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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

D8

[REDACTED]

FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: FEB 15 2011

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: SELF-REPRESENTED

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, initially denied the petition for a nonimmigrant visa as abandoned pursuant to 8 C.F.R. § 214.2(b)(13), based on the petitioner's failure to respond to a request for additional evidence. The director granted the petitioner's subsequent motion to reopen and denied the petition based on the merits of the case. The matter is now before the Administrative Appeals Office ("AAO") on appeal. The AAO will dismiss the appeal.

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 restaurant, catering and food consulting business, seeks to hire the beneficiary in the position of senior chef for a period of two years.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary qualifies as an alien of extraordinary ability in the culinary arts. The director determined that the petitioner failed to establish that the beneficiary meets the evidentiary criterion at 8 C.F.R. § 214.2(o)(3)(iv)(A), and submitted evidence to satisfy only one of the six evidentiary criteria set forth at 8 C.F.R. § 214.2(o)(3)(iv)(B), of which three must be met to establish eligibility. The director further found that the petitioner failed to submit the required advisory opinion from an appropriate peer group or association with expertise in the beneficiary's field.

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, the petitioner contends that the director "denied the petition for minor reasons; each having no statutory or regulatory support under the Immigration Laws." The petitioner 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:

*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 set forth in a 2010 decision issued by the U.S. Court of Appeals for the Ninth Circuit. *Kazarian v. USCIS*, 2010 WL 725317 (9<sup>th</sup> 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 she is prominent, renowned, leading, or well-known in the field of culinary arts. 8 C.F.R. §§ 214.2(o)(3)(ii).

## II. Discussion

### A. Procedural History

The beneficiary in this matter is a native and citizen of India who has been in the United States in H-4 nonimmigrant status since August 2002. The petitioner, a restaurant, filed Form I-129, Petition for a Nonimmigrant Worker, on October 8, 2009. In a letter dated October 5, 2009, the petitioner described the beneficiary's background and qualifications in the culinary arts as follows:

[The beneficiary] is a individual of extraordinary ability in the culinary arts. Her reputation in this category is marked by evidence from statements of her peers, and likewise, from evidence of either training or working in locally or internationally recognized eating establishments ranked either in the "Top 50" or ranked as "Best restaurant[s] in the Asia" under star chefs of extraordinary ability. She has worked under world renowned [REDACTED] [REDACTED] to cook or train within these establishments, one must be of extraordinary ability[.]

[The beneficiary] pursued a 3-year program of study at Pusa Institute of Hotel management, New Delhi, India. During her studies, [the beneficiary] received practical training in Cuisine in Indian kitchen at Taj Hotel, New Delhi, India. After completion of her studies she joined Centaur Hotel, Juhu Mumbai, India to work under world renowned [REDACTED] [REDACTED] who was then executive Chef of the establishment. Later on she moved back to Delhi to work for [REDACTED] in one of their best restaurant[s] in Asia "Bukhara."

The petitioner stated that the beneficiary would work in its restaurant in the position of chef under [REDACTED] [REDACTED]. The petitioner stated that she would be assisting "in planning, preparing and artfully displaying a variety of high end menu selections," as well as performing the following duties:

Additional duties will include organizing, overseeing the booking for executive dining reservations and confirming reservations 24 hours prior. Scheduling and coordinating the work of kitchen and pantry employees to ensure that food preparation is economical, technically correct and keeping with a standard of excellence. Directing regular physical inventory of food supplies, and assessing projected needs; directing the ordering of food, supplies and ensuring that high standards of sanitation and cleanliness are maintained in the kitchen area at all times; establishing and maintain controls to minimize food and supply waste. Assisting with Partistry ([www.partistry.com](http://www.partistry.com)), [redacted] creations and [the petitioner's] online extension devoted to confectionary matters such as wedding cakes, chocolates, etc.

