

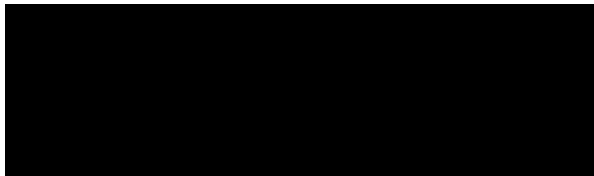
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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Room A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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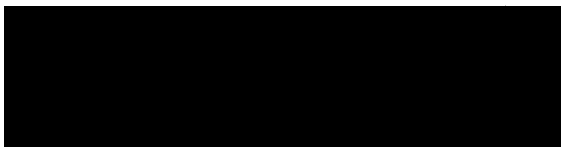


FILE: LIN 04 114 52837 Office: NEBRASKA SERVICE CENTER Date: JAN 20 2000

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

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

ON BEHALF OF PETITIONER:



PUBLIC COPY

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Mari Johnson

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Acting Director of the Nebraska 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 is seeking O-1 classification of the beneficiary as an alien with extraordinary ability in the arts under section 101(a)(15)(O)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(O)(i), in order to employ him for three years as a French pastry chef at an annual salary of \$36,000.

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

On appeal, counsel for the petitioner submits a brief.

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 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.

At issue is whether the petitioner has established that the beneficiary qualifies as an alien with extraordinary ability in the arts within the meaning of the statute and regulations.

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 that in order to qualify as an alien of extraordinary ability, the alien must be recognized as being prominent in his or her field of endeavor as demonstrated by the following:

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

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

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

(2) Evidence that the alien has achieved national or international recognition for achievements evidenced by critical reviews or other published materials by or about

the individual in major newspapers, trade journals, magazines, or other publications;

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

(4) Evidence that the alien has a record of major commercial or critically acclaimed successes as evidenced by such indicators as title, rating, standing in the field, box office receipts, motion picture or television ratings, and other occupational achievements reported in trade journals, major newspapers, or other publications;

(5) Evidence that the alien has received significant recognition for achievements from organizations, critics, governmental agencies, or other recognized experts in the field in the alien is engaged. Such testimonials must be in a form 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.

Although the beneficiary has been the recipient of several prizes, the petitioner failed to establish that the prizes received by the beneficiary are significant national or international awards. The awards are discussed below.

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 submitted a letter from the petitioner's vice president addressed to the beneficiary, confirming his employment with the petitioner as a French Pastry Expert. The petitioner also submitted search results from the Yahoo search engine about the Villager Courtyard, a hotel located in Lincoln, Nebraska, where the petitioner intends to place the beneficiary. The petitioner sought to establish the reputation of the Villager Courtyard with on-line publicity releases. The petitioner failed to establish that the beneficiary would play a lead or starring role for the petitioner in the future.

The petitioner asserts that the beneficiary has participated in and won awards from prestigious international culinary events in the past.

According to the evidence on the record, the beneficiary has received the following honors:

- An undated certificate of participation in the *Golden Hands Challenge*, sponsored by the Pastry Chefs and Ice Cream Artisans of Haute-Savoie.

- Third prize in the chocolate sculptural category in the *Golden Hands Challenge*, Haute-Savoie (1989).
- First Place in the chocolate artistic pieces - under the age-23 category - at the 25th Rhone-Alpes Convention in Annecy, France (1988).
- Grand Prize of the City of Annecy - under the age-23 category - at the 25th Rhone-Alpes Convention in Annecy, France (1988).
- Diploma of Honor for participation in the Soloca Competition - 23rd Rhone-Alpes Convention in Aix les Bains, France (1986).

Counsel for the petitioner stated that the Rhone-Alpes Convention invites only 15-20 prominent pastry chefs around the world to compete in its annual competition. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The 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).

Several items of documentation are undated, however, the beneficiary indicates in his curriculum vitae that he won five awards in the years 1986-1989. It is noted that the beneficiary has not received any awards since 1989, more than 15 years ago.

He won two awards in the under the age-23 category. To the extent that he won awards in a junior category, the awards are not evidence of distinction. He was competing with other young culinary artists rather than the entire field for these awards.

It is further noted that several of the awards are certificates for participation rather than awards in competitions.

Finally, the petitioner failed to provide evidence in the form of critical reviews, advertisements, publicity releases, publications, contracts or endorsements to demonstrate that the beneficiary *has and will* perform as a lead or starring participant in productions that have a distinguished reputation.

The beneficiary does not satisfy this criterion.

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.

No evidence was submitted in relation to criterion number two.

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.

Criterion number three requires evidence in the form of articles in newspapers, trade journals, publications or

testimonials. The petitioner submitted evidence exclusively in the form of testimonials.

[REDACTED] Professor of Pastry, Confectionary, and Chocolate at the Centre de Formations des Apprentis in Groisy, France wrote that the beneficiary worked at the Jowa Company, Switzerland's leading manufacturer of bakery and pastry products, first as an apprentice and then as a pastry chef. [REDACTED] also wrote that the beneficiary has participated at the national level in professional competitions.

Counsel for the petitioner asserts that the beneficiary has performed services in a lead role for organizations with distinguished reputations. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. at 534; *Matter Of Laureano*, 19 I&N Dec. at 1; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506.

Bruno Neveu, Chef Instructor, Connecticut Culinary Institute wrote that "[the beneficiary] will perform [as a pastry chef] for [the petitioner] A major company of top reputation, [the petitioner] earned a gross annual income of \$3.2 million in the past years, serving hotels, banquet companies, catere[r]s, and five-star restaurants, etc." The petitioner failed to establish that the beneficiary will play a lead, starring or critical role for the petitioner. The beneficiary does not satisfy this criterion.

