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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

D8

[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: DEC 08 2010

IN RE: Petitioner: [redacted]
Beneficiary:

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

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed the nonimmigrant petition seeking to classify the beneficiary under section 101(a)(15)(O)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(O)(ii), as an accompanying alien to [redacted], a chef who has been granted O-1 classification for employment with the petitioner. The petitioner seeks to employ the beneficiary in the position of restaurant general manager for a period of approximately 22 months. The beneficiary has worked in the United States in H-1B status since 2004 and the petitioner requests that she be granted a change and extension of status.

The director denied the petition, concluding that the beneficiary, as a restaurant general manager, would be assisting the petitioner's restaurant in general, rather than accompanying and assisting in the artistic performance of the principal O-1 alien chef. The director further determined that the petitioner did not submit sufficient evidence to establish that the beneficiary has had a prior working relationship that is critical and essential to support the O-1's artistic performance as a chef, or that she performs services that are an integral part of the principal alien's actual performance. Finally, the director found the beneficiary ineligible because the petitioner "did not file for the beneficiary in conjunction with the O-1 as the beneficiary is filing for a change of status."

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO. On appeal, counsel asserts that "the conclusion that the beneficiary will be supporting the Restaurant and not the O-1 alien is . . . erroneous and demonstrates a misunderstanding of the situation." Counsel asserts that the beneficiary had a prior working relationship with the O-1 alien and substantial experience performing the critical skills and essential support required to support the principal alien's performance as a chef. Counsel further contends that there is no requirement that the O-2 alien must be petitioned concurrently with the O-1 alien, and the fact that the beneficiary was lawfully present in the United States in another status does not prevent the approval of an O-2 petition filed on her behalf.

Counsel indicated on the Form I-290B, Notice of Appeal or Motion, that he would submit a brief and/or additional evidence to the AAO within 30 days. Counsel filed the appeal on May 6, 2010. As of this date, no brief or additional evidence has been received, and the record will be considered complete.

I. The Law

Section 101(a)(15)(O)(ii) of the Act provides classification to a qualified alien who:

(I) seeks to enter the United States temporarily and solely for the purpose of accompanying and assisting in the artistic or athletic performance by an alien who is admitted under clause (i) for a specific event or events;

(II) is an integral part of such actual performance,

(III) (a) has critical skills and experience with such alien which are not of a general nature and which cannot be performed by other individuals . . . .

(IV) has a foreign residence which the alien has no intention of abandoning.

The regulations at 8 C.F.R. § 214.2(o)(4) provide the following requirements for an O-2 accompanying alien:

(i) General. An O-2 accompanying alien provides essential support to an O-1 artist or athlete. Such aliens may not accompany O-1 aliens in the fields of science, business or education. Although the O-2 alien must obtain his or her own classification, this classification does not entitle him or her to work separate and apart from the O-1 alien to whom he or she provides support. An O-2 alien must be petitioned for in conjunction with the services of the O-1 alien.

(ii) Evidentiary criteria for qualifying as an O-2 accompanying alien –

(A) Alien accompanying an O-1 artist or athlete of extraordinary ability. To qualify as an O-2 accompanying alien, the alien must be coming to the United States to assist in the performance of the O-1 alien, be an integral part of the actual performance, and have critical skills and experience with the O-1 alien which are not of a general nature and which are not possessed by a U.S. worker.

* * *

(C) The evidence shall establish the current essentiality, critical skills, and experience of the O-2 alien with the O-1 alien and that the alien has substantial experience performing the critical skills and essential support services for the O-1 alien.

II. Discussion

The primary issue addressed by the director is whether the beneficiary will assist in the performance of the O-1 alien as an integral part of his artistic performance as a chef, and whether she has critical skills and substantial experience performing essential support services for the O-1 alien. The petitioner must establish that the beneficiary's skills are not of a general nature and cannot be performed by a United States worker.