The petitioner's supporting evidence related primarily to the reputation of the petitioner's restaurant and its executive chef, [redacted]. With respect to the beneficiary's qualifications, the petitioner submitted testimonials from [redacted] and from [redacted] and [redacted]

The petitioner did not provide evidence of the beneficiary's culinary training, her resume, or letters from her prior employers corroborating the information provided in its initial letter with respect to her educational and professional background.

The director issued a request for additional evidence ("RFE") on November 18, 2009, in which the director addressed the insufficiency of the initial evidence. The director instructed the petitioner to submit evidence to meet the evidentiary criteria for aliens of extraordinary ability in the arts pursuant to 8 C.F.R. § 214.2(o)(3)(iv)(A) or (B), as well as a written consultation from an appropriate association, peer group or labor organization with expertise in the beneficiary's area of expertise.

The director initially denied the petition on March 15, 2010, concluding that the petitioner failed to respond to the RFE by the stated deadline of February 13, 2010. The director advised the petitioner that the petition was therefore considered abandoned and denied pursuant to 8 C.F.R. § 103.2(b)(14).

The petitioner subsequently filed a motion to reopen in which it provided evidence that it had submitted a timely response to the RFE on or about January 15, 2010. The director reopened the matter to adjudicate the petition on its merits. The director affirmed the denial of the petition, noting that the petitioner: (1) failed to submit evidence to satisfy the evidentiary criteria at 8 C.F.R. § 214.2(o)(3)(iv)(A) or (B); and (2) failed to submit the required advisory opinion from a peer group with expertise in the beneficiary's area of extraordinary ability.

**B. The Beneficiary's Eligibility under the Evidentiary Criteria**

The first issue to be addressed is whether the petitioner submitted evidence to establish that the beneficiary satisfies the evidentiary criterion at 8 C.F.R. 214.2(o)(3)(iv)(A), or at least three of the six criteria set forth at 8 C.F.R. § 214.2(o)(3)(iv)(B). In denying the petition, the director determined that the evidence submitted meets none of these criteria. After careful review of the record, it must be concluded that the petitioner has failed to overcome the grounds for denial.

The AAO emphasizes that 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 indicates that "the beneficiary has received a nationally recognized award of distinction," but did not specifically indicate whether it was claiming eligibility under 8 C.F.R. § 214.2(o)(3)(iv)(A). In support of this claim, the petitioner submits a letter dated February 22, 2001 from the Government of India, Ministry of Tourism. The letter is addressed to the beneficiary and congratulates her "on winning the Best Chef Award [REDACTED] [REDACTED] for the year 1999-2000."

The petitioner stated that "this is also confirmed by nationally circulated newspaper articles on [the beneficiary] (Delhi Times, Saturday, October 20, 2001, [REDACTED] 2000." The petitioner submitted the referenced article titled, "It's time to honour top chefs," which discusses the upcoming "International Chefs Day & 6<sup>th</sup> Chef Awards, a gala affair organized by the PHD Chamber of Commerce and Industry in collaboration with the Indian Culinary Forum, Indian Federation of Culinary Association and HT City, that aims to celebrate and award the immense pool of talented chefs in the country." The article indicates that a "high-level jury will select the best chefs across 16 categories." The article includes a photograph and quote from the beneficiary. The caption indicates that she is the executive chef of "Bukhara," and identifies her as "Master Chef 2000."

Upon review, the petitioner has not established that either the Ministry of Tourism "Best Chef Award" or the "Master Chef 2000" awards received by the beneficiary are "significant national or international awards or prizes" that rise to the level comparable to an Academy Award or Grammy Award, the examples provided in the regulations. The record contains insufficient evidence regarding the purpose of the awards, the application, nominating, or selection process used by the issuing bodies, the eligibility criteria, or the extent to which the winners of such awards are recognized beyond the issuing body. The winners and nominees of Emmy and Grammy awards, for example, receive significant national and international media attention as the result of their recognition, and the awards themselves are considered among the highest achievements attainable in the performing arts.