The petitioner submitted testimonials as evidence to satisfy this criterion. In review, the testimonials do not establish that the beneficiary played a leading or critical role as a performer for organizations with a distinguished reputation. The beneficiary does not satisfy this criterion.

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 asserts that criterion number four is inapplicable to the beneficiary's field of endeavor. On appeal, counsel for the petitioner states that "[h]aving published materials or records of major commercial or critically acclaimed successes as evidence of national or international recognition is not the norm in the field of culinary arts. In fact, these criteria cannot be met even by the most proficient of French pastry chefs. Instead, much of [the beneficiary's] evidence falls under the 'additional comparable evidence' criterion."

Occupational achievements in the culinary field are reported in trade journals and other major media; nonetheless, the AAO agrees that major commercial or critically acclaimed successes are less applicable to culinary arts than performing artists. The petitioner failed to clarify what evidence it submitted as comparable evidence for this criterion.

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.

For criterion number five, the petitioner submitted numerous testimonials.

Andre Saffrey, Centre de Formation des Apprentis, wrote that he can "confirm that [the beneficiary] is celebrated and esteemed in France."

██████████ President of Cotner Investment Corporation and Sugar Plum Candies wrote that "[the beneficiary] attained a level of prominence as a French pastry chef in France through his work and extensive involvement with various prestigious organization[s], entities and projects."

██████████ Director, Industrial Sales and Marketing, Guittard Chocolate Company, Burlingame, California wrote "after reviewing [the beneficiary's] resume, I can see that he is a highly accomplished pastry chef. . . . He has won top prizes for international culinary competitions."

██████████ Chef Instructor, Connecticut Culinary Institute, said "I can confirm that [the beneficiary] has been Pastry Chef to numerous prestigious organizations of excellent reputation."

██████████ President ██████████ an oven manufacturer, wrote, "We know [the beneficiary] since several years and followed his perfect career in [the] pastry field. He is famous in France for his skills. I can personally confirm his work quality . . . one of the best pastry and bakery Chef[s] in France."

██████████ assertion that the beneficiary is famous in France is uncorroborated by objective evidence, such as articles about the beneficiary in major media. None of the testimonials are corroborated by letters of former employers that could speak to the role the beneficiary played in their respective organizations. Mr. Spini wrote on the basis of his review of the beneficiary's resume, rather than upon the beneficiary's reputation in the field.

██████████ Chef and Entrepreneur, Le Delice, Inc., a French bakery and cafe in Denver, Colorado wrote, "I have known [the beneficiary] since 2001 through his professional internship with Red Mountain Delice, Inc. Judging from his work quality, I can confirm that [the beneficiary] has achieved the level of distinction in his field, as evidenced by his high degree of technical and artistic perfection." He further wrote that "[the beneficiary] has attained a level of prominence by winning multiple awards and prizes in culinary competitions including the Golden Hand Challenge and the Rhone-Alpes Competitions, two major competitions sponsored by the Association of Pastry Chefs and Ice Cream Artisans of Haute-Savoie in France."

██████████ President of Red Mountain Delice, Inc., a French bakery in Denver, wrote that he "invited [the beneficiary] to participate in a training program with [Red Mountain Delice] in 2001. . . . I have no hesitation in saying that [the beneficiary] is a French pastry chef of extraordinary ability and stands well above the average bakers I have known in the business. He has made a reputation of prominence as a French pastry chef in France. . . ."

██████████ a teacher of the beneficiary's daughter in the United States and a friend of the beneficiary's family wrote that "[the beneficiary] is truly a French pastry and bakery chef expert of extraordinary ability."

While the testimonials' authors all speak highly of the beneficiary's reputation, and skill, the evidence falls short of establishing that the beneficiary has received significant recognition for his achievements from organizations, critics, government agencies, or other recognized experts in his field.

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

For criterion number six, the petitioner provided CIS with the *prevailing wage* for experienced "chefs and head cooks" in the geographical area where the petitioner is located. According to the survey, the *prevailing wage* for chefs and head cooks in the Denver Colorado area is \$31,741 per year. The proffered wage is \$36,000 per year. On appeal, counsel for the petitioner asserts that the beneficiary will be paid a wage that is 29 per cent higher than the *median* earnings of chefs and head cooks. The petitioner failed to provide a wage survey for median wages, so its assertion is not persuasive. The petitioner submitted a wage survey conducted by the U.S. Department of Labor, Employment and Training Administration (USDOLETA). According to USDOLETA's website, the *prevailing wage* is defined as the *average* wage paid to similarly employed workers.¹ The survey submitted indicates that the beneficiary would receive 12 per cent more than the prevailing wage for chefs and head cooks in the geographical area of the petitioner. Twelve per cent more than the average wage is not necessarily a high salary. This criterion must be indicative of a high level of achievement or distinction. The petitioner should have provided more than just the average (mean) wage. To evaluate whether the salary is high, CIS needs to compare it to the median and highest wages offered nationwide to chefs and head cooks. The beneficiary does not satisfy this criterion.

The beneficiary fails to satisfy at least three of the criteria set forth at 8 C.F.R. § 214.2(o)(3)(iv)(B).

The petitioner submitted a favorable consultation from the Connecticut Culinary Institute. Consultations are advisory in nature and are not binding on Citizenship and Immigration Services (CIS). 8 C.F.R. § 214.2(c)(5)(i)(D). It is further noted that the American Culinary Federation is the appropriate peer group for consultations for chefs.

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

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not met that burden.

ORDER: The appeal is dismissed.

¹ See <http://ows.doleta.gov/foreign/wages.asp> [as accessed on 1/25/2005].