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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



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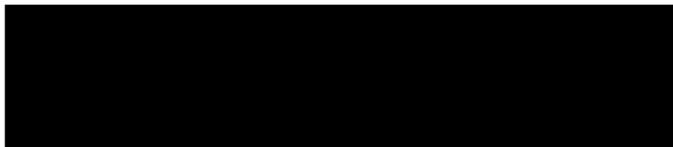


FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: **SEP 30 2010**

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Petition for a Nonimmigrant Worker under 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:

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 \$585. 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, California Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner filed this nonimmigrant petition seeking to classify the beneficiary as an O-1 nonimmigrant pursuant to section 101(a)(15)(O)(i) of the Immigration and Nationality Act (the Act), as an alien with extraordinary ability in the arts. The petitioner, which is self-described as a premier provider of casino branded entertainment, seeks to employ the beneficiary in the position of French Specialty Chef, Master Cook at [REDACTED]. The petitioner has employed the beneficiary pursuant to an approved O-1 classification petition since December 31, 2007 and seeks to extend his status for three additional years.

The director denied the petition, finding that the petitioner failed to establish that the beneficiary is an alien of extraordinary ability in the culinary arts. The director determined that the petitioner established only one of the six evidentiary criteria set forth at 8 C.F.R. § 214.2(o)(3)(iv)(B).

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that sufficient evidence was presented attesting to the beneficiary's distinction in the field, and suggests that the director placed undue emphasis on the beneficiary's current and past job titles rather than the beneficiary's actual qualifications. Counsel further asserts that the director failed to apply the preponderance of evidence standard when adjudicating the petition, particularly in light of the prior approval granting the beneficiary O-1 status for employment with the petitioner. Finally, counsel suggests that the director erroneously concluded that only an executive chef could qualify for O-1 classification. Counsel submits a brief and additional evidence in support of the appeal.

I. The Law

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 regulation at 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.

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

¹ Subsequent to the filing of the petition in May 2009, the beneficiary received a promotion to the position of Chef Tournant.

Evidentiary criteria for an O-1 alien of extraordinary ability in the arts. To qualify as an alien of extraordinary ability in the field of 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 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, government 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.

Additionally, the regulation at 8 C.F.R. § 214.2(o)(2)(iii) provides:

The evidence submitted with an O petition shall conform to the following:

- (A) Affidavits, contracts, awards, and similar documentation must reflect the nature of the alien's achievement and be executed by an officer or responsible person employed by the institution, firm, establishment, or organization where the work was performed.
- (B) Affidavits written by present or former employers or recognized experts certifying to the recognition and extraordinary ability . . . shall specifically describe the alien's recognition and ability or achievement in factual terms and set forth the expertise of the affiant and the manner in which the affiant acquired such information.

The decision of U.S. Citizenship and Immigration Services (USCIS) in a particular case is dependent upon the quality of the evidence submitted by the petitioner, not just the quantity of the evidence. The mere fact that the petitioner has submitted evidence relating to three of the criteria as required by the regulation does not necessarily establish that the alien is eligible for O-1 classification. 59 Fed Reg at 41820.

In determining the beneficiary's eligibility under these criteria, the AAO will follow a two-part approach recently set forth in a decision issued by the U.S. Court of Appeals for the Ninth Circuit. *Kazarian v. USCIS*, 2010 WL 725317 (9th Cir. March 4, 2010). Similar to the regulations governing this nonimmigrant classification, the regulations reviewed by the *Kazarian* court require the petitioner to submit evidence pertaining to at least three out of ten alternative criteria in order to establish a beneficiary's eligibility as an alien with extraordinary ability. *Cf.* 8 C.F.R. § 204.5(h)(3).

Specifically, the *Kazarian* court stated that "the proper procedure is to count the types of evidence provided (which the AAO did)," and if the petitioner failed to submit sufficient evidence, "the proper conclusion is that the applicant has failed to satisfy the regulatory requirement of three types of evidence (as the AAO concluded)." *Id.* at *6 (citing to 8 C.F.R. § 204.5(h)(3)). The court also explained the "final merits determination" as the corollary to this procedure:

If a petitioner has submitted the requisite evidence, USCIS determines whether the evidence demonstrates both a "level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the[ir] field of endeavor," 8 C.F.R. § 204.5(h)(2), and "that the alien has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise." 8 C.F.R. § 204.5(h)(3). Only aliens whose achievements have garnered "sustained national or international acclaim" are eligible for an "extraordinary ability" visa. 8 U.S.C. § 1153(b)(1)(A)(i).

Id. at *3.

Thus, *Kazarian* sets forth a two-part approach where the evidence is first counted and then, if qualifying under at least three criteria, considered in the context of a final merits determination. The final merits determination analyzes whether the evidence is consistent with the statutory requirement of "extensive documentation" and the

regulatory definition of "extraordinary ability" as "one of that small percentage who have risen to the very top of the field of endeavor."

The AAO finds the *Kazarian* court's two part approach to be appropriate for evaluating the regulatory criteria set forth for O-1 nonimmigrant petitions for aliens of extraordinary ability at 8 C.F.R. § 214.2(o)(3)(iii), (iv) and (v). Therefore, in reviewing Service Center decisions, the AAO will apply the test set forth in *Kazarian*. As the AAO maintains *de novo* review, the AAO will conduct a new analysis if the director reached his or her conclusion by using a one-step analysis rather than the two-step analysis dictated by the *Kazarian* court. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO reviews appeals on a *de novo* basis).