Without documentation to provide additional context regarding the beneficiary's awards within the scope of her profession, the AAO cannot conclude that the beneficiary's awards in the culinary field are regarded as comparable to, for example, an Academy award in the motion picture field. It is the petitioner's burden to establish how the submitted evidence establishes eligibility under the regulatory criterion. Furthermore, with respect to the "Master Chef 2000" award, the petitioner has not submitted primary evidence confirming the beneficiary's receipt of the award, such as a certificate or letter from the issuing body. 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)).

Accordingly, the petitioner has not established that the beneficiary has received or been nominated for a significant national or international prize or award that would qualify for her for O-1 status under 8 C.F.R. § 214.2(o)(3)(iv)(A).

Therefore, 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 AAO will address these criteria below.<sup>1</sup>

*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 submitted two newspaper clippings in an attempt to satisfy the criterion at 8 C.F.R. § 214.2(o)(3)(iv)(B)(2). The petitioner indicates that both articles were published in *Delhi Times* in 2001, although we note that the name of the publication is only visible on one of the clippings. The first article, "It's time to honour top chefs," mentioned above, is not specifically "about the beneficiary," nor does the body of the article mention the beneficiary. There is a small photograph of the beneficiary, with a caption that identifies her as "Master Chef 2000" and includes a one-line quote regarding the importance of awards as encouragement for young chefs.

The second article, titled "This smells good!" is from the December 29, 2001 edition of *Delhi Times*. The article mentions that the beneficiary participated in an "ongoing series of culinary Crest Experiences presented by The Crest Edition of the Times of India." The article mentions that the beneficiary "taught authentic South Indian delicacies like Banana Dosa, Keira Mashiyal and Eleneer Payasam to the guests." The article merely confirms that the beneficiary was invited to perform a cooking demonstration.

The AAO cannot conclude that these two brief mentions of the beneficiary in a newspaper provide evidence of her national or international recognition for achievements in the culinary arts. Therefore, while the AAO disagrees with the director that "no evidence" was submitted that pertains to the criterion at 8 C.F.R. § 214.2(o)(3)(iv)(B)(2), we concur that this criterion has not been met.

*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.*

In response to the RFE, the petitioner stated:

As evidence the beneficiary has performed services in the culinary arts in a critical role enclosed please find a news paper article from the Delhi Times dated December 29, 2001 acknowledging the contributions of [the beneficiary] during the Crest Fiestas held in India at the Sheraton

<sup>1</sup> The petitioner does not claim to meet or submit evidence relating to the criteria not discussed in this decision.

Bukhara Restaurant – a highly prominent restaurant in New Delhi, India which is a part of the Sheraton Hotel. During this position, [the beneficiary] held the position of Master Chef. See article from Delhi Times dated October 20, 2001 (noted previously), quoting [the beneficiary]. See also, Bukhara Restaurant, Wikipedia, recognizing the popularity of the restaurant, its visitation by recognized celebrities ( [redacted], [redacted], to name a few), and its accolades over the years, including during the tenure of the beneficiary (1998-2002), when the restaurant was named in the World's 50 Best Restaurants in 2002-2004. Moreover, the beneficiary is being asked to perform services as Chef for [the petitioner], which is an extremely popular restaurant in New York City as illustrated in the articles previously submitted. To clarify the beneficiary's role as chef for [the petitioner], please be advised that she will take on the role as Executive Chef in my absence, as I seek expansion. I am therefore seeking not just any chef, but one who will be able to sustain the reputation that [the petitioner] has grown to achieve. She will therefore perform in a critical role for [the petitioner's] restaurant."

The regulation at 8 C.F.R. § 214.2(o)(3)(iv)(B)(3) requires the petitioner to submit evidence that the beneficiary 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

With respect to the beneficiary's previous employment, the petitioner initially indicated that the beneficiary received "practical training" [redacted] later worked at Centaur Hotel in Mumbai under [redacted] and finally, worked at the Bukhara restaurant at the Sheraton Maurya Hotel in New Delhi. The petitioner provided no specific dates or job titles with respect to the beneficiary's employment history, no evidence of her academic qualifications, no resume, and no letters from her former employers verifying her qualifications. However, the evidence of record appears to confirm that the beneficiary held the title of executive chef at the Maurya Sheraton hotel's restaurant "Bukhara" as of 2001.