The petitioner has offered the beneficiary the position of restaurant general manager of its critically-acclaimed New York restaurant. The petitioner indicated on the Form I-129 that the beneficiary "has worked with the O-1 alien over the past year (2009)."

In a letter dated February 8, 2010, the petitioner stated that the beneficiary "will be providing support services to [redacted] an internationally renowned chef who is currently employed, in O-1 visa status" at the petitioner's award-winning restaurant. The petitioner noted that it is part of a network of restaurants which

includes the petitioner, [redacted] and the recently-opened restaurant, [redacted] The petitioner further stated:

> Through our network of restaurants, [the beneficiary] has worked with [redacted] using her extensive restaurant managerial skills to orchestrate the demands of a critically-acclaimed, top New York restaurant, as well as meeting the demands of an exactly clientele, while maintaining profitable margins.
>
> She has succeeded in developing mutually beneficial relationship with vendors for both The [redacted] and [the petitioner's] Restaurants. Her important contributions have resulted in improving the overall operations of our restaurants; her highly valuable skill set has ensured the strengthening of our restaurant brand. She has become an invaluable asset to our trademark as she has leveraged her knowledge of Anglo food and customer service to the organization.

The petitioner submitted an advisory opinion letter from [redacted] of The James Beard Foundation, who notes that the beneficiary will be employed by the petitioning restaurant as the general manager "with the goal to assist and support [redacted], a highly respected British chef." Of the beneficiary, [redacted] further states:

> [The beneficiary's] international sensibilities, as well as her exacting management style and attention to detail, have made her an integral part of not only the success of [the petitioning restaurant] but also the success of the group's newest venture called [redacted]
>
> * * *
>
> Upon review of the material submitted, it is the position of the James Beard Foundation that [the beneficiary] possesses extraordinary skills in her profession and will provide the benefit of her expertise in her activities with the petitioner. We sincerely believe that [the beneficiary's] creative and technical skills support her status as an alien of extraordinary ability, of food industry expertise and utmost professionalism.

The petitioner submitted evidence that the beneficiary was maintaining H-1B status at the time of filing, pursuant to an approved petition filed by [redacted]

The petitioner submitted substantial evidence regarding its restaurant, including reviews from major media sources and several articles regarding [redacted], the co-owner of the restaurant. All of the submitted documentation identifies [redacted] as the petitioning restaurant's executive chef, although the AAO notes that the majority of this evidence is dated 2008 and earlier. The petitioner also submitted a recent article published in *New York* magazine regarding the [redacted] which is owned by the petitioner's owners and appears to have opened in late 2009.

With respect to the O-1 alien, [redacted], the petitioner submitted a copy of his approval notice authorizing O-1 employment with the petitioner since January 2009, accompanied by a number of testimonial letters which were apparently submitted in support of his O-1 petition in 2008.
The director issued a request for additional evidence ("RFE") on March 4, 2010, in which he requested, *inter alia,* the following: (1) a statement describing the prior and current essentiality, critical skills and experience of the beneficiary with the principal alien; and (2) a statement from the principal alien or from persons having first-hand knowledge showing that the alien has had substantial experience performing the critical skills and essential support services for the O-1 alien.

In response, the petitioner submitted a letter from its president, who described the beneficiary's skills and experience as follows:

> In January 2009, I offered [the beneficiary] employment with [redacted] at which time she was hired as a General Manager, Restaurants, in conjunction with several imminent restaurant projects which were being developed by our organization. It was [the beneficiary's] ten-plus years of experience within the hospitality industry that triggered the offer to join our organization. Beginning in 2004, she achieved recognition for a long-standing tenure as Director of Food and Beverage for the prestigious Hotels [redacted]
>
> In this role with our group, [the beneficiary] has assumed overall management responsibilities of all our new restaurant enterprises, the first of which was the [redacted] She has been responsible for ensuring that all Food & Beverage ("F&B") operations for our forthcoming projects operate efficiently, and generate profits. She has been in charge of overseeing all aspects of the food and beverage operations for our restaurants as well as creating, implementing and developing service standards established for all outlets.
>
> More recently, over the past six months, through our group of restaurants, [the beneficiary] has been collaborating and assisting [redacted], the O-1 Chef at [the petitioner's restaurant], our flagship restaurant, using her broad restaurant managerial skills to orchestrate the demands of this critically acclaimed, top New York restaurant.
>
> We attribute the continued success of our restaurants to the unique business model which we have created and adhered to over the years. The key ingredient in our recipe for success is a combination of strategic planning in day-to-day managerial activities and a meticulous attention to detail and creativity in our food preparation. We emphasize a team approach both in our kitchen and with our front-of-house staff. The front of the house efforts enable, back up and support the kitchen endeavors. The pairing of [the beneficiary] and [redacted] has enabled us to continue to thrive in a contracting economic climate.
>
> [The beneficiary's] extensive experience in the industry including her most recent tenure with our organization has enabled [redacted] to focus his culinary obligations on the creative process, which is so essential to our brand. Her support has enabled the development of mutually beneficial relationships with vendors for both [redacted] and [the petitioner]. [The

> beneficiary] also handles much of the administrative support elements of a job such as [redacted] including setting up press, sending out media kits and booking appearances (and the hotels and travel) for Food and Wine festivals and suchlike. She also manages the sourcing and purchasing of the necessary accoutrements to compliment [redacted] food including but not limited to plateware and displayware. [The beneficiary] manages the financial aspects of the business [redacted] food sales contribute to. It is as a result of her analyses that monthly [redacted] knows exactly what is selling, where his costs stand and the profit margin on his sales.

The petitioner also submitted recent pay statements which show that she continues to be employed by her current H-1B employer, [redacted] Counsel stated that this entity is a "member of the petitioner's restaurant group," although the AAO notes that the petitioner did not mention [redacted] in describing its restaurant group, nor did it provide a fictitious name for this company. We further note that none of the submitted articles regarding the petitioner or its related restaurants mention this entity.

The director denied the petition on April 8, 2010, concluding that the beneficiary "will not be supporting the O-1 alien but the restaurant itself which is not owned by the principle [*sic*] O-1 alien." The director further noted that, based on the evidence submitted, the O-1 alien is also not the head chef of the petitioner's restaurant. In addition, the director found that the petitioner "did not file for the beneficiary in conjunction with the O-1 as the beneficiary is filing for a change of status."

Finally, the director acknowledged the petitioner's statements that the beneficiary is very skilled and knowledgeable as a restaurant manager, but determined that the petitioner failed to establish "that the beneficiary has had a prior working relationship that is critical and essential to support the O-1's artistic performance as a chef." Specifically, the director determined that the evidence does not establish "that the beneficiary has substantial experience performing the critical skills and essential support necessary to support the services of the O-1 or as an integral part of the actual performance of the O-1 as defined by [the Act]."

On appeal, counsel for the petitioner asserts that the director incorrectly concluded that the beneficiary would be supporting the petitioner's restaurant and not the O-1 alien, and contends that such conclusion "demonstrates a misunderstanding of the situation." Counsel states that "[t]he Head Chef is in de factyo [*sic*] the restaurant since without the Chef, there is no restaurant." Counsel asserts that the "purpose of the O-2 visa is to specifically permit the Chef to perfect his performance as a Chef and not be involved in the management/operation of a restaurant."

Counsel contends that the beneficiary "did in fact have a prior working relationship with the O-1 alien which is critical and essential to support the O-1 performance as a chef," and "does in fact have substantial experience performing the critical skills and essential support necessary to support the O-1."