In the present matter, the petitioner has failed to submit evidence that satisfies three of the evidentiary criteria at 8 C.F.R. § 214.2(o)(3)(iv)(B), and has not established that the beneficiary has 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 he is prominent, renowned, leading, or well-known in the field of culinary arts. 8 C.F.R. §§ 214.2(o)(3)(ii).

II. The Beneficiary's Eligibility under the Evidentiary Criteria

The beneficiary in this matter is a native and citizen of the Philippines. The beneficiary holds a [REDACTED]

[REDACTED] He also received a [REDACTED]

The petitioner states that the evidence submitted in support of the petition satisfies at least four of the six criteria at 8 C.F.R. § 214.2(o)(3)(iv)(B) and establishes that the beneficiary is renowned, leading and well-known in the field of culinary arts. In denying the petition, the director determined that the evidence submitted meets only one of these criteria. After careful review of the record, it must be concluded that the petitioner has failed to overcome the grounds for denial.

As noted above, simply submitting evidence to satisfy the evidentiary criteria will not automatically establish eligibility for this visa classification. The mere fact that the petitioner has submitted evidence relating to three of the criteria as required by the regulation does not necessarily establish that the alien is eligible for O-1 classification. 59 Fed Reg 41818, 41820 (August 15, 1994).

If the petitioner establishes through the submission of documentary evidence that the beneficiary has been nominated for or has been the recipient of, significant national or international awards or prizes in the particular field pursuant to 8 C.F.R. § 214.2(o)(3)(iv)(A), then it will meet its burden of proof with respect to the beneficiary's eligibility for O-1 classification. The regulation lists an Academy Award, an Emmy, a Grammy, or a Director's Guild award as examples of qualifying significant awards or prizes. The petitioner does not claim that the beneficiary qualifies for O-1 classification on the basis of his nomination for or receipt of such an award.

Accordingly, the petitioner must establish the beneficiary's eligibility under at least three of the six criteria set forth at 8 C.F.R. § 214.2(o)(3)(iv)(B). The petitioner indicates that the beneficiary meets at least four criteria.

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.

The petitioner states that the beneficiary satisfies the criterion at 8 C.F.R. § 214.2(o)(3)(iv)(B)(1) based on his role as an assistant chief cook at [REDACTED] his role as chef intern at [REDACTED] and his roles as [REDACTED] at the petitioner's restaurant. The AAO notes that the petitioner relies on essentially the same claims and evidence in support of this criterion and the criterion at 8 C.F.R. § 214.2(o)(3)(iv)(B)(3).

In its letter dated April 9, 2009, the petitioner stated the following in support of its assertion that the beneficiary satisfies this criterion:

[The beneficiary] was previously Assistant Chief Cook at [REDACTED] where, in addition to [REDACTED] its distinguished reputation was further heightened by entertaining regular clients. . . . [The beneficiary] vibrantly performed his duties of [REDACTED]. As such, [the beneficiary] was actively engaged in Filipino menu service in conjunction with the coordination of VIP service and management. From his very first day at [REDACTED] [the beneficiary's] skill and expertise in the field of culinary arts, allowed him to successfully provide excellent service for his clients and prepare various feasts of enormous magnitude.

Upon classification as an O-1 alien of extraordinary ability and as French Specialty Chef, Master Cook, [the beneficiary] will continue to further perform culinary services as a lead participant in events of distinguished reputation at [the petitioner's] restaurant. His responsibilities . . . will include the direct supervision of his support staff. These services and events include preparing authentic French Cuisine for both French and non-French clientele, VIPs, and private parties in a world-class, state-of-the-art galley at [REDACTED]. See list of events hosted by [REDACTED]

In response to a request for additional evidence ("RFE") issued on August 11, 2009, counsel emphasized that the beneficiary's former employer, [REDACTED] "regularly hosts celebrity clients and supports prestigious charity events," and noted that the beneficiary, in his proposed role, will be responsible for "organizing festivals, [REDACTED] and other galas hosted by [the petitioner's] restaurant."

Upon review, the evidence submitted does not establish that the beneficiary meets this criterion. The plain language of the regulation requires that the petitioner identify with specificity the *events or productions* in which the beneficiary performed services in a lead or starring capacity, document the distinguished reputation of such events or productions, and provide evidence of the beneficiary's role in such events in the form of critical reviews, advertisements, publicity releases, publications, contracts, or endorsements.

The AAO acknowledges the distinguished reputation of [REDACTED] and the petitioner. These establishments may host celebrity and VIP clientele, well-publicized events, and entertainment

productions that enjoy a distinguished reputation. However, the petitioner has neither identified nor documented through submission of the evidence prescribed by regulation, the beneficiary's lead or starring role in such events. The majority of the evidence in the record pertaining to the beneficiary's accomplishments is testimonial evidence, and does not include reviews, advertisements, publicity releases or publications that mention him by name. Moreover, the testimonial evidence provided also fails to mention the beneficiary's services as a lead or starring participant in any particular events or productions with a distinguished reputation. It is insufficient to establish that the beneficiary works and has worked for a distinguished establishment that regularly host events. The petitioner has not established that the beneficiary meets this criterion. The evidence submitted is more relevant to the evidentiary criterion at 8 C.F.R. § 214.2(o)(3)(iv)(B)(3) and will be discussed in more detail below.