The petitioner submitted two testimonial letters in support of the petition. [redacted] states:

An independent review of [the beneficiary's] career shows a remarkable level of progression and success. Before joining Hotel Maurya, Bukhara Restaurant in 1998-2002, a rated among top 10 in Asia, she worked with Centaur, Mumbai under the World renowned Indian Chef [redacted] where she perfected and developed her own style of cooking from 1992 till 1998.

The petitioner also submitted a letter from [redacted] and [redacted], who state that they are co-executive chefs at Devi Restaurant in New York. They indicate that the beneficiary "has worked as a chef with renowned restaurant and eating establishments Bukhara, in India and with Chef [redacted] in India." [redacted] and [redacted] later submitted a statement clarifying that their information was based on "conversations with [the beneficiary], a review of her documentation, conversations with [redacted]."

Finally the petitioner submitted a *Wikipedia* article about "Bukhara (restaurant)." Regarding the information from *Wikipedia*, there are no assurances about the reliability of the content from this open, user-edited internet

site.<sup>2</sup> See *Lamilem Badasa v. Michael Mukasey*, 540 F.3d 909 (8<sup>th</sup> Cir. 2008). Therefore, this evidence is insufficient to establish that the restaurant Bukhara enjoyed a distinguished reputation during the beneficiary's tenure as executive chef.

assertion that Bukhara is rated among the top 10 restaurants in Asia is not supported by evidence of any such rankings, and and letter merely refers to the restaurant as a "renowned restaurant and eating establishment." If Bukhara is in fact considered to be one of the top restaurants in Asia, the AAO finds it reasonable to expect the petitioner to provide evidence of its distinguished reputation in the form of published materials about the restaurant and detailed testimonials. A *Wikipedia* article, vague assertions regarding the restaurant's renown, and unsupported references to the restaurant's rankings are insufficient to establish the distinguished reputation of the establishment.

As for her employment with Centaur restaurant in Mumbai, the petitioner has neither indicated nor submitted evidence that the beneficiary held a leading role with this restaurant or established that the restaurant enjoys a distinguished reputation. Rather, the petitioner indicates that the beneficiary worked under executive chef who is claimed to be a renowned Indian chef. The petitioner failed to identify the beneficiary's job title during her tenure with the restaurant, and submitted no evidence regarding the distinguished reputation of the restaurant. Based on the foregoing, the evidence does not support a conclusion that the beneficiary was previously employed in a leading or critical role for this organization or establish that Centaur restaurant has a distinguished reputation.

Although the persons providing testimonials indicate that they have reviewed the beneficiary's "documents," we emphasize that the petitioner has not provided USCIS with a copy of the beneficiary's resume, educational qualifications, or letters from her prior employers confirming her dates of employment, job titles and duties and any other pertinent information that would establish her claimed critical roles with these Indian restaurants. It is unclear exactly what documents were reviewed by the authors of the testimonial letters.

With respect to the offered employment as a "chef" or "senior chef" with the petitioning restaurant, the AAO notes that the petitioner indicated very clearly at the time of filing that is the restaurant's executive chef, and that he requires a chef to assist him with various aspects of menu planning, organizing reservations, coordinating the work of kitchen and pantry employees, directing the inventory and ordering of

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<sup>2</sup> Online content from *Wikipedia* is subject to the following general disclaimer:

WIKIPEDIA MAKES NO GUARANTEE OF VALIDITY. *Wikipedia* is an online open-content collaborative encyclopedia, that is, a voluntary association of individuals and groups working to develop a common resource of human knowledge. The structure of the project allows anyone with an Internet connection to alter its content. Please be advised that nothing found here has necessarily been reviewed by people with the expertise required to provide you with complete, accurate or reliable information. . . . *Wikipedia* cannot guarantee the validity of the information found here. The content of any given article may recently have been changed, vandalized or altered by someone whose opinion does not correspond with the state of knowledge in the relevant fields.

