played a critical role from his expertise as the Chef de Partie to leadership skills." She failed to fully explain how the beneficiary played a critical role at The Little Nell.

¹ The Colony was then a newly opened restaurant in Aspen, Colorado.

² The term *letter* is used interchangeably with *testimonial*.

██████████ Director of Sales and Marketing, The Little Nell, reiterated ██████████'s assertion that the beneficiary has achieved national and international recognition for his achievements. He further wrote that the beneficiary "worked in a lead role as Sous Chef for The Little Nell's restaurant Montagna and also assisted with special events. ██████████ failed to explain how the beneficiary, as a Sous Chef, played a lead role at Montagna.

██████████ General Manager, Aspen Mountain Club, wrote that the beneficiary "assisted in creating and implementing recipes and menus and special events . . . trained the culinary staff to meet high standards, which resulted in excellent presentation and quality." She credited him as helping "to establish the Club as one of the top in the nation. ██████████ indicated that the Aspen Mountain Club is under the management of The Little Nell and that the beneficiary consulted with her organization. The evidence is insufficient to establish that the food facility at the Aspen Mountain Club has a distinguished reputation.

██████████ Human Resources Director for The Little Nell Hotel in Aspen and the area director of Human Resources for the Ritz-Carlton Hotel in Avon Colorado wrote two testimonials on the beneficiary's behalf. His first letter, dated November 3, 2000, outlines the beneficiary's work history. In a second letter, dated June 3, 2005, ██████████ writes that the beneficiary "has been an integral icon and driving force in [the Aspen Food and Wine summer festival] . . . over the past five years." The petitioner failed to submit any corroborating documentary evidence regarding this festival and the beneficiary's involvement. 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).

██████████ General Manager, Hotel Gasthof Post, Austria, wrote that the beneficiary had worked under his supervision as a sous chef for approximately eleven months.

██████████ Hotel Manager and Owner, Hotel Alpenhof, Switzerland, wrote in a letter dated November 15, 2000, that the beneficiary "oversaw the kitchen operations for [their] upscale fine dining restaurant and banquet facility."

██████████ Corporate Executive Chef, Seabourn Cruise Line, wrote that the beneficiary worked under his supervision on the Seabourn Pride "as a sous chef and chef."

All of the above letters were written by persons associated with the beneficiary's former employers or his prospective employer, the petitioner. While such letters are important in providing details about the petitioner's role in various organizations, they cannot by themselves establish the beneficiary has achieved distinction in his field of endeavor.

It is noted that the beneficiary has typically held secondary positions such as sous chef and chef de partie, rather than the principal position of a chef de cuisine.

As evidence that the beneficiary will play a lead role in the future, the petitioner's Chairman and CEO indicates that the beneficiary "will work in a lead role as Chef for [the petitioner], preparing special meals and dining experiences for very distinguished guests at small and large dinner gatherings." The petitioner failed to submit any evidence to establish that the petitioner, a publishing company, is an organization with a distinguished reputation. The evidence is insufficient to establish that the beneficiary, as a chef, will play a lead role for the petitioner. The beneficiary does not satisfy this criterion.

For criterion number four, the petitioner submitted letters and three published items that are discussed above. While this evidence is favorable to the beneficiary, they do not establish that the beneficiary has a record of major commercial or critically acclaimed successes as required by the regulation. The beneficiary does not satisfy this criterion.

For criterion number five, the petitioner submitted letters. As indicated above, the letters fail to establish that the beneficiary has received significant recognition for his achievements. The beneficiary does not satisfy this criterion.

The petitioner has offered to pay the beneficiary an annual salary of \$30,000. In the absence of wage surveys, the AAO is unable to evaluate whether the proffered wage may be considered high in relation to others in the beneficiary's field of endeavor.

After a careful review of the entire record, it is concluded that the petitioner has not shown that the beneficiary is a person of extraordinary ability in the arts.

Counsel for the petitioner asserts "the Service has abused its discretion by inexplicably departing from its own regulations, failing to consider all relevant factors, and considering irrelevant facts in its stated reasons for denial of the petition." Counsel quoted the director's decision, i.e., "the denial states: '[t]he record does not reflect any evidence to show how the beneficiary's work as a chef is different from others chefs at other facilities.'" Counsel states that the regulations do not require the petitioner to show how the beneficiary's work as a chef is different from other chefs at other facilities. The regulations do require a showing that the beneficiary has achieved distinction in his field of endeavor. See 8 C.F.R. § 214.2(o)(3)(ii), *supra*. The director did not depart from the regulations.

Counsel further asserts that the director abused its discretion by failing to consider all factors. The director correctly evaluated the evidence in the context of the relevant eligibility criteria at 8 C.F.R. § 214.2(o)(3)(iv). The AAO considered all of the evidence in the record, even if it failed to mention every item of evidence.³

Beyond the director's decision, the petitioner failed to submit a consultation as required by the regulation at 8 C.F.R. § 214.2(o)(5)(i). Counsel for the petitioner wrote that the petitioner was requesting a waiver of the advisory opinion (consultation) requirement because there is no appropriate peer group or labor organization for the position offered; however, Citizenship and Immigration Services (CIS) has consistently required chefs to submit consultations from the American Culinary Federation. There is no evidence of the consultation. For this additional reason, the petition may not be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit

³ The petitioner submitted a letter dated February 11, 1999 from Daniel Boulard, which addresses the issue of whether an Executive Chef is a specialty occupation. This letter is not relevant in the context of an O-1 petition.

SRC 05 100 50633

Page 6

sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.