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

The petitioner initially indicated that the beneficiary can meet this criterion based on his recognition as a [REDACTED] competition held at the [REDACTED] and based on his receipt of a [REDACTED]. The petitioner did not submit any additional evidence in reference to this criterion when responding to the director's RFE.

The director determined that the petitioner did not submit evidence to satisfy this criterion, noting that the plain language of the regulations clearly requires submission of published materials by or about the beneficiary in major newspapers, trade journals, magazines or other publications. The AAO agrees that the evidence submitted is not in the proper format. The petitioner has not submitted evidence of any critical reviews or any type of published materials by or about the beneficiary in any type of publication.

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.

The petitioner asserts that the beneficiary meets this criterion based on his current and previous employment with three restaurants that enjoy a distinguished reputation. As noted above, sufficient documentary evidence has been submitted to establish that [REDACTED] enjoy a distinguished reputation in the culinary field. The remaining question is whether the beneficiary has performed and will perform in a lead, starring or critical role with these establishments. The record of proceeding contains two letters from the beneficiary's prior employer, [REDACTED]. The first letter, dated December 1, 2004, is from [REDACTED] human resources manager, who states that the beneficiary was employed by the restaurant and held the following positions: Assistant Chief Cook (April 1, 2004 – November 30, 2004); Management Trainee (Kitchen) (August 16, 2003 – March 30, 2004); and Cook III (April 4, 2003 – August 15, 2003).

The petitioner also submits a letter dated September 11, 2009 from [REDACTED]

This is to confirm that [the beneficiary] was employed at [REDACTED]
[REDACTED] His employment records with the company were as follows:

1 st employment	February 6, 2002 to November 30, 2002
2 nd employment	April 4, 2003 to November 30, 2004

With his loyal service to the company and diligence in the performance of his duty, [the beneficiary] rose from the ranks until he reached the above stated position under the [REDACTED]
[REDACTED] During his stint with the company, he has proven his honesty and integrity in doing his job. Furthermore, he has exhibited good customer service orientation towards internal and external customers. He has proven to be well-versed in his duties and responsibilities.

His performance has been consistently evaluated to be ranging from above average to outstanding. Moreover, [the beneficiary] has not committed any violation of the company policy and complied with the set technical standards of the restaurant operations. He has generally reached the expectations of the company.

In a letter dated September 22, 2009, counsel for the petitioner further stated:

Prior to serving as Assistant Chief Cook [the beneficiary] received the opportunity to participate in the lead role of Cook III for the distinguished [REDACTED]
[REDACTED]

Key to the fact that [the beneficiary's] duties as Cook III were that of a lead participant and not of a supporting nature, is that while working alongside [REDACTED] [the beneficiary] had the pleasure of creating new dishes to be featured on the daily menu. It is no wonder then that just within a few months of undertaking this lead role, [the beneficiary] was promoted to Management Trainee. Once [the beneficiary] completed this exclusive management program, he was invited to partake in the lead role of Assistant Chief Cook at [REDACTED]
[REDACTED] [The beneficiary] remained in this position and created only the finest culinary masterpieces alongside [REDACTED]. [The beneficiary] excelled not only in his cuisine, but also in culinary design. As such, it is evident that [the beneficiary] has extraordinary ability in creating and presenting extraordinary dishes.

Finally, the petitioner submitted a letter from acclaimed celebrity chef, [REDACTED] who noted the distinguished reputation of the [REDACTED] and stated that the beneficiary "rose through the ranks at this restaurant in a very short period" before continuing his culinary studies in the United States.

Upon review, the evidence submitted fails to demonstrate that any of the beneficiary's roles at the [REDACTED]
[REDACTED] were in a lead or critical role. In order to establish that the petitioner performed a leading or critical role for an organization or establishment with a distinguished reputation, the petitioner must establish the nature of his role within the entire organization or establishment and the reputation of the organization or establishment.

While [REDACTED] acknowledges the beneficiary's honesty, integrity, knowledge of his job duties and responsibilities, customer service orientation, and "above average to outstanding" evaluations, the AAO cannot equate her conclusion that he "generally reached the expectations of the company," with a finding that he was employed in a role that was leading or critical to the organization. The letters submitted from the prior employer provided little or no discussion of the beneficiary's role or responsibilities. Similarly, while [REDACTED] stated that the beneficiary "rose through the ranks" at the [REDACTED], his statement falls significantly short of establishing that the beneficiary achieved the rank of a lead or critical role within the establishment.

Counsel has provided her account of the beneficiary's duties, the beneficiary's close working relationship with the [REDACTED] executive chef, and her opinion that the beneficiary "performed as lead participant" in the restaurant "above and beyond the call of his duties as Assistant Chief Cook," and served in a "lead" position as "cook III." However, it is unclear on what evidence counsel bases these statements, as they go well beyond the conclusions that can reasonably be drawn from the testimonial letters addressing the beneficiary's employment with this restaurant. 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).

There is no evidence demonstrating how the beneficiary's role as Cook III, Management Trainee, or Assistant Chief Cook differentiated him from others where he worked. For instance, the petitioner did not submit evidence such as an organizational chart which would demonstrate the beneficiary's position within the organization, or otherwise describe the hierarchy among the kitchen staff. Mere title, without specific information regarding the beneficiary's actual duties or explanation of relevance or importance of that position within the hierarchy of the organization, is not sufficient to establish the beneficiary's leading or critical role. Typically, senior restaurant staff use a "chef" rather than a "cook" job title. While it is possible that the job title conventions are different in fine dining establishments [REDACTED] this is a fact that should be established through evidence. The job title "Cook III" or "assistant chief cook" offers no insight into the relative importance of this job when the hierarchy is unknown. While the AAO does not doubt that the beneficiary provided valuable services to the [REDACTED] the petitioner has failed to support the proposition that he has performed a leading or critical role for that establishment.