See [http://en.wikipedia.org/wiki/Wikipedia:General\\_disclaimer](http://en.wikipedia.org/wiki/Wikipedia:General_disclaimer), accessed on February 11, 2011, a copy of which is incorporated into the record of proceeding.

food and supplies, and ensuring that sanitation standards are met in the kitchen. The petitioner submitted sufficient evidence in the form of published reviews and other materials to establish that [REDACTED] and the petitioning restaurant enjoy a distinguished reputation in the culinary field.

In response to the RFE, in which the director noted that the petitioner already has an executive chef, the petitioner's president, [REDACTED], stated:

To clarify the beneficiary's role as Chef for [the petitioner], please be advised that she will take on the role as Executive Chef in my absence, as I seek expansion. I am therefore seeking not just any chef, but one who will be able to sustain the reputation that [the petitioner] has grown to achieve. She will therefore perform in a critical role for [the petitioner's] restaurant.

The director denied the petition concluding that "no evidence has been submitted to show that the beneficiary will appear or perform as a lead participant at the restaurant, especially since there is already an executive chef." The beneficiary concluded that the beneficiary would be assisting the executive chef, rather than acting in the lead role of executive chef herself.

On appeal, the petitioner asserts that the director's conclusion was based on conjecture, and contends that the petitioner's statements should be accepted as evidence. Therefore, the petitioner asserts that "the evidence of record shows that the beneficiary will assume the position of executive chef in the place and stead of the undersigned, so that the undersigned can concentrate on pursuing expansion." The petitioner's letter on appeal is signed by [REDACTED], who is identified on the Form I-129 as the petitioner's president.

Upon review, the AAO concurs with the director's conclusion that the beneficiary's offered position of "chef" or "senior chef" is not in fact the "executive chef" position at the petitioner's restaurant. The petitioner has not submitted sufficient evidence regarding the hierarchy of the petitioner's staff to establish that the proffered position could otherwise be considered leading or critical within the restaurant.

The petitioner's assertion that it intends to hire the beneficiary as executive chef fails for several reasons. First, the petitioner clearly stated at the time of filing that [REDACTED] is the restaurant's executive chef and that the beneficiary is being hired to assist him with the restaurant's operations. All supporting evidence submitted to establish the restaurant's distinguished reputation establishes that [REDACTED] is the executive chef. If the petitioner intended to hire the beneficiary as executive chef, then it is reasonable to assume that it would directly state this intention on the petition as of the date the petition was filed. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). Further, a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

Second, [REDACTED] who states that he is the petitioner's president, has twice indicated that the beneficiary will take his own place as executive chef. Such statements were made after [REDACTED] initial statement that [REDACTED] is the executive chef of the restaurant. Since [REDACTED] is not the petitioner's executive chef,

these statements are not persuasive. If the petitioner wished to establish that the beneficiary would be taking over the executive chef role, then it would be reasonable to submit a letter from the current executive chef, [REDACTED], indicating that the beneficiary would be assuming his current position. The petitioner has provided no such letter.

While the petitioner contends that its statements must be accepted as evidence, it has clearly made conflicting statements regarding the nature of the beneficiary's proposed role within its restaurant. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The petitioner has submitted no such objective evidence, such as a copy of its written contract with the beneficiary, or, alternatively a written summary of the oral agreement under which she will be employed, and thus has no objective evidence to corroborate either of its conflicting claims regarding the beneficiary's proposed job title.

For the foregoing reasons, the petitioner has not submitted evidence to meet the criterion at 8 C.F.R. § 214.2(o)(3)(iv)(B)(3).