With respect to the director's observation that the O-1 chef, [redacted], does not appear to be the head chef at the petitioner's restaurant, counsel asserts that this conclusion is incorrect and that [redacted] was granted O-1 status "for the specific purpose of becoming Head Chef at [the petitioner's] restaurant in order that [redacted] (Award-Winning Chef and co-owner of the restaurant) could assume responsibilities at the Group's newest restaurant, [redacted]"

Finally, counsel asserts that "there is no requirement that the O-2 alien must be petitioned concurrently with the O-1 alien," and thus no basis for the director to conclude that the beneficiary was ineligible based on the fact that the O-1 alien was granted that status in January 2009.
As noted above, counsel indicated that he would be submitting evidence in support of the statements made on the Form I-290B, Notice of Appeal or Motion, within 30 days of filing the appeal, but as of this date, no additional evidence has been submitted.

After a careful review of the record, it must be concluded that the petitioner has failed to meet its burden of proof. However, the AAO agrees with counsel that there is no statutory or regulatory requirement that the petition for an O-2 accompanying alien be filed concurrently with the O-1 alien's petition. While such petitions are typically filed together, the fact that the beneficiary was already in the United States in another visa status would not prohibit the approval of the petition, assuming, *arguendo*, that all other eligibility requirements for O-2 classification were met. As discussed below, these requirements have not been met.

In order to establish the beneficiary's eligibility, the petitioner must, in part, establish that the beneficiary has substantial experience performing critical skills and essential support services for the O-1 alien. 8 C.F.R. 214.2(o)(4)(ii)(C). The O-1 alien, [redacted] has worked for the petitioning restaurant in the United States in O-1 status since January 2009 and the petitioner has not claimed that the beneficiary worked with him prior to his arrival in the United States. While there is no doubt that [redacted] is a chef at the petitioner's` restaurant, the AAO concurs with the director's determination that, based on the evidence submitted, the head chef of the restaurant appears to be [redacted] Although counsel states on appeal that [redacted] was hired specifically to fill the head chef position at the restaurant, there were no statements or evidence to this effect submitted prior to the adjudication of the petition, and no supporting evidence has been submitted on appeal. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The beneficiary is in the United States in H-1B status pursuant to a petition filed by [redacted] and approved in January 2009. Counsel asserts that this entity is a "member of the petitioner's restaurant group," but no corroborating evidence has been provided in support of this statement. It is not been established that the beneficiary's authorized employment for [redacted] also included authorization for employment responsibilities performed for other restaurants. Further, the petitioner has provided no clear description of the roles the beneficiary has held since assuming H-1B status. The petitioner's president and co-owner indicates that he offered the beneficiary "employment with [redacted] in January 2009, not employment with the petitioning restaurant. He states that the beneficiary has served as "General Manager, Restaurants" responsible for the group's "new restaurant enterprises," which would not appear to include the petitioning restaurant, which was opened in 2004. If the beneficiary was "offered employment with [redacted]" and petitioned for by [redacted], [redacted] it is unclear under what circumstances her claimed experience working with the beneficiary at the petitioner's restaurant occurred.

Based on the petitioner's statements, the beneficiary's only experience with the principal alien appears to have occurred "over the last past six months," or since approximately September 2009, and "through [the petitioner's] group of restaurants." The petitioner indicates that during this time the beneficiary "has been collaborating and

assisting [redacted] and "using her broad managerial skills to orchestrate the demands" of the restaurant. It has not been established that she has formally assumed the position of general manager of the restaurant, or even that she works exclusively for the petitioner's restaurant in conjunction with her authorized H-1B employment with [redacted] The petitioner's vague statements regarding the beneficiary's employment history with its group of restaurants are insufficient to establish that the beneficiary has "substantial experience" working with the O-1 alien. While there is no bright-line test for determining what amount of experience qualifies as "substantial" the petitioner has not even adequately documented the claimed six months of experience. The record does not contain a résumé for either the beneficiary or the O-1 alien, and their exact roles within the petitioner's organization, and the date they assumed such roles, remains unclear. Going on record without supporting documentary evidence is not 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)).

Even if the petitioner established that [redacted] assumed the restaurant's head chef position in January 2009 and the beneficiary assumed the restaurant general manager position in September 2009, it would be evident that someone other than the beneficiary provided the same types of management services for the restaurant during the first eight to nine months of [redacted] employment in the United States. The petitioner must establish that the beneficiary assists in the performance of the O-1 alien, is an integral part of his actual artistic performance as a chef, and has critical skills and experience which are not of a general nature and which are not possessed by a U.S. worker. 8 C.F.R. § 214.2(o)(4)(ii)(A). The AAO agrees with the director's conclusion that this burden has not been met.

The petitioner initially described the beneficiary's skills as "extensive restaurant managerial skills," "maintaining profitable margins," "developing mutually beneficial relationships with vendors" and knowledge of "Anglo food and customer service." The petitioner did not address these skills in relation to the beneficiary's support relationship with the O-1 alien, explain why there are no available U.S. workers who possess similar knowledge and skills, or describe how these skills are essential to [redacted] artistic performance as a chef.

Although the petitioner submitted an advisory opinion letter from [redacted] of The James Beard Foundation, the letter does not address the beneficiary's prior working relationship with the O-1 alien. [redacted] stated that the beneficiary is "an integral part of not only the success of [the petitioning restaurant], but also the success of the group's newest venture called the [redacted]" While [redacted] states that the beneficiary will assist and support [redacted] the letter does not describe the beneficiary's essentiality to and working relationship with the O-1 artist or whether there are available U.S. workers who can perform the support services, pursuant to the consultation requirements for O-2 accompanying aliens as set forth at 8 C.F.R. § 214.2(o)(5)(iv). Furthermore, [redacted] spoke of the beneficiary's skills in similarly broad terms, noting her "exacting management style," "attention to detail," "international sensibilities," "creative and technical skills," "food industry expertise," and "utmost professionalism." Such attributes and skills would reasonably be possessed by the majority of restaurant managers employed at critically-acclaimed metropolitan restaurants in the United States and have not been shown to be anything more than skills "of a general nature," rather than skills that are specific to and integral to the performance of [redacted]

When asked to provide additional evidence of the beneficiary's critical skills and her experience providing essential support services for the O-1 alien, the petitioner stated that the duties the beneficiary performs and will

perform for the restaurant "enabled [redacted] to focus his culinary obligations on the creative process." The petitioner noted that the beneficiary performs "administrative support elements" such as setting up press and booking appearances, "sourcing and purchasing . . . plateware and displayware," and managing "financial aspects of the business." Again, all of these duties appear to be the typical duties of a restaurant general manager in a fine dining establishment. The petitioner also emphasized its "team approach" among its kitchen and front-of-house staff, noting that "the front of house efforts enable, back up and support the kitchen endeavors." The petitioner has described the organizational structure and division of labor that would be found in any large restaurant.

As noted by the director, a restaurant manager is clearly integral to the successful performance of the restaurant. The duties of the position are not, however, assistive to, supportive of, or integral to the artistic performance of the head chef. The petitioner has not established that these skills are not of a general nature or addressed why such skills and duties could not be performed by a U.S. worker. The fact that the beneficiary and the O-1 alien may have successfully maintained the front-of-house and kitchen operations of the restaurant for several months as general manager and head chef, respectively, does not establish the existence of the required essential support relationship between these two individuals. The petitioner has failed to establish the critical element of eligibility - that the beneficiary possesses critical skills that are integral to the chef's actual artistic performance.

Based on the foregoing discussion, we concur with the director's findings that the petitioner failed to establish that the beneficiary is an integral part of [redacted] performance as a chef, or that she has critical skills and experience with [redacted] that are not of a general nature and which cannot be performed by a U.S. worker.

The beneficiary is clearly a skilled and experienced restaurant manager who is undoubtedly an asset to the petitioner's restaurant. The denial of this petition is without prejudice to the filing of a new petition by the petitioner in an appropriate visa classification, accompanied by the appropriate supporting evidence and fee.

In visa petition proceedings, the burden of proving eligibility for the benefit 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.