More recently, while attending the [REDACTED] the beneficiary served as a chef intern at the [REDACTED]. Counsel indicates that the beneficiary "worked alongside the very talented and passionate [REDACTED]. The petitioner submitted ample evidence to establish [REDACTED] acclaim as a chef and the distinguished reputation of his restaurant, but did not provide a letter from the restaurant discussing the leading or critical role the beneficiary held within that organization as an intern.²

² Counsel indicated in her letter dated September 22, 2009 that the petitioner was submitting a letter from [REDACTED] as part of Exhibit 26 in response to the RFE; however, that exhibit only contains [REDACTED] biography. Upon careful review of the record of proceeding, the AAO was unable to locate a letter from [REDACTED]. Counsel does not further refer to the letter or its contents.

states that he is aware of the beneficiary's current employment with the petitioner and his completion of an internship at . He further indicates that he is acquainted "with both , owners of these two restaurants" and that he can "unequivocally state that they could and would only select those at the top of their field to work for them." While statement indicates his expert opinion that would only hire the most highly skilled chefs to work in his kitchen, it does not speak to the nature of the beneficiary's role or level or responsibility as an intern at or how he played a leading or critical role for the restaurant.

Counsel further states in her letter dated September 22, 2009 that the beneficiary "vibrantly performed in his lead role as Intern Chef at ' She indicates that "despite his title, [the beneficiary] was actively engaged in classic preparations of French cuisine ranging from stocks to sauces; vegetable and meats; and desserts." As with counsel's statements referenced above, it is unclear how counsel arrived at her conclusion that the beneficiary's position as an intern was a "lead role" or how he was deemed "irreplaceable" by the executive chef at the restaurant, as there is virtually no independent evidence with respect to his role at this establishment. Counsel's statements cannot be accepted as testimonial evidence in support of this criterion. Again, 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. at 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506 (BIA 1980).

Based on the above, the petitioner has not established that the beneficiary's role as an intern was of a leading or critical nature to

The petitioner further indicates that the beneficiary played a lead and critical role in the role of French Specialty Chef and Master Cook at , the position he held at the time of filing and for approximately the previous two years. In its letter of support dated April 9, 2009, the petitioner stated that the position "is not simply that of an ordinary Chef, but rather one requiring artistic precision, experience and expertise in conjunction with direction and supervision." The petitioner emphasized that service of authentic French food is essential to the success of the business, and that the beneficiary's "product/ingredient knowledge, cooking style, taste and unique presentation of French cuisine are critical to the restaurant's success and customer loyalty." The petitioner particularly noted the beneficiary's skill and expertise in preparing hot appetizers. The petitioner stated that the beneficiary's daily duties include daily execution of station *mis en place*, service and menu item execution, working within guidelines established by the Executive chef and assisting in verifying inventory rotations and daily orders, assisting in new menu idea development, assisting in new purveyor contacts and research for sourcing new products, assisting in the organization and execution for external functions, and overseeing the training and development of current and new staff. The petitioner stated that "chefs of the highest caliber such as [the beneficiary] play a leading and critical role in maintaining [the petitioner's] Culinary Department's competitive prowess."

The testimonial evidence submitted in support of this claim includes letters from the petitioner's current and previous Executive Chefs and from

In a letter dated April 29, 2009, states:

[The beneficiary] is integral to our quest for the third Michelin star. [The beneficiary] is a chef whom I personally recognized based on his extraordinary ability in the culinary arts and he is a valuable asset to the culinary brigade. He is fully committed to our goals and exhibits his passion for tradition and the highest possible quality on a daily basis. Each chef and cook has a distinctive role in the culinary brigade and the brigade must work together flawlessly. Again, [the beneficiary] demonstrates this daily and plays a critical role in our kitchen and its internationally-recognized success. It is mastery of the art and consistency in the delivery that will earn [redacted] its third Michelin star; [the beneficiary] understands this and puts it into practice with every service. For every table, every plate, every person, he delivers excellence.

In a letter dated March 15, 2009, [redacted] current executive chef of [redacted] states:

[The beneficiary] has been an integral member of the culinary brigade at our establishment for the past two years. During his time with us he has shown continual passion for the industry and a desire to evolve both professionally and personally. Never content with the status quo, [the beneficiary] demonstrates to all of our team that he is always searching to better himself and his work. The characteristics of dedication, professionalism, punctuality and focus are all apt descriptions of his daily work. [The beneficiary] has a genuine understanding of the style of cuisine that [redacted] has become renowned for in the world of [redacted]. The subtleties of seasoning, utilization of only the finest seasonal ingredients, and perfection of technique are the foundation of our cuisine and the daily focus of the staff. [The beneficiary] is a true asset to our restaurant with regards to these elements. He takes direction well and is able to understand and execute what is required of the position he is working. His experience thus far has included multiple positions within the brigade, as well as experience in special functions and off premise quantity oriented events. As a management team, we rely heavily on [the beneficiary's] work and are confident in his abilities as a chef. He is a valuable asset and an essential element to the continued success of [redacted].