*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.*

As discussed above, the petitioner has provided two testimonial letters. [REDACTED] states that the beneficiary is "a highly-regarded professional who has risen to an expert level in his [sic] chosen field of chefdom." As noted above, [REDACTED] summarized the beneficiary's employment with Bukhara restaurant and Centaur restaurant between 1992 and 2002, and stated that "indicative of [the beneficiary's extraordinary ability is her selection to work and head their kitchen of these renowned eating establishments and the celebrated chefs behind them." [REDACTED] states that the beneficiary has "risen to the top of her field of endeavor over the past several years." He states that his opinion was based on "an independent review of [the beneficiary's] career."

[REDACTED] and [REDACTED] refer to the beneficiary as "a leading chef of Indian cuisine," and "one of Indian's [sic] renowned chefs." They further state that the beneficiary "has distinguished himself [sic] as a leader in her chosen field and her culinary accomplishments have been noted in the Indian press over the years." As noted above, [REDACTED] and [REDACTED] later submitted a statement indicating that the basis of the information they provided included conversations with the beneficiary, a review of her documentation, and conversations with chef [REDACTED] "who did verify that [the beneficiary] work [sic] with him and that her abilities as a chef were excellent."

As discussed above, the persons who provided letters indicate that their knowledge of the beneficiary's achievements is based, at least in part, on a review of "her documentation." Again, we emphasize that it is unclear what "documentation" was provided to the authors. The record before the AAO contains no primary evidence of the beneficiary's educational or professional qualifications. While [REDACTED] and [REDACTED] also state that they spoke to the beneficiary herself and one of her former employers, the opinions they formed

based on these conversations cannot be given the same evidentiary weight as concrete evidence of her actual qualifications and employment history.

With regard to the reference letters provided, we concede that reference letters can provide useful information about an alien's qualifications or help in assigning weight to certain evidence. However, the submitted reference letters did not specifically reference the beneficiary's achievements, but rather contain conclusory assertions that the beneficiary is "leading" or "renowned." In this case, the letters of recommendation submitted by the petitioner are not sufficient to meet this regulatory criterion. These letters, while not without weight, cannot form the cornerstone of a successful extraordinary ability claim. USCIS may, in its discretion, use as advisory opinion statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Commr. 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters of support from the petitioner's personal contacts 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. Thus, the content of the writers' statements and how they became aware of the petitioner's reputation are important considerations. Even when written by independent experts, letters solicited by an alien in support of an immigration petition are of less weight than preexisting, independent evidence of achievements in the field that one would expect of a chef who has achieved a reputation as leading, well-known or outstanding in the culinary field. Such letters are not a substitute for objective evidence of the alien's achievements and recognition as required by the statute and regulations. The nonexistence of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). Primary evidence of achievements and recognition is of far greater probative value than the opinions of one's professional acquaintances.

"We also recognize that the beneficiary has received a "Best Chef Award [REDACTED]" from the Government of India, Industry of Tourism, and the award or title "Master Chef 2000." As discussed above, the petitioner has provided confirmation of the beneficiary's receipt of the awards, but failed to provide any supporting explanation or documentation with respect to the significance of these awards and the context in which winners and nominees are chosen. As such, we have no basis on which to conclude that such prizes constitute "significant recognition for achievements."

Based on the foregoing, the petitioner has not submitted evidence that satisfies the criterion at 8 C.F.R. 214.2(o)(3)(iv)(B)(5).

*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*

The petitioner has offered the beneficiary an annual salary of \$72,000. In the request for evidence issued on November 18, 2009, the director observed that no evidence was submitted to establish that this is a high salary for a chef position in New York. In response, the petitioner submitted salary information for Chefs, Head Cooks and Food Preparation and Serving Supervisors from the U.S. Bureau of Labor Statistics *Occupational Outlook Handbook, 2010-11 Edition*. According to this information, the highest 10 percent of chefs and head cooks nationwide earned more than \$66,680 annually.

The director determined that the proffered salary is a "high salary," but noted that no other criteria were satisfied. The AAO disagrees with the director's finding that \$72,000 is a "high salary" for a chef working in the proposed geographic area of employment. Available wage information for the New York metropolitan area indicates that many chefs in New York earn well above the national 90<sup>th</sup> percentile figure provided in the *Occupational Outlook Handbook*. Specifically, according to the Foreign Labor Certification Online Wage Library, a Level 2 chef in the New York metropolitan area earned \$63,024, a Level 3 chef or head cook earned \$80,933, while the Level 4 wage was \$98,842.<sup>3</sup> Therefore, the beneficiary's proffered salary in 2009 fell between the average wage for a Level 2 and Level 3 chef in the area of proffered employment. The wage does not appear to be a particularly "high salary" for a chef in New York City. Accordingly, the petitioner has not established that the beneficiary meets the evidentiary criterion at 8 C.F.R. 214.2(o)(3)(iv)(B)(6).

**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 she 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 her field, pursuant to 8 C.F.R. § 214.2(o)(3)(iv). 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 she 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). It is claimed that the beneficiary has worked with and will work with chefs who are nationally and internationally recognized and that she has worked in establishments that have a distinguished reputation. However, this classification focuses on the beneficiary's individual achievements and recognition within the field. The petitioner has provided little evidence of such recognition. As emphasized throughout this decision, the petitioner has not provided such basic documentation as evidence of the beneficiary's educational qualifications, her resume, or letters from her past employers. The petitioner's evidence pertaining to the beneficiary consists of two testimonial letters, two newspaper articles published 8 years prior to the filing of the petition, and evidence of the beneficiary's receipt of a Best Chef Award for the year 1999-2000.

<sup>3</sup> See FLC Wage Results, <http://www.flcdatacenter.com/OesQuickResults.aspx?area=35644&code=35-1011.00&year=11&source=1> (accessed on February 11, 2011), copy incorporated into record of proceeding.

As discussed above, the favorable opinions of experts in the field, while not without evidentiary weight, are not a solid basis for a successful extraordinary ability claim.<sup>4</sup> 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 eligibility for the benefit sought. *Id.*

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 submitted little published evidence regarding the beneficiary with the exception of two brief mentions of the beneficiary in newspapers. 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 her 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 she has received significant independent recognition based on her reputation or achievements.

Further, even if we found that the beneficiary had achieved the requisite recognition in the culinary field in the past, there is no evidence of how she sustained that reputation during seven years preceding the filing of the petition, during which time she was continuously in the United States in H-4 status.

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 she 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). Accordingly, the appeal will be dismissed.

Nothing in the decision of the AAO should be seen as an attempt to minimize the beneficiary's talent or past accomplishments or as a comment on the criteria used by the petitioner to select persons for positions.

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<sup>4</sup> 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. Blacks 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).

Further, the AAO once again emphasizes that many of the petitioner's claims regarding the beneficiary's credentials simply failed on an evidentiary basis.

### **III. Consultation Requirement**

The remaining issue addressed by the director is whether the petitioner submitted a written advisory opinion from the appropriate consulting entity or entities, pursuant to 8 C.F.R. 214.2(o)(2)(ii)(D). The regulation at 8 C.F.R. § 214.2(o)(5)(i)(A) provides that consultation with an appropriate U.S. peer group (which could include a person or persons with expertise in the field), labor and/or management organization regarding the nature of the work to be done and the alien's qualifications is mandatory before a petition for an O-1 or O-2 classification can be approved.

The petitioner submitted a peer opinion letter from [REDACTED] and provided substantial evidence of their qualifications as experts in Indian Cuisine.

The director determined that the petitioner did not submit evidence to satisfy the consultation requirement because it failed to submit an advisory opinion from "an appropriate association or entity." The regulation at 8 C.F.R. § 214.2(o)(5)(i)(A) plainly states that a U.S. peer group may include "a person . . . with expertise in the field." Therefore, the director had no basis for insisting that the petition submit a peer group opinion from an "association or entity." Nevertheless, the petitioner has submitted a "no objection" letter from the American Culinary Federation in support of the appeal. The AAO will withdraw the director's determination with respect to this issue.

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.