The record contains a letter dated November 3, 2007 from chef [redacted] former executive chef for the petitioner's restaurant, who states:

My expertise allows me to comment on the work of [the beneficiary]. His abilities in the kitchen go beyond the ordinary and he excels in the responsibilities given to him. [The beneficiary] is highly regarded among chefs he has worked with, and his talent was recognized by master chef [redacted] when he joined the culinary brigade in Las Vegas. [redacted] restaurants are an institution in the culinary world, and it is with good reason that [the beneficiary] was picked to help continue his tradition in the United States. His professionalism, focus and dedication to the craft is a key element in the daily operations of the restaurant and are integral in assuring that quality and efficiency are unwavering.

As noted above, [redacted] also noted that he is personally acquainted with [redacted] and expressed his opinion that [redacted] "could and would only select those at the top of their field" to work with him.

Finally, counsel addressed the beneficiary's role as French Specialty Chef and Master Cook as follows:

In light of his culinary prowess so efficiently displayed at [REDACTED] [the beneficiary] transitioned as lead and starring participant in the role of French Specialty Chef and Master Cook at [REDACTED]. In this capacity, [the beneficiary] had exclusive responsibility in the creation of all appetizers, special and daily. Moreover, critical to insuring the [REDACTED] [REDACTED] maintained its high standards of perfection and distinction, [the beneficiary] hand-selected products and ingredients to create dishes that only a chef of his level of expertise could carry out to execute specialty appetizer's [sic] to please the palates of the most discriminating and up-market food connoisseurs in the world.

Counsel goes on to state that the beneficiary "worked very closely" with [REDACTED] participated in new menu idea development, "played a leading role in coordinating new purveyor contracts and researching for sourcing new products, and was "key to the prestigious culinary team in organizing festivals, Master Chef Dinners, Charity Events, and other galas." Finally, counsel noted that the beneficiary "oversaw the training and development of current and new staff, while researching new individuals for potential future openings."

Finally, counsel stated in response to the RFE that the beneficiary had been promoted to the position of Chef Tournant while the petition was pending. The petitioner provided a copy of its standard position description for this role. According to the job summary for the position, the Chef Tournant is "responsible for the preparation of various entrees and side items required by station assignment," and "responsible for product ordering and inventory rotation as required by station assignment," and "covers other line stations for backup as needed." According to the job description, the position supervises master cooks/commis in their job responsibilities, and is supervised by a restaurant chef and/or sous chef, who monitor the chef's specific duties, procedures and products. Counsel noted that the beneficiary will be supervising one Master Cook and one Commis Chef, and stated that his new role elevates his overall position within the petitioner's culinary team.

The director determined that the beneficiary does not meet this criterion, noting that while many individuals play an important role for a restaurant or kitchen, not every individual working in the kitchen can be credited with performing a lead or starring role. The director concluded that "an individual may satisfy this criterion only when employed in a starring, leading or critical role at a restaurant, such as executive chef." The director also declined to consider evidence of the beneficiary's promotion from Master Cook/French Specialty Chef to Chef Tournant, noting that USCIS cannot consider facts that have come into being subsequent to the filing of the petition. The director cited to *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971), *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998), *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988) and *Matter of Bardouille*, 18 I&N Dec. 114 (BIA 1981).

On appeal, counsel asserts that the director failed to give proper consideration to the opinions of [REDACTED] and erroneously applied her "non-expert opinion" that only an executive chef can hold a lead or critical role among a restaurant's kitchen staff. Counsel asserts that the definition of "arts" at 8 C.F.R. § 214.2(o)(3)(ii) includes not only principal creators and performers but other essential persons. Therefore counsel asserts that in the same way that an instrumentalist in an orchestra can meet the same criteria for O-1 status as the conductor of that orchestra, or in the same way that a dancer in a performance can meet same criteria

for O-1 status as the choreographer, so, too, can a French Specialty Chef (Master Cook) and a Chef Tournant meet the same criteria for O-1 status as an Executive Chef.

Counsel further asserts that the director improperly excluded evidence that the beneficiary was promoted while the petition was pending, noting that the petitioner did not provide the information "in order to prove that the beneficiary now qualified for O-1 status." Counsel emphasizes that USCIS already found that the beneficiary qualified for O-1 status when it approved his initial petition.

Upon review, counsel's assertions with regard to the beneficiary's promotion are persuasive in part. The beneficiary was promoted while the petition was pending, and the petitioner took the correct course of action by notifying USCIS of this change in response to the RFE. The information provided confirms that, if the petition is approved, the beneficiary would continue to work in his claimed area of extraordinary ability, and the AAO cannot find that the promotion was a material change that would warrant the filing of a new amended petition. The AAO is also satisfied that the petitioner was not attempting to make changes to the petition in order to make a deficient petition conform to USCIS requirements. Regardless, in order to satisfy this criterion, the petitioner must still establish that the beneficiary has been employed in a lead, starring or critical role with the petitioner's organization in the past, regardless of whether his role as Chef Tournant qualifies as such a role.

Upon review, the petitioner has not established that the role of Master Cook, French Specialty Chef, was in a lead, starring or critical role. As noted above, at issue for this criterion are the position the beneficiary was selected to fill and the reputation of the entity that selected him. The distinguished reputation of the petitioner's restaurant has been established. Employment among the culinary brigade of this restaurant is evidence of a degree of recognition. However, the AAO cannot conclude that a "Master Cook" role in and of itself is a lead, starring or critical role within the restaurant. For instance, there is no organizational chart or other evidence documenting how the beneficiary's position fit within the general hierarchy of the restaurant's culinary brigade. Although the petitioner indicates that the position is responsible for supervision of staff, the petitioner has not identified the number of types of employees the beneficiary supervised as a master cook. However, there is reason to believe that there are many higher-ranked roles within the hierarchy of the petitioner's kitchen.

The AAO concurs with counsel that an executive chef is not necessarily the only lead or critical role within a restaurant, particularly in the case of a high-end fine dining establishment such as the petitioner's. The names of the petitioner's general manager, chef de cuisine, sous chef and pastry chef appear in reviews, articles and press materials about the restaurant. These are the types of roles that are typically attributed with responsibility for the success or standing of a restaurant to a degree consistent with the meaning of "leading, starring or critical role." The AAO does not doubt that the lower-level chefs working in relative anonymity may contribute just as significantly to the final products presented to the restaurant's clientele, but the evidence does not establish how the beneficiary, as "master cook" served in a leading role that would place him among the top tier of chefs within the kitchen.

The testimonial letters submitted establish that the beneficiary is considered to be a valuable employee and a highly-skilled culinary professional. According to [REDACTED] all culinary professionals hired by the petitioner's restaurant are extremely talented or they would not be offered employment with one of the country's finest restaurants. It does not follow that every talented culinary professional working in the petitioner's highly acclaimed kitchen is employed in a "leading, starring or critical" role in the company. For example, [REDACTED]

praises the beneficiary's culinary knowledge, technique, work ethic, professionalism, and punctuality, and describes him as a "true asset" and "essential element" to the restaurant's continued success. However, he also notes that beneficiary's ability to take direction and notes that his experience has included "multiple positions." These statements are insufficient to establish that the beneficiary is employed in a leading or critical role. [REDACTED] does not discuss the beneficiary's role or responsibilities with any specificity or differentiate the beneficiary from other master cooks within the kitchen.

[REDACTED] statement also suggests that every employee in the culinary team is considered an "essential element" of the restaurant. He states that "the attention to detail and rigor of work ethic demanded of the culinary team at [REDACTED] is a defining theme amongst everyone involved in the experience that our guests receive," that "every element in the chain must be faultless," and that "this is no more true than with regards to our employees."

[REDACTED] the petitioner's former executive chef, similarly praises the beneficiary's "professionalism, focus and dedication," states that the beneficiary's abilities are "beyond the ordinary" and indicates that he excels in his responsibilities. However, he does not discuss the beneficiary's role or the leading, starring or critical nature of that role, although he, too, concludes that the beneficiary "is a key element in the daily operation of the restaurant," and "integral in assuring that quality and efficiency are unwavering."

Finally, the AAO recognizes that [REDACTED] states that the beneficiary is "a valuable asset to the culinary brigade," and "plays a critical role in our kitchen and its internationally recognized reputation." Again, the beneficiary's value to the petitioning organization is not in question. [REDACTED] statement indicates that "each chef and cook has a distinctive role in the culinary brigade and the brigade must work together flawlessly." Presumably, all of the chefs and cooks in their distinctive roles are considered to be critical to the success. [REDACTED] does not discuss the beneficiary's specific role as a master cook or how that role is considered to be leading, starring or critical relative to other kitchen staff.

Overall, the documentation submitted by the petitioner does not establish that the beneficiary, as a master cook, was responsible for the success or standing of the petitioner's restaurant to a degree consistent with the meaning of "leading, starring or critical." Therefore the petitioner has not established that the beneficiary has been employed in a lead, starring or critical role as of the date the petition was filed, notwithstanding the petitioner's distinguished reputation.

Nor can we conclude that the beneficiary's new role as chef tournant would satisfy the requirement that he will be performing in such a role. The position appears to be one step higher in the hierarchy of the petitioner's culinary staff in comparison to the master cook position. However, as discussed above, the record is devoid of evidence that would illuminate where either position falls in the overall hierarchy of the restaurant's culinary staff. 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)).

Furthermore, the plain language of the regulations require the submission of evidence in the form of published articles or testimonials in support of this criterion. The petitioner has submitted testimonial evidence, but all of the testimonials pre-date the beneficiary's promotion to the position of Chef Tournant. As discussed above, the

testimonials do not establish that the role of master cook is a lead, starring or critical role within the restaurant, such that it could be reasonably concluded that the new role is also a qualifying role for the purposes of meeting this criterion.

The AAO also acknowledges counsel's argument that the definition of "arts" does not only include "principal creators and performers." The definition at 8 C.F.R. § 214.2(o)(3)(ii) provides many examples of "essential persons" who may qualify under the arts category, however, the AAO notes that none of these examples are in the culinary arts field. While it is true that both an instrumentalist and a conductor, and a dancer and choreographer may be eligible for O-1 status based on their prominence in their respective fields, the AAO cannot find that there is a similar relationship between a "master cook" and an "executive chef" or other high-level chef within a restaurant. Not every professional instrumentalist in a critically acclaimed orchestra or every dancer in a renowned ballet company can be considered to be in a lead, starring or critical role. Similarly, not every chef working in the kitchen of an internationally-recognized restaurant can be considered to be serving in a lead, starring or critical role. As discussed above, the AAO does not find that it is necessary for a beneficiary to be an executive chef in order to meet this criterion in the field of culinary arts, but it is the petitioner's burden to establish how lesser roles rise to the level of leading or critical within the individual organization. As discussed, the testimonial evidence submitted does not meet this burden.

Therefore, we concur with the director that the beneficiary's role as master cook, while of great value to the petitioner in ensuring the consistency and highest quality in its cuisine, is not considered employment in a "lead, starring or critical role" as would be the position of the higher level chef positions to whom the restaurant's overall reputation is normally attributed.

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.

The petitioner did not initially indicate that it was submitting evidence to meet this criterion. In response to the request for evidence, the petitioner stated that "the beneficiary earned the critically acclaimed success of being bestowed with the title of a [REDACTED] [REDACTED]". The petitioner further claims the beneficiary's [REDACTED] is a "critically acclaimed" success. The petitioner submitted a copy of the beneficiary's [REDACTED] 2004 Chefs on [REDACTED] issued by the Hotel and Restaurant Association of the Philippines, given to the beneficiary "in recognition of acceptable performance [REDACTED]".

The director determined that such evidence does not satisfy this criterion. The AAO agrees. The plain language of this criterion specifically requires documentation of commercially or critically acclaimed success as reported in published format. There is no evidence that the beneficiary's [REDACTED] or ServSafe certificate was memorialized in trade journals, major newspapers, or other publications. Furthermore, as noted by the director, the ServSafe certificate is awarded as a result of successful performance on an examination and is not an indicator of commercial or critical success. The director further noted that a single third-place finish in a cooking competition would be insufficient to evidence a "record" of acclaimed successes.

Evidence that the alien has received significant recognition for achievements from organizations, critics, government 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.

The director determined that the testimonial evidence in the record satisfies this criterion. The AAO notes that, with one exception, the letters submitted are from the beneficiary's own current and former employers and discuss his talents and work ethic rather than his *achievements* in the culinary arts field. While there is ample evidence that [REDACTED] can be considered recognized experts in the field, they wrote their letters as employers and did not discuss the beneficiary's achievements beyond confirming that he works for the petitioning establishment and performs his duties admirably.

The only letter that was not provided by a former employer was the letter from [REDACTED]. [REDACTED] recognizes the beneficiary's employment with [REDACTED] and the petitioner's restaurant, and his admission to the California School of Culinary Arts, as achievements in the field of culinary arts which establish that the beneficiary is at the top of the field with "culinary accomplishments that are world class." He also appears to have sufficient knowledge of the beneficiary's employment history and clearly has the expertise to render his expert opinion. Therefore, the AAO finds that [REDACTED] letter satisfies the plain language of this criterion.

As discussed above, the beneficiary has also received recognition in the form of a [REDACTED] [REDACTED] competition held at the 2004 [REDACTED] event. According to the evidence submitted, Chefs on Parade is an annual competition organized by the Hotel and Restaurant Association of the Philippines, and had nearly 2,000 participants in 2004. Counsel stated that the event "attracted prominent high profile chefs and figures from around the world including celebrity guest [REDACTED]." The petitioner provided evidence regarding the event and [REDACTED]. While Chefs on Parade appears to be a high-profile national event in the Filipino culinary industry, the record contains insufficient evidence regarding the specific "Market Basket" competition in which the beneficiary [REDACTED] the entry criteria for the competition, the number of competitors in the specific competition in which the beneficiary placed, or the total number of competitions held during the two-day event. The evidence submitted is also insufficient to support counsel's assertion that the beneficiary placed in the [REDACTED] among 2,000 competitors. As none of the testimonials address the significance of this [REDACTED] and there is no published information regarding the beneficiary's award, the AAO cannot determine whether the certificate rises to the level of a "significant recognition."

B. Final Merits Determination

Kazarian sets forth a two-part approach where the evidence is first counted and then considered in the context of a final merits determination. However, as discussed above, the petitioner established eligibility for only one of the criteria, of which three are required under the regulation at 8 C.F.R. § 214.2(o)(3)(iv)(B).

Notwithstanding the above, a final merits determination considers all of the evidence in the context of whether or not the petitioner has demonstrated: (1) that the beneficiary has 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 he is renowned, leading, or well-known in the field of arts, pursuant to 8 C.F.R. § 214.2(o)(3)(ii); and (2) that the beneficiary is recognized as being prominent in his field, pursuant to 8 C.F.R. § 214.2(o)(3)(iii). *See Kazarian*, 2010 WL 725317 at *3.

In this case, we concur with the director's finding that the petitioner has not established that the beneficiary is prominent to the extent that he could be considered renowned, leading or well-known in the field of culinary arts.

The specific deficiencies in the documentation submitted by the petitioner have already been addressed in our preceding discussion of the regulatory criteria at 8 C.F.R. § 214.2(o)(3)(iv)(B). The petitioner submitted documentation relating to the beneficiary's education, employment history, and achievements. Although the petitioner's evidence meets one of the six criteria, the submitted evidence is not indicative of the beneficiary's prominence in the field and there is no indication that his individual achievements have been recognized to the extent that he is leading, renowned or well-known in the field.

The beneficiary has worked with chefs who are nationally and internationally recognized and he has worked in establishments that have a distinguished reputation. As noted above, merely having the opportunity to work with such acclaimed chefs and establishments would be considered an achievement for most chefs and the fact that the beneficiary has had such opportunities confirms that he is a highly talented chef. However, this classification focuses on the beneficiary's individual achievements and recognition within the field. The petitioner has provided little evidence of such recognition beyond providing testimonials from the beneficiary's current and prior employers and has failed to establish that the beneficiary has already risen to the level where he is performing lead or critical roles for establishments that have a distinguished reputation.

The favorable opinions of experts in the field, while not without evidentiary weight, are not a solid basis for a successful extraordinary ability claim.³ Unusual in its specificity, section 101(a)(15)(O)(i) of the Act clearly requires "extensive documentation" of the alien's achievements. Again, USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. at 795. However, USCIS is ultimately responsible for making the final determination regarding an alien's

³ Letters may generally be divided into two types of testimonial evidence: expert opinion evidence and written testimonial evidence. Opinion testimony is based on one's well-qualified belief or idea, rather than direct knowledge of the facts at issue. *Black's Law Dictionary* 1515 (8th Ed. 2007) (defining "opinion testimony"). Written testimonial evidence, on the other hand, is testimony about whether something occurred or did not occur, based on the witness' direct personal knowledge. *Id.* (defining "written testimony"); *see also id.* at 1514 (defining "affirmative testimony").

Depending on the specificity, detail, or credibility of a letter, USCIS may give the document more or less persuasive weight in a proceeding. The Board of Immigration Appeals (the Board) has held that testimony should not be disregarded simply because it is "self-serving." *See, e.g., Matter of S-A-*, 22 I&N Dec. 1328, 1332 (BIA 2000) (citing cases). The Board also held, however: "We not only encourage, but require the introduction of corroborative testimonial and documentary evidence, where available." *Id.* If testimonial evidence lacks specificity, detail, or credibility, there is a greater need for the petitioner to submit corroborative evidence. *Matter of Y-B-*, 21 I&N Dec. 1136 (BIA 1998).

eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; USCIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795-796; *see also Matter of V-K-*, 24 I&N Dec. at 500, n.2. Thus, the content of the experts' statements and how they became aware of the beneficiary's reputation are important considerations. Here, as noted above, all but one of the persons providing testimonial evidence are personally acquainted with the beneficiary, and have worked as his supervisor. Even when written by independent experts, letters solicited by an alien in support of a nonimmigrant petition are of less weight than preexisting, independent evidence of recognition in the field.

The AAO emphasizes that four out of the six criteria set forth at 8 C.F.R. § 214.2(o)(3)(iv)(B) require the petitioner to submit various types of published materials to establish the beneficiary's recognition, such as critical reviews, advertisements, publicity releases, newspaper, magazine or trade journal articles. Therefore, it is significant that the petitioner has not submitted any evidence that the beneficiary's name has ever appeared in any publication. Absent evidence that the regulatory criteria are not applicable to the beneficiary's occupation, pursuant to 8 C.F.R. § 214.2(o)(3)(iv)(C), the petitioner must submit some published materials about the beneficiary in order to establish his eligibility for this classification. It is not reasonable to include the beneficiary among the group of chefs recognized in the field as leading, renowned or well-known if the petitioner does not establish that he has received some form of independent recognition based on his reputation or achievements.

Therefore, the conclusion we reach by considering each evidentiary 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 a chef who has achieved a level of distinction to the extent that he can be deemed to be renowned, leading, or well-known in the field of culinary arts. 8 C.F.R. § 214.2(o)(3)(ii). The beneficiary, a master cook recently promoted to Chef Tourant, relies on the praise of his employers and the reputation of the acclaimed chefs and establishments with which he has worked. While the evidence may distinguish the beneficiary from other mid-level chefs working for less accomplished chefs in less distinguished establishments, the petitioner must establish that the beneficiary is recognized based on his own reputation as leading, renowned or well-known among all chefs.

Nothing in the decision of the AAO should be seen as an attempt to minimize the accomplishments or obvious talent of the beneficiary, who was only 28 years old when the petition was filed, or as a comment on the criteria used by the petitioner to select persons for positions. Indeed, as many of the testimonial letters make clear, the beneficiary shows great promise and potential in the culinary arts and appears to be on a career path that would eventually lead him to the type of prominence required for this visa classification.

III. Prior Approval and Conclusion

The record does show that the beneficiary held O-1 status authorizing employment with the petitioner at the time the petition was filed. In matters relating to an extension of nonimmigrant visa petition validity involving the same petitioner, beneficiary, and underlying facts, USCIS will generally give deference to a prior determination of eligibility. However, the mere fact that USCIS, by mistake or oversight, approved a visa petition on one occasion does not create an automatic entitlement to the approval of a subsequent petition for renewal of that visa. *Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 148 (1st Cir 2007); *see also Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 597 (Comm. 1988). For example, if USCIS determines that there was material error, changed

circumstances, or new material information that adversely impacts eligibility, USCIS may question the prior approval and decline to give the decision any deference. The prior approvals do not preclude USCIS from denying an extension of the original visa petition based on a reassessment of the beneficiary's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004).

In the present matter, the director reviewed the record of proceeding and concluded that the petitioner was ineligible for an extension of the nonimmigrant visa petition's validity. In both the request for evidence and the notice of decision, the director clearly articulated the objective statutory and regulatory requirements and applied them to the case at hand. 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). Despite any number of previously approved petitions, USCIS does not have any authority to confer an immigration benefit when the petitioner fails to meet its burden of proof in a subsequent petition. *See* section 291 of the Act.